SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

A PRÉCIS OF *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?*

BY

COREY BRETTSCHNEIDER

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 5, No. 1 (2016): 3-8
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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A Précis of *When the State Speaks, What Should It Say?*

Corey Brettchneider

Liberalism demands robust rights to free expression. In American jurisprudence, the liberal state is bound by one of the world's strictest rules protecting free speech, the doctrine of "viewpoint neutrality."[1] This doctrine requires the state to protect all speech regardless of beliefs or political content. Viewpoint neutrality is commonly thought to be based on a neutralist theory of liberal democracy that requires the state not to favor any set of values.[2]

Feminist critics of neutralist liberalism resist what they regard as an overemphasis on unlimited freedom of expression rights.

[1] *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000); *Rosenberger v. Rector*, 515 U.S. 819, 828-29 (1995). For further background, see also *Virginia v. Black*, 538 U.S. 343, 360-62 (2003) (citing R.*A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

[2] For discussions of the doctrine of viewpoint neutrality as being essential to the meaning of First Amendment free speech protection, see Martin H. Redish, *The Adversary First Amendment: Free Expression and the Foundations of American Democracy* (Stanford, CA: Stanford University Press, 2013) 105-114. Larry Alexander takes a more neutralist position in "Free Speech and "Democratic Persuasion": A Response to Brettschneider," *in Philosophical Foundations of Human Rights* (Rowan Cruft et al. eds., forthcoming Sept. 2014), *available at* http://ssrn.com/abstract=2277849. For a defense of neutralism as a political theory, see generally Bruce A. Ackerman, Social Justice in the Liberal State (New Haven: Yale University Press, 1980).

 Philosophy and Public Issues (New Series), Vol. 5, No. 1 (2016): 3-8
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Catharine MacKinnon, for instance, claims that free speech and the value of equality are on a "collision course."[3] According to these critics, while rights to free speech matter, rights to equality are equally if not more important and should sometimes limit free speech rights when the two conflict. Almost all democracies outside of the United States follow this "prohibitionist" approach.[4] They limit free speech when hateful expression attacks equal respect for minorities or the value of democracy itself. The prohibitionist approach tries to correct the alleged inability of liberalism to defend the core values of democracy.

In my book, *When the State Speaks*, I offer an account of liberal democracy that combines the neutralists' protection of rights with the feminists' and prohibitionists' concern for the equal status of citizens.[5] I call this third view of liberalism and free speech "value democracy." It grounds viewpoint neutrality on an ideal of free and equal citizenship. On my account, the state should be neutral in protecting the right to express all viewpoints. But it should not be neutral in the values that it supports and expresses. Value democracy thus embraces viewpoint neutrality in protecting the right to free expression of all beliefs, but rejects neutralism as a

[3] Catherine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993), 71-73. For another example of the "collision course" view, see Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus, in Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment, ed. Mari J. Masuda et al (Boulder: Westview, 1993), 53, 57-58.

[4] See Erik Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (New York: Oxford University Press, 2011), 97-105; see also Adam Liptak, "Outside U.S., Hate Speech Can Be Costly: Rejecting the Sweep of the First Amendment," N.Y. TIMES, June 12, 2008, at A1 (describing differences in the way the United States and other countries, such as Canada and Germany, treat potentially offensive speech).

[5]Corey Brettschneider, *When the State Speaks, What Should it Say? How Democracies Can Protect Expression and Promote Equality (*Princeton: Princeton University Press, 2012).

theory of what the state should say. The state must favor some substantive values, namely the ideal that all citizens should be treated as free and equal.

It is not enough, however, to recognize this commitment in the abstract. Liberal democracy must also find a way to protect the substantive values on which it is based. Otherwise, it will run into the problem that neutralist liberals face of "being unable to take their own side in an argument" when the free and equal status of women, minorities, gays, and other citizens is attacked. In these cases, liberal democracy must be able to articulate the "reasons for rights" that justify respecting free speech rights and viewpoint neutrality in the first place.

When the State Speaks thus offers an account of "democratic persuasion" that requires the state to protect all viewpoints from coercion or prohibition. But when it "speaks" in statements by public officials, when it educates, when it uses its spending power, and when it confers the tax privileges of non-profit status, the state must affirmatively take the side of upholding free and equal citizenship. Democratic persuasion, I argue, is not just something that the state is permitted to do. It is a matter of political obligation. Our constitutional jurisprudence, including the doctrine of viewpoint neutrality, must be tailored to permit the state to pursue its duty of democratic persuasion. At the same time, democratic persuasion places limits on state speech. It prohibits the state from speaking in ways that undermine its commitment to the values of freedom and equality.

The proper place for viewpoint neutrality, I argue, is in preventing government coercion or censorship of viewpoints. Citizens should be allowed to hear and endorse all viewpoints, even hateful ones. While I think threats and speech that might incite imminent violence can be prohibited under the First Amendment, generalized viewpoints cannot be banned. I argue, however, that the state should not be viewpoint neutral in its own

expression. The state should protect free speech out of respect for the freedom and equality of citizens. Citizens are free and equal in having the capacity to debate and decide on matters of personal and political principle. The state should find a way not only to uphold free speech, but also to defend the democratic values that justify protecting free speech in the first place. For example, the state has an obligation to advance civil rights through education and public holidays. We rightly dedicate a holiday to Martin Luther King, not to the Southern segregationist Bull Conner. Likewise, the public schools are justified in teaching students racial equality.

An even stronger measure that the state should take is to use its spending power to advance democratic values. I therefore defend the IRS decision to deny the subsidies that come with non-profit 401(c)(3) status to Bob Jones University, which the Supreme Court upheld in *Bob Jones v. United States*.[6] The IRS already requires that, for non-profits to receive the subsidies of tax-exemption, they must have a "public benefit."[7] That is, such organizations must provide services to the public that offset the cost of the tax-exemption. In the book, I argue that the IRS should make its public benefit more specific, and explain that being a hate group is inconsistent with having a public benefit. This clarification of the meaning of public benefit should be made by Congress rewriting the 501(c)(3) statute. The IRS should thus be required by law to deny the tax subsidies of 501(c)(3) to hate groups that directly oppose the democratic values of free and equal citizenship. When the state uses its spending powers, it should promote democratic values and not be bound by viewpoint neutrality.

[6] 461 U.S. 574 (1983).

[7] *Regan v. Taxation without Representation*, 461 U.S. 540, 542-44 (1983).

While the Court's decision in *Bob Jones* is consistent with my view, the Court has since moved in the wrong direction in expanding viewpoint neutrality in other cases that concern state spending. In *Christian Legal Society v. Martinez*,[8] the Supreme Court held that it was constitutional for Hastings Law School to withdraw funds from a student group that discriminated against gay students. In her majority decision, Justice Ginsburg claimed that the funding policy of requiring non-discrimination in admissions for student groups was consistent with the state's viewpoint neutrality. She wrote that the policy was based on an ideal of toleration, which she claimed was a neutral value. Although I agree with the Court's result in *Christian Legal Society*, I suggest its reasoning wrongly tried to show that requiring non-discrimination in admissions is consistent with the doctrine of viewpoint neutrality. Non-discrimination and toleration are non-neutral viewpoints. Their non-neutrality can be seen in how those viewpoints are attacked by discriminatory groups. The problem with the Court's reasoning was that it assumed that the state must be viewpoint neutral in its expression. I argue in the book that non-discrimination and toleration are non-neutral viewpoints that the state should advance through its own speech. In sum, while viewpoint neutrality has a place in limiting government coercion, it should not limit the state's ability to promote democratic values.

It should be emphasized, however, that democratic persuasion places limits on what the state can say. Democratic persuasion prohibits the state from speaking in ways that undermine the ideal of free and equal citizenship. For example, it would be wrong for the president, legislators, and the courts to speak in favor of racial discrimination. I therefore favor an expansive reading of the equal protection clause and the

[8] 130 S. Ct. 2971 (2010).

establishment clause to limit some forms of state speech. For instance, I argue that *Rust v. Sullivan*[9] was wrongly decided, because the state did not have the right to deny information to women about to their rights to an abortion as guaranteed by *Roe v. Wade* and *Planned Parenthood v. Casey*. I also endorse the view that it would not be constitutional for states to fly the Dixie flag, because it would be a form of state speech on behalf of the discriminatory values that flag represents.[10]

The essays in this symposium attempt to push my view toward one of the opposing poles of neutralism or prohibitionism. In response to these critics, I suggest that value democracy and democratic persuasion offer a third way forward in thinking about the role of values in liberalism. I attempt to show that value democracy strikes a "the golden mean" between neutralism and prohibitionism.[11]

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[9] 500 U.S. 173 (1991)

[10] Michael C. Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings," Va. L. Rev. 97 (2011): 1316-23.

[11] This précis reprises material from my book and from another response to critics essay published in the Brooklyn Law Review as "Democratic Persuasion and the Freedom of Speech," Vol. 79, issue 3 (Spring 2014): 1059-1089.

If you need to cite this article, please use the following format:

Brettschneider, Corey, "A précis of *When the State Speaks, What Should It Say?*" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 3-8, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

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RELIGIOUS FREEDOM AND THE REASONS FOR RIGHTS

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© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 9-24
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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Religious Freedom and the Reasons for Rights

Kevin Vallier

In *When the State Speaks, What Should It Say?*, Corey Brettschneider argues that there is a middle-path between the conceptions of the roles of the democratic state offered by "neutralists" and "militant democrats."[1] In contrast to neutralists, the state is required to promote core democratic values even against those who reject those values, and in contrast to militant democrats, it must employ relatively non-coercive means to realize those goals. Thus, while the state cannot use coercion to restrict hateful views that threaten to undermine the basis of liberal democracy (namely the value of free and equal citizenship), it can use "democratic persuasion" to help maintain the integrity and vivacity of liberal democratic institutions over time. The values underpinning liberal democracy also generate duties of "reflective revision" where citizens have an obligation to rethink and revise their beliefs when those beliefs are publicly relevant and incompatible with the ideal of free and equal citizenship. The core case of illustration is the federal government's denial of tax-exempt status to Bob Jones University in order to compel them to end their ban on interracial dating. Bob Jones had a public purpose granted via its tax-exempt status, and public purposes in a liberal democracy must not frustrate free and equal citizenship. Consequently, the state was permitted to

[1] Princeton University Press, 2012, hereafter referred to as "WSS."

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Luiss University Press
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engage in democratic persuasion to bring their public behavior into line with public democratic values.

Chapter 5 of the book brings this approach to bear on religious freedom. It is clear from the book that religious groups challenge the compatibility of democratic persuasion with liberal democracy. Many religious groups seem to endorse "hateful" views, but liberal democrats are typically hesitant that use democratic persuasion to change theological convictions. Theological commitments are not on the table.

Brettschneider thinks the state may nonetheless use democratic persuasion. In contrast to the "static" view of religious freedom, where current beliefs and practices of a religious are thought to merit protection, "religious beliefs should not be exempt from the principle of public relevance" (WSS: 143). Because religious beliefs affect the culture of liberal democracy, hateful religious views are publicly relevant for state tinkering. Thus, if religious beliefs oppose free and equal citizenship, "democratic persuasion is justified in order to transform these beliefs."

A subsidiary aim of the chapter is to show that by making religious beliefs subject to democratic persuasion, Brettschneider has not thereby adopted an objectionably secularist approach to liberal democracy. To demonstrate, Brettschneider stresses the "substance-based" and "means" limits on democratic persuasion. Substance-based limits hold that Brettschneider's democracy is limited to promoting the shared political values of free and equal citizenship and prohibited from promoting religious or non-religious comprehensive values. The means limit implies that democratic persuasion is limited to the state's "expressive and subsidy capacities" and does not include "its coercive capacities" such that religion cannot be subjected to coercive transformation

(WSS: 143). By emphasizing these limits, Brettschneider hopes to defang the objection from secularist bias.

In this essay, I will argue that Brettschneider has not successfully avoided secularist bias. To vindicate my thesis, I will first lay out Brettschneider's argument for applying democratic persuasion to religious groups. I will then argue that the state lacks both the pragmatic capacity and moral authority to transform theological beliefs on political liberal views like Brettschneider's. It is unable to make the necessary theological distinctions to correctly transform religious belief and the subjects of "transformation" have no reason to accord the state's persuasive power moral authority over them. I end by considering an objection.

I

The *Lukumi* Principle

Brettschneider builds his case for the state transformation of religious belief around the "*Lukimi* principle" following the Supreme Court case *Church of the Lukimi Babalu Aye v. City of Hialeah*, where the Supreme Court ruled that the Hialeah city council did not have the legal authority to restrict animal sacrifice practices characteristic of the Santeria religion. The lesson of the case, Brettschneider argues, is that the SCOTUS did not merely strike down the law but articulated the "reasons for rights" of religious freedom in the case, scolding the city council for a failure to recognize the value of religious freedom. In doing so, the SCOTUS engaged in permissible democratic persuasion aimed at altering the city council's supposedly Christian view that they had the legal authority to ban animal sacrifice. The ban was based on "animus" or hatred, and so was subject to democratic persuasion.

Note that the court did not criticize Christian beliefs generally. Instead, they only criticized those beliefs that impacted negatively and directly on the ideal of free and equal citizenship. In other words, they implicitly distinguished (as Brettschneider wishes to explicitly distinguish) between publicly relevant religious beliefs and those properly cordoned off from public concern.

The discussion eventuates in the *Lukumi* principle, which holds that the commitment to religious tolerance in value democracy has two elements:

> First, it entails the protection of the right to express religious beliefs and to practice one's religion free from coercive sanction, even when that religion espouses principles at odds with the ideal of free and equal citizenship.
>
> Second, the *Lukumi* principle entails that the state should explain why the democratic values underlying religious freedom are incompatible with religious beliefs that contradict the values of free and equal citizenship (WSS: 148).

The *Lukumi* principle is compatible with both the substance-based and means limits of democratic persuasion. But it has the controversial implication that insofar as a religious belief is hateful, discriminatory, and impacts the expression of free and equal citizenship, to that extent it is the object of public, state concern. If the result is that religious doctrine is a matter of government oversight, so be it.

II

Undermining the *Lukumi* Principle's Apparent Secularist Bias

Brettschneider then argues that the *Lukumi* principle does not exhibit secularist bias because applying the *Lukumi* principle does

not threaten to extinguish religion. Transformational dialectics does not require an all-or-nothing choice between religion and secularism. Instead, Brettschneider's view attempts to synthesize democratic and religious values, rather than replacing the former with the latter. Second, the transformation is not forced on any group.

Brettschneider also claims that state expression and financial incentives should not be coercive, further dissolving the appearance that his view is overly secularist. Freedom of association means that groups have a right to resist democratic persuasion via their own organizational and theological decisions. For instance, in 2006, the Roman Catholic Church withdrew its facilitation of adoption services rather than "comply with a state law requiring adoption agencies not to discriminate against gay families." (WSS: 166). Brettschneider argues that the state was permitted to impose this requirement and that the freedom of the Catholic Church was preserved by its right to withdraw. All the state did was use its power of the purse to promote the value of equality, which it was permitted to do based on Catholic Charities' reliance on state funds. But the Catholic Church had a right to resist, despite the fact that the state should not accept or promote their discriminatory views.

III

The Persuasive State Lacks Competence on Theological Matters

Critical to Brettschneider's argument is the claim that the state has both the *pragmatic ability* and *moral authority* to judge whether theological views are hateful and publicly relevant. But he has not adequately defended either claim. Consequently, Brettschneider's

conception of democratic persuasion of religious groups cannot meet the test of public justification.

In Brettschneider's discussion of *Christian Legal Society v. Martinez*, he combats a potential argument that the Christian Legal Society does not discriminate against homosexuals. Brettschneider suggests that the CLS may have distinguished between a ban on homosexual acts as opposed to a ban on gay citizens as such (WSS: 119). In other words, the CLS would discriminate based on behavior rather than "status." Here is Brettschneider's reply, which I think is emblematic of his approach to religion,

> But I believe that such an attempted distinction between status and choice of behavior is inconsistent with the ideal of free and equal citizenship. … It is not a choice to be gay, any more than it is a choice to be heterosexual. Discrimination against gay citizens, based supposedly on their actions, thus amounts to status discrimination. The Christian Legal Society cannot treat gays as equals while banning them on the basis of their most intimate bonds and relationships (WSS: 120).

In this passage, Brettschneider wades into complex moral and theological matters. Distinguishing between status and behavior is inevitably rooted in complex theological conceptions of the body and personal identity.

For instance, on some Christian views, there is *no such thing* as a sexual identity; all forms of identity are subsidiary to one's identity in Christ, and identifying with disordered impulses is incompatible with Christian identity. While individuals may have inescapably biological homosexual sexual *orientations*, they are not in their essence gay. In fact, in the next life, they will have no sexual desires (neither will heterosexuals). Thus at our deepest level, we are neither gay nor straight, and so a distinction between status and behavior is perfectly natural. The Christian identity is

that of a redeemed child of God; our behavior, gay or straight, is less important.

In the passage quoted, Brettschneider simply asserts, without consulting any major theological traditions, that the distinction between status and choice can be dismissed because asking gay citizens not to have gay sex as a condition of group membership is status discrimination. Such a judgment is hasty and bound to unsettle citizens of faith with a developed theology of sexuality, the body, and family life.

By giving the state the right to make these judgments, however, Brettschneider has effectively given the state the general power to make explicit, pedagogical distinctions between publicly relevant religious beliefs that violate free and equal citizenship and beliefs that either are not publicly relevant or do not violate free and equal citizenship. But giving the state the right to make these judgments forgets that *the state is a bad theologian*, even when staffed by well-meaning officials. Even the Supreme Court does not have the general knowledge necessary to determine how to separate some religious beliefs from others. They are similarly poorly equipped to determine whether theological objections are based on animus or whether they are due to a deep, sincere theological opposition to the contemporary secular liberal's historically anomalous view of human sexuality and social identity.

Thus, the democratic state's pedagogy is bound to be ham-handed at best and offensive and authoritarian at worst. And this concern is not idiosyncratic to me. It is raised repeatedly in discussions of constitutional law on religious freedom, as Kent Greenawalt makes plain in his *Religion and the Constitution* volume

on free exercise of religion.[2] Unfortunately, Brettschneider provides no genuine assessment of the state's theological abilities in the book.

IV

The Persuasive State Lacks Normative Authority on Theological Matters

My concern is not merely pragmatic, however. I am also concerned about the state's rightful authority to engage in democratic persuasion. Brettschneider assumes the democratic state is *entitled* to make judgments determining when certain religious beliefs contradict an admittedly vague and contestable ideal like free and equal democratic citizenship. This entitlement is likely based on the foundations of Brettschneider's notion of value democracy.[3] But I can see little reason to think that it has this authority.

To see why, let's review a bit of Rawls. The later Rawlsian project, as I understand it, is an attempt to show that a political conception of justice can be congruent with, supportive of or else not in conflict with a series of reasonable comprehensive doctrines in contemporary liberal democratic societies.[4] As a result, theorists not only engage in a substantive determination of the content of the political conception of justice but also determine whether the political conception is fully justified to

[2] Kent Greenawalt, *Religion and the Constitution, Volume 1: Free Exercise and Fairness* (Princeton: Princeton University Press, 2009), 1-34.
[3] Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2010), 7-27.
[4] John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005), 11.

each reasonable comprehensive doctrine (though most of the determination of fit is left to each person.[5] On Rawls's view, there is a genuine possibility that reasonable comprehensive doctrines *might reject* a reasonable political conception. And there is a critical reason for this: the entire point of political liberalism is to create a focal point of values, reasons and exegetical principles by which free and equal people who deeply disagree about matters of right and good can live together on moral terms. If comprehensive doctrines lacked this power, they would be superfluous (and in a way some political liberals, like Jon Quong, recognize this, though they respond to it differently than I would).[6]

In political liberalism, the determination relation between the political conception and comprehensive doctrines is not uni-directional. Comprehensive doctrines can provide reasons to reject certain interpretations of political values. Political conceptions, after all, do not interpret themselves. And that means members of those comprehensive doctrines have a say in how their political institutions are to interpret the ideal of free and equal citizenship. The proper interpretation of free and equal citizenship is not written in the heavens. For an interpretation to be authoritative, then, it must comport with reasonable comprehensive doctrines in a particular society.

Brettschneider's foundational views differ from Rawls's. But there is good reason to agree with Rawls on allowing different comprehensive doctrines to help provide the authoritative interpretation of political values. There is a kind of respect manifested in not presuming to dictate to citizens how to understand their comprehensive doctrines. When theorists

[5] Ibid., 386.

[6] See Jonathan Quong, *Liberalism Without Perfection* (New York: Oxford University Press, 2011), 161-191.

presume how to understand the theological views of others, they arrogate themselves to a position of expertise and authority that they lack. State officials are no better. They also lack any special access to how political values and theological values fit together. State intervention implies a lack of respect for citizens by presuming to dictate to them which features of their comprehensive doctrines are hateful, which are publicly relevant and which are inessential to their core commitments.

If so, it is dubious that adherents of reasonable religious views have reason to acknowledge the state's theological judgments as authoritative, including judgments necessary to articulate a doctrine of public relevance according to which religious beliefs would be subject to state transformation. This would be to give the state the authority to lord its interpretation of the essentials of a group's theology over the group itself. And such authority would invariably be affected by fleeting fads and politically motivated considerations. Given this, it is hard to see why citizens should leave it up to the state to determine which parts of their beliefs have public relevance and which do not. It is even harder to see why citizens should let the state put pressure on them to *change their views* when they sincerely believe their views are morally well grounded.

For example, Roman Catholics who have theological reason to separate homosexual sexual acts from sexual identity and to downplay sexual identity in favor of spiritual identity have reason to reject the coercive pressure Brettschneider's state would impose upon them. It seems to me appropriately liberal to hold that Roman Catholics are entitled to appeal to their deep theological commitments to make this sort of determination for themselves. The state should not subject them to manipulative persuasion if they fail to agree with the views of those in power.

In sum, it is hard to see how the use of persuasive power is publicly justified to those who are the object of persuasion.

Perhaps Brettschneider can reply that the state's expressive powers are not the subject of public justification, just its coercive powers. But he repeatedly emphasizes that the judgments of the Supreme Court, for instance, exemplify public reason (WSS: 45). From my understanding of the public reason tradition, exemplifying public reason means being sensitive to the fact that groups not only have the authority to determine their own organizational structure and teachings but a strong presumption in favor of making its own determinations about the public relevance of its theological doctrines.

In sum, Brettschneider's democratic state cannot respect persons as free and equal citizens and exercise this sort of pedagogical and exegetical authority over them, as such authority is neither publicly justified nor pragmatically trustworthy.

V

An Objection

In discussion, Brettschneider has argued that he is merely defending a set of democratic values that might or might not conflict with theological values.[7] This is not the same as making theological judgments, though it may have an impact upon them. Brettschneider is seeking to defend the reasons for rights like the right to free exercise of religion. That right is ultimately based on the ideal of free and equal citizenship. So to defend religion, we

[7] See Brettschneider's reply in an online reading group hosted by the Public Reason blog here: http://publicreason.net/2013/04/08/state-speaks-symposium-responses-to-chambers-chapter-3-rubinstein-chapter-4-vallier-chapter-5-and-stiltz-chapter-5/

are required to defend these values even if religious people oppose them. This means we must make political judgments about the meaning of religious freedom, but we are not required to make theological judgments.

However, Brettschneider acknowledges my point that some religious groups will find that democratic persuasion impinges on their theological commitments. Some groups will undoubtedly come to hold that their theological commitments are not compatible with the state promoting the ideal of free and equal citizenship. As a result, if the state is promoting equal treatment of gays and lesbians, and some religions oppose that, then religious practice will be affected. But given the state's duty to promote equal treatment of all, it must engage in education and persuasion, and if it turns out that requires modifying religious views, then so be it.

So Brettschneider maintains that even if we know that the state must engage in democratic persuasion to change theological beliefs, this does not mean the state engages in theology or endorses theology. Instead, the state is merely promoting shared democratic values when it conflicts with religious values.

But my concern is narrower than Brettschneider's. I do not claim that the state must shrink back from ensuring that all citizens are treated as free and equal. Instead, I argue that the idea of free and equal citizenship is *reasonably contestable*. Reasonable people can offer different reasonable interpretations of the ideal. Roman Catholics widely claim to strongly endorse the ideal of free and equal citizenship, but they do not *interpret* this ideal as requiring the public recognition of gay marriage. Catholics frequently defend this point on two grounds. First, they appeal to political values like promoting the common good to defend

traditional marriage.[8] Catholics root this idea in their own doctrine of natural law; but having a private, comprehensive grounding for promoting the common good is not the same as appealing to non-political values. Second, Catholics typically deny that they fail to treat gays and lesbians as equals by publicly claiming that homosexual sex is disordered and unnatural. And this is because Catholic theologians typically deny that one's desire to have homosexual sex is an intrinsic part of your ultimate identity as one who seeks the Good, understood as communion with God. Such an identity is not inherently sexualized. As a result, fulfilling desires for homosexual sex cannot possibly count as realizing one's identity either as a natural creature or as a child of God. Traditional Roman Catholics of the sort I describe simply disagree with Brettschneider's *interpretation* of the ideal of free and equal citizenship and so object to the state promoting a conception of free and equal citizenship that prevents them from living lives compatible with their own theological commitments.

I think the political liberal is within her rights to insist that, in seeking to ban gay marriage, traditional Roman Catholics are themselves seeking to impose a sectarian, comprehensive conception of the good on others. However, even if this is true, Catholics still have a good reason to insist on maintaining their institutional and theological integrity against a state interested in democratically "persuading" them to change their minds on matters of *eternal* and *unalterable* doctrine. And they have especially strong reason to reject the state using tools like tax-exempt status to engage in such persuasion, as this adds an element of manipulation.

[8] For Catholic teaching on homosexuality, see the U.S. Catholic Church, *Catechism of the Catholic Church* (USCCB Publishing, Random House, 1995), 625-6.

So the real question is whether the state is permitted to impose a *sectarian* interpretation of the ideal of free and equal citizenship on people who reasonably disagree with that interpretation. The issue is not religion vs. equality, but rather religious conceptions of equality vs. secularist conceptions of equality. And there is very good reason for someone to object to her state attempting to prod her into endorsing a conception of equality she strenuously rejects on thought-out conscientious grounds.

There is a further problem here, and perhaps an ironic one. Political liberalism not only forbids imposing comprehensive doctrines on citizens who reasonably reject them, but also prohibits forcing people to comply with interpretations of political values that they reasonably reject. There is no real difference between the two forms of imposition; the latter is in many cases as morally problematic as the former. If so, imposing a controversial and reasonably rejected interpretation of a political value on unwilling but reasonable citizens is authoritarian and so *acts of democratic persuasion will frequently violate free and equal citizenship*. State officials fail to treat their reasonable "persuadees" as equal to themselves. State officials dominate their fellow citizens by imposing publicly unjustified coercion on them.

I anticipate Brettschneider replying as follows. Consider the legal doctrine of "separate, but equal" which was used to justify the obviously unequal treatment of blacks in the Jim Crow South. Couldn't white citizens offer an objection similar to the Catholic citizens I describe? Southern whites could claim, and did claim, that they believe in the ideal of free and equal citizenship, and then argue that free and equal citizenship does not prohibit segregation. Surely the state was justified in imposing an ideal of free and equal citizenship interpreted as incompatible with segregation, so why can't it be similarly justified with respect to Roman Catholics?

The short answer is that racists who made this objection were *obviously unreasonable* because their racism prevented them from recognizing that the legal institutions of separate, but equal could not live up to their "ideal" of equality in political practice. Separation meant inequality. And political liberals can explain part of why this is: the Jim Crow laws were not publicly justified to Southern blacks; so imposing those laws on them was unequal treatment. Roman Catholic doctrinal opposition to homosexual sex is quite different. It is rooted not in mere animus but in careful theological reflection on the nature and purpose of the human body. Sincere, honest and thoughtful people accept the Catholic theology of the body, but only the vicious or ignorant could support segregation.

I conclude, then, that sincere religious groups threaten Brettschneider's doctrine of democratic persuasion. Brettschneider has not removed secularist bias from his view.

VI

Addendum on Brettschneider's Interpretation of *Mozert*

A small but important point: I think Brettschneider misrepresents *Mozert*. It is wrong to say that Vicki Frost wanted to "exclude even knowledge of these [non-Christian] cultures," rather that the Holt Reader was biased against Protestant Christianity by presenting the comprehensive view that all religions were equal and that the paranormal was legitimate, among other things. Brettschneider states that in this case "a mother objected to her child's being subject to curriculum that included a textbook that taught non-biblical literature and presented information about other cultures" (WSS: 163). I do not believe this claim is consistent with Ms. Frost's original testimony, (as opposed to Frost's "new" view Brettschneider

describes on p. 164). So I think we mischaracterize *Mozert* and Ms. Frost by glossing over what was a complex, systematic and well-thought-out series of objections to a particular reader, not a wholesale rejection of diversity education.[9]

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[9] For a defense of Ms. Frost along these lines, see John Tomasi, *Liberalism Beyond Justice* (Princeton: Princeton University Press, 2001), 91-2. I discuss the case in Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (New York: Routledge, 2014), 211-3.

If you need to cite this article, please use the following format:

Vallier, Kevin, "Religious Freedom and the Reasons for Rights" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 9-24, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

IN DEFENSE OF THE (SOMEWHAT MORE) INVASIVE STATE

DISCUSSION OF COREY BRETTSCHNEIDER'S *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?*

BY

SARAH CONLY

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 25-37
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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In Defense of the (Somewhat More) Invasive State

Discussion of Corey Brettschneider's *When the State Speaks, What Should it Say?*

Sarah Conly

Brettschneider explores the familiar and vexing problem of what a democratic state should do about citizens who promote anti-democratic values—racism, or religious intolerance, or sexism. While many believe that the state should remain neutral when it comes to competing values among its citizens, Brettschneider argues that on the contrary, the government should use its varied powers (including its powers to spend and subsidize) to promote the ideal of equal citizenship and to discourage the promotion of values that are antithetical to democracy. The state should take a stand, and persuade citizens that some political beliefs are wrong-headed. We need to promote democratic congruence, "the consistency between democratic public values and personal commitments…" since "democratic legitimacy is based not only on whether the state protects democratic rights, but also on democratic endorsement or citizens' agreement with the values that justify rights." (38) These are the values of free and equal citizenship: "For a democratic ideal to be fully realized, it is important for those values to be endorsed and embraced by the citizenry, and not only instantiated in public policy." (39)

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Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

Brettschneider makes his argument clearly and convincingly, and I agree that his conclusion is correct: a state founded on the principles of democracy has an obligation to give public support to democratic values. Some find the degree of state intervention that Brettschneider allows to be controversial. Not only should the state express symbolic support of equality, on his account, it should take away tax exempt status from organizations that oppose equality for all citizens, and if this causes those organizations to fail, so much the worse for them: the state should protect freedom of speech in certain ways, but has no obligation to help these organizations get their message out. To some this will seem too much interference by the state in public opinion, but again, I find Brettschneider's argument convincing. My only quarrel with Brettschneider is, on the contrary, that he is too restrained in what he wants the state to do. Given both the goals and the principles he articulates, he should allow more action in the service of value democracy

Brettschneider wants to avoid what he calls the Hateful State, where anti-democratic values abound among citizens, and the Invasive State, where the government intervenes too much in its attempt to stamp out undemocratic values. To avoid the hateful state the government delivers persuasive messages about the wrongness of anti-democratic values. To avoid the Invasive State, Brettschneider outlines two sorts of limits his value democracy must observe in its attempt to persuade people of properly democratic beliefs. One limitation is of means, the methods the state can use to persuade people to give up undemocratic values and adopt values consistent with belief in the equality of all citizens. The second limitation is one of substance: the state ought not to try and persuade us of just any values, and not just any truly good values, but only those directly implied by the acceptance of democracy. The state must convey the message that we are all equal in the *political* sphere—not necessarily that we

are all have equal value, but that we all have equal value as citizens. Thus, discrimination against any set of citizens in the public realm must be addressed, but private beliefs, insofar as these have no political significance, are off limits to state suasion. In this way the state prevents itself from being too intrusive—a hateful state—and manifests the same respect for equal rights that it demands of its citizens.

This seems reasonable, as far as it goes. I will argue, however, that Brettschneider draws his lines—between acceptable means, and unacceptable means, and between those of an individual's values that are open to public scrutiny, and those which are off limits—in the wrong places.

I

Means

In looking at the methods the state can use to persuade us of the value of political equality Brettschneider makes two distinctions. The first is between coercive methods—making an action illegal, with the threat of sanctions—and the less intrusive "expressive" means of persuasion. We want to emphasize the "central role of the state's persuasive, as opposed to its coercive, capacities." (13) This is because valuing democracy requires valuing the ability of citizens to make decisions for themselves: "In contrast to coercion, reasoning with individuals differs because it respects their capacity as free and equal citizens to decide upon their own conception of the good and their conception of justice. Unlike force, reasoning attempts to change minds through the active participation and free thought of the citizens whom one is seeking to persuade." (66)

The second distinction is between different kinds of expressive persuasion. It is preferable, on Brettschneider's account, to appeal to reason when expressing the state's views, rather than using non-rational means of persuasion—better to articulate the reasons that a particular sort of behavior or a particular set of beliefs is wrong than doing something else, like an appeal to the emotions, that might bring about the same belief. This way, a person will use her abilities as a rational agent to re-assess her own say, racially prejudiced beliefs, and will see that they are not in fact compatible with support for democracy. Brettschneider thinks a good example of an appeal to reason is a court decision that spells out the particular ways in which a behavior—say, segregation in schools—is contrary to the principle equal citizenship. Non-rational means, on the other hand, obviously bypass the reasoning ability that makes us fit for democracy and appeals to less exalted parts of our psyche. The example Brettschneider gives several times of a non-rational means of suasion is that of subliminal messages that tell us what to do, presumably effecting a change in attitude without our knowing that we are being exposed to such a force for change. In the end, coercive methods and non-rational expressive methods share the same failing --they do not address the agent's reason, but simply try to push him towards right behaviors and right beliefs without any understanding on his part.

These two parts distinctions as to means is not neat, though. First, we may consider the distinction between coercive and non-coercive methods. One objection Brettschneider makes to coercive means is that they may not respect rights, and we want our persuasive methods to respect rights appropriately. This is true. However, since this book is intended to show us more properly just how to delineate our rights, this isn't much of a guideline: he is, after all, willing to say that some non-profit organizations should be denied tax exempt status because of the

values they hold, and some would argue that that violates rights. Do we have a right to produce and to view violent pornography, for example? We have decided that we don't have this right when it comes to child pornography, and some would argue violent pornography where women are cut apart with chainsaws might fit into the same category. So, while it is certainly true that we don't want to violate rights, that does not serve at this point as much of a guideline as to when it is appropriate to make something illegal.

The second argument against the use of coercion is that it won't induce belief. He says coercion might cause citizens "who hold these views to go underground and to become even more hostile to liberal democratic regimes." (17) Brettschneider may be thinking of Locke, who argues that enforced conformity to state religious practice won't in itself bring about the desired orthodox belief, which is really what the religious reformer wants from the recalcitrant citizen: "For no man can, if he would, conform his faith to the dictates of another," and if we are forced to act as if we believe what we do not in fact believe "we add unto the number of our other sins those also of hypocrisy."[1]

However, while action and thought are certainly logically distinct, and commanding someone to change a belief simply because you've commanded it seems ineffective as well as excessively intrusive, there is some connection between coercion and rational thought. Coercive action often leads to reflection, and this may induce belief. For one thing, when we are forced to do something, or under a threat that we will be forced, we very often think about whether and why this is justified. The Court decisions that Brettschneider praises are often in service of coercive laws, either making or unmaking them. And outside the

[1] John Locke, "A Letter Concerning Toleration," in "The Second Treatise of Government and A Letter Concerning Toleration," Dover Publications, Mineola, NY, 2002, p. 119

judiciary, the fact that something is a law, or that it may become a law, prompts just the sort of public discussion that Brettschneider praises. This may be especially true when the law in question provokes some opposition. The 1973 Roe v. Wade decision, while it did not coerce individuals into having abortions, did coerce states into making abortion legally accessible, and that has prompted a huge amount of discussion about privacy, personhood, states' rights, and a number of related issues. As I write, the prospective American law that would coerce unwilling landowners to accept the presence of the Keystone Pipeline has prompted a great deal of debate over the environment, over the importance of endangered species, over the power of the oil lobby, over the proper use of presidential vetoes, and other matters.

And of course, even without this recourse to rational discussion of the bases of a law, we might be influenced simply by the fact that a law is a law. Laws themselves have expressive power, and this can affect us in non-rational ways. When we know that a law has been passed, we come to believe that the subject matter of the law must be important to our fellow citizens, and we want to please our fellow citizens.[2] We often, too, come to believe something just because we think other people believe it.[3] Of course, this isn't universal: we may not all feel this desire, and when we do it isn't always the strongest motivation we feel—much as we like to fit in with our society, we

[2] See Richard McAdams, "An Attitudinal Theory of Expressive Law," *Oregon Law Review*, vol. 79, 2000; see also Robert Cooter, "Expressive law and Economics," *Journal of Legal Studies,* vol. 27, S2, June 1998; see also the seminal psychological studies by S.E. Asch, "Opinions and Social Pressure," *Scientific American* 193, 1955

[3] Muzafer Sherif, *The Psychology of Social Norms*, Harper, New York, 1936; Vasily Klucharev, "Brain May be Wired for Social Conformity," *Neuron* (January 15, 2009)

might like even more to embezzle enough money for our Caribbean get-away. And, we may resist the lure of a popular belief about what is right and what is wrong. But the fact that something is law does provide some motivation to act in accordance with the rule the law presents, and also makes us more likely to believe that what the law expresses is true.

Of course, this use of non-rational power runs afoul of Brettschneider's second distinction, that between rational and non-rational means of persuasion. Brettschneider wants us to come to an understanding of democratic values. Accepting them in some emotional sense—finding manifestations of racism repugnant without reflecting on why they are repugnant—doesn't advance our acceptance of democracy per se, even if it leads us to act in ways compatible with democratic values. "Democratic suasion should also avoid manipulation that circumvents citizens' ability to reason."(70) It may be unavoidable that we are non-rationally swayed by our desire to fit in with prevailing social norms, but a respectful democratic state will not intentionally resort to non-rational suasion.

This differentiation between rational and non-rational persuasion doesn't play out well in practice, however. The distinction is supposed to safeguard us from propaganda and other forms of communication that suggest brain-washing more than the desire to engage an informed citizenry. It needn't be true that non-rational suasion is tantamount to brainwashing, though. Brettschneider refers to subliminal messages as unacceptable, and that seems reasonable. We generally assume that subliminal messages are deceptive: we don't know that we are seeing them. Deceit in government is generally undesirable, because it implies the citizens lack control over the government, and that the government itself celebrates this fact. While even democratic governments take individual actions that citizens may disapprove

of, we don't want to feel that we are entirely shut out of the process. We want to know what is going on. Where there is no transparency, the possibility of abuse is great.

Non-rational suasion needn't be deceitful, however. Some of the means of expression that Brettschneider supports aren't themselves geared towards reasoning, after all: a public statue is not a statement of principle, and a holiday in honor of someone is not a manifesto. They are symbols of approval, and to that extent they not appeals to reason, but we don't mind them because we know what they are. Nor are they manipulative in the pejorative sense of that term: they are designed to affect us, but not to bend us to the evil purposes of an alien will. And of course, the reasoning that lies behind the choice of a particular person to celebrate is available if we choose to pursue it, so we don't need to feel that mysterious machinations are determining public statuary or whose face is on a stamp. The availability of a rationale—that we know we can find out why someone is celebrated, if we choose, and think about that-- may be as close as we can typically come to public reasoning. After all, emotional appeals are effective, and very often the way we communicate. This is why, for example, those who want to drum up support for charitable giving don't just give us statistics, but hone in on particular cases, the particular child you can help. And, emotional appeals—patriotic songs, celebrations, marches—are accessible to everyone. While court decisions may be refined, insightful, and convincing pieces of reasoning, how many people will read them—what percentage of society? Non-rational suasion is more accessible, for many more effective, and for most of us an almost unavoidable influence on our convictions. In the long run, the divide between rational and non-rational suasion is not as great as Brettschneider suggests. Much of our reasoning remains influenced by convictions not based on reason—it's just the way we operate. Whether it's the crying Indian in the famous tv

commercial against littering or a sign by the road that threatens a $200 fine if we toss trash out the window, our sense of value is influenced by non-rational forces.

Now, Brettschneider is certainly not arguing that coercion is never appropriate. A law that requires that jobs be open to people of all races is of course, coercive, and justly so. He doesn't think we should think of coercion as a primary means of changing beliefs, and here is where we need more thought. Laws often change beliefs when they change practices. Coercive laws make a statement about what we believe is valuable, and this is a statement that can affect us in both rational and non-rational ways.

II

Substance

Brettschneider's second constraint on what the state can rightfully do to change our values concerns substance. There are limits on what sorts of values the state should oppose. Here, he says that the state's job, as a democracy, is to oppose specifically anti-democratic values. Its job is not to impose values more generally, not to persuade its citizens to accept this or that comprehensive view of the good. Rather than concerning all the different values citizens may hold, the state's job is to target only those values that have public relevance. Citizens may have conceptions of inequality between types of persons that can go unchallenged, as long as these do not affect their belief in the political equality of all citizens.

What kinds of conceptions of equality would these be, that have no impact on citizenship? Perhaps those that in no way pertain any public issue, but these, I think, will be few when we

are talking about the equal merit of different types of people. Perhaps I believe that only southerners can make good barbecue. This might seem like a personal belief with no public relevance, since barbecuing skill is not a criterion for citizenship, but then we see that if I own a chain of barbecue places and automatically rule out all applicants from north of the Mason-Dixon line, my belief will affect my hiring, and equality in hiring *is* publicly relevant. I don't want to imply that there can be no beliefs concerning the equality of persons that are irrelevant to the functioning of democracy. I do want to imply, though, that beliefs that may seem irrelevant at first glance can be discovered to affect our judgments and actions when it comes to the public role of citizenship.

For example, Brettschneider contrasts the Roman Catholic belief that women and (practicing) gays cannot be priests with beliefs that he thinks are publicly relevant. The Boy Scouts of American should lose their tax exempt status (132, 169) because of their position on homosexuality:

> The message of the Boy Scouts toward gay citizens and gay children contradicts the ideal of free and equal citizenship. While the mission of the organization is to teach children about leadership in the society at large, its view seems to be that gay citizens are incapable of such leadership because they refuse to live "cleanly." (132)

The fact that women and gays can't be priests, however, does not bespeak any belief that they are unfit in other ways, and thus

> does not constitute a clear violation of free and equal citizenship….The Church does not actively campaign as a matter of policy against either women or gays who seek public office in contemporary American politics. Indeed, it often celebrates Catholic women who attain high political office. …To the extent that the Church dos not oppose the equal status of gays and women in society at large, despite its policy on the priesthood, it should not be subject to democratic persuasion. (134-135)

Can this be right, though? The fact that women and gays cannot be priests does not mean merely that they cannot administer the sacraments. It means they cannot become bishops, archbishops, cardinals, or popes. In other words, they cannot take a role in governing one of the most influential international organizations in the world. Aside from its churches, it's an organization that runs countless schools and hospitals, and sets policies that certainly affect women—like the opposition to contraception and abortion. Nor can women and gays govern in what is a very small, but still independent, state entity, Vatican City. Women and gays are denied both employment and the possibility of a particular political status.

I do understand that the argument for discrimination against women in the priesthood is that Jesus was a man, not a woman, rather than a belief that being woman is simply inferior or sinful in the way that the Church holds homosexuality to be. However, the policy makes too much of the distinction of sex, suggesting that sex is so determinative of one's essence that it fixes even one's proper role towards God. Jesus was not African or East Asian, but if the church declined to allow black or Asian priests on that account I think we would consider it an unjustified and unacceptable show of employment bias. Race, we would say, is irrelevant in the roles a person can play, and acting as if something is relevant when it is not is just what bias is. Brettschneider himself points to equal opportunity in employment being part of equal citizenship (36) and concedes that even religious beliefs can be public relevant. (48) At the very least, on Brettschneider's principles, I think we should deny any church or religious organization tax-exempt status if it discriminates in hiring for reasons of sex or sexual orientation. I think it would be consistent as well to be coercive in this case: to prosecute them for discrimination in hiring. To require equal access to position would not prevent freedom of speech—people

may say what they want, but not display that in discriminatory behavior. As it is, to declare that women and gays are not fit for a particular kind of religious leadership cannot help but affect their ability to lead in other positions.

It is true that these changes in law might not alter the beliefs of those at whom the law, be it coercive or simply a change in tax status, would primarily be directed. The religious hierarchy might hold to the conservative beliefs they were raised with. But as Brettschneider himself points out, often the message of state action is intended more for third parties, for what we might call the onlookers. Our making it illegal to burn a cross on the lawn of an African-American family will not lead dedicated Ku Klux Klanners to embrace ideals of equality, but it can affect other people whose principles are not so compromised. (86-86) Allowing discrimination, on the other hand, sends its own message, one that he describes as one of complicity—a message that the state thinks that the discrimination in question is justified. Saying that even churches cannot practice discrimination, however, would send a powerful message about the centrality of equal status.

III

Conclusion

I think Brettschneider's principles are correct. If our citizens are normal human beings, though, we need to be realistic about their psychology. We are not entirely rational. The differentiation between rational and non-rational means of persuasion is not as wide as we often like to believe. Our substantive ideas of people as citizens and our ideas of them in other capacities, again, are not so strictly differentiated as he seems to think. If we want to bring about an alignment between the values that underlie democracy

and the ideals held by individuals, we need to do that consistently, and we need to use tools that will work.

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If you need to cite this article, please use the following format:

Conly, Sarah, "In Defense of the (Somewhat More) Invasive State Discussion of Corey Brettschneider's When the State Speaks, What Should it Say?" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 25-37, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

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ILLIBERAL VIEWS IN LIBERAL STATES

INDUCING DEMOCRACY IN THE AGE OF ERIC GARNER

BY

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© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 39-54
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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Inducing Democracy in the Age of Eric Garner

Jennifer Rubenstein

In his insightful and elegant book, *When the State Speaks, What Should it Say*? Corey Brettschneider asks how democratic states should respond to hate speech. He argues that they should usually not respond coercively.[1] Instead, they should engage in "democratic persuasion," ("DP"), which primarily involves using reasoned argument to convince individuals with "hateful viewpoints" to change their minds and endorse "free and equal citizenship."[2] If states engage in DP, Brettschneider argues, they can maintain their balance on the "liberal tightrope,"[3]

[1] Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton: Princeton University Press, 2012). Brettschneider defines coercion as "the state threatening to impose a sanction or punishment on an individual or group of individuals with the aim of prohibiting a particular action, expression, or holding of belief" (p. 88). While Brettschneider thinks that the state can sometimes justifiably engage in coercion, it should not manipulate (*When the State Speaks, What Should It Say?*, p. 70). There is much to say about what counts as manipulation and whether the state can avoid it, especially when it comes to addressing implicit bias. I leave these important issues to one side here.

[2] Ibid., p. 4.

[3] The "liberal tightrope" is Sarah Song's term (see Song, "The Liberal Tightrope: Brettschneider on Free Speech," *Brooklyn Law Review* 79, no. 3 (2014)). In his reply to Song, Brettschneider does not dispute her use of this term, so I take it to be a reasonably accurate characterization of his view. Brettschneider, "Democratic Persuasion and Freedom of Speech: A Response

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Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

avoiding both the Scylla of the "Invasive State" that constrains free speech too much and the Charybdis of the "Hateful Society" that constrains free speech too little.[4]

Hate speech, and the violent hate crimes often associated with it, are of course horrifying. They are also ongoing, as the recent mass murder of nine people at the Emanuel African Episcopal Church in Charleston, South Carolina by white supremacist Dylann Roof vividly and painfully reminds us.[5] Yet explicit hate speech and violent hate crimes are not the only types of harmful bias. This is especially so for anti-Black racial bias in the contemporary United States.[6] Indeed, without denying the importance of explicit hate speech and hate crimes, scholars, commentators, and activists in the US have, in recent years, begun to pay much more attention to institutional and structural racism, hidden racism, subconscious racial bias, and informal or *de facto* racism.[7] They have shown how these forms of racial bias manifest in police violence, the "carceral state," housing and

to Four Critics and Two Allies," *Brooklyn Law Review* 79, no. 3 (2014), 1059-1089.

[4] Brettschneider, *When the State Speaks, What Should It Say?* p. 10-13.

[5] wrote this essay in late 2014/early 2015 and revised it slightly in July 2015, just after the Charleston shooting.

[6] I here use "racial bias" as an umbrella term to refer to all forms of racism and racial inequality. Other terms are possible, cf. Melvin Rogers' defense of the term "White Supremacy," in "Social Equality and the Afterlife of White Supremacy," *The Contemporary Condition* (January 16, 2015), URL = <http://contemporarycondition.blogspot.com/2015/01/social-equality-and-afterlife-of-white.html?m=1>.

[7] While scholars and activists have been interested in these issues in an ongoing way, we might date the latest iteration of the public debate to Hurricane Katrina in 2005. It continued through Barack Obama's victory in 2008 US presidential election (in debates about whether the US was now "post-racial") and carries on in the present day in discussions of police violence, the carceral state, and other issues.

school segregation, mandatory sentencing laws that affect African-Americans disproportionately, and the tendency for African-Americans to have shorter life spans, worse health, and less wealth, income, and schooling than members of other social groups.[8]

Brettschneider argues that states should fight explicit hate speech because it threatens the well-being of members of stigmatized groups, due to its adverse psychic and physical effects, e.g. laying the groundwork for violent hate crimes.[9] Yet for African-Americans, at least, forms of racial bias other than explicit hate speech and hate crimes almost certainly pose a greater threat in this regard. For example, Brettschneider states that in 2012, "nearly 6,000 hate crimes, including assaults, rapes, and murders," were committed in the US. He then "cite[s] just one example": "a gunman 'followed his victim, Mark Carson, for several blocks, taunting him with antigay slurs, before killing him.'"[10] Contrary to what Brettschneider implies, however,

[8] See Christopher Lebron, *The Color of Our Shame* (Oxford: Oxford University Press, 2013); Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2012); Vesla Weaver and Amy Lerman, *Arresting Citizenship: The Democratic Consequences of American Crime Control (Chicago: University of Chicago Press, 2014).* On hidden racism, see MTV Research/David Binder Research (2014), online at https://www.evernote.com/shard/s4/sh/5edc56c3-f8c8-483f-a459-2c47192d0bb8/a0ba0ce883749f4e613d6a6338bb4455/res/5cff2161-7c98-4c9a-9830-a900c7496644/DBR_MTV_Bias_Survey_Executive_Summary.pdf . On health effects, see David R. Williams, "Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination," *Annals of the New York Academies of Sciences* 896 (December 1999), 173-88.

[9] In "Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies," Brettschneider implies that hate speech contributes to violent hate crimes. See also Brettschneider, *When the State Speaks, What Should It Say?*, p. 11.

[10] Brettschneider, "Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies," quoting from the *New York Times*.

Carson's murder was not a typical hate crime: while there were 6,000 hate crimes in the US in 2012, only ten of those crimes were murders.[11] Ten is, of course, ten too many. Yet in that same year, *5,000* more African-Americans were murdered in *non*-hate-crimes than would have been murdered if murders were distributed proportionately across racial groups.[12] It is highly likely that many of these 5,000 "extra" murders of African-Americans were caused in part by institutional and subconscious racism (e.g. because these forms of racism contribute to Blacks living in poor, high-crime areas where murders are more likely to occur).[13] So insofar as Brettschneider is concerned about hate speech because of its harmful psychic and physical effects on African-Americans, he should also be concerned—indeed, he should perhaps be *more* concerned—about less dramatic, but more insidious and far-reaching, forms of racial bias.

11 "FBI Releases 2012 Hate Crime Statistics," November 25, 2013, URL = <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2012-hate-crime-statistics>.

12There were 12,755 non hate-crime murders in the United States in 2012. Of these, 51.1% of the victims were Black, even though Blacks comprised only 13.6% of the population.
See "Expanded Homicide Data," URL = <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide>. On percentage of the population, see "Black (African-American) History Month: February 2012," URL = <https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff01.html>. If murders were distributed proportionally across racial groups, there would have been 1,735 murders of African-Americans (13.6% of 12,755). Instead, there were 6,518 (51% of 12,755). I suspect that an analogous analysis of other types of violent crime would yield a similar result.

13 See Michael C. Dawson, *Not in Our Lifetimes: The Future of Black Politics* (Chicago: University of Chicago Press, 2011), pp. 53-4. This is not to deny that hate speech also contributes indirectly to these "extra" murders.

In this response, therefore, I will try to extend Brettschneider's argument about hate speech to other forms of anti-Black racial bias. In so doing, I will show that not only is Brettschneider's central concept of DP unlikely to be effective in addressing many types of racism; it also doesn't acknowledge important aspects of the challenge that states face in fighting racial bias, such as the need to navigate among potentially conflicting strategies, and the need to fight their own racial biases. However, other features of Brettschneider's account are relevant to racial bias more generally; indeed, their value becomes even more apparent when applied to this broader set of concerns.

I

Hateful Viewpoints

As Brettschneider's Primary Object of Concern

The main practical problem motivating *When the State Speaks, What Should It Say?*, is the existence and expression of what Brettschneider calls "hateful viewpoints" in liberal democracies. These hateful viewpoints are extreme, conscious, located in the minds of individual racists, and expressed in the form of hate speech—and, potentially, violent hate crimes. (Hateful viewpoints are "extreme instances of discriminatory views,"[14] which in turn are "views that oppose or are inconsistent with the ideal of free and equal citizenship."[15]

Brettschneider is most concerned about extreme cases of hate speech.[16] He does not aim to transform the views of "each

[14] Brettschneider, *When the State Speaks, What Should It Say?*, p. 4.
[15] Ibid..
[16] Ibid., p. 6. See also p. 44.

solitary crank."[17] Indeed, he writes that the purpose of DP is not only "to change the minds of the opponents of liberal democracy," but also and "more broadly, to persuade the public of the merits of democratic values."[18] Thus, the dystopic "Hateful Society" that Brettschneider thinks liberal democratic states must struggle to avoid is characterized not only by individual racists, but also by some elements of institutional and hidden racism, for example discrimination against minorities in financial institutions and minorities being "silenced."[19] That said, on Brettschneider's account, these forms of racism seem to emerge quite directly from the viewpoints of individual racists.[20] Because he wants to focus largely on extreme cases, and because he sees institutional racism as largely the result of individuals' racist beliefs, the viewpoints of explicitly racist individuals appear to be Brettschneider's main target.

Brettschneider sometimes seems to suggest that DP, will also address other problems, or at least have other benefits. For example, when a state engages in DP, it not only changes the minds of individual racists; it also reduces its own "complicity" with their hateful viewpoints and reduces psychological harm to members of despised social groups.[21] Because Brettschneider thinks that DP does all of this simultaneously, i.e., because he

[17] Brettschneider, "Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies."
[18] Brettschneider, *When the State Speaks, What Should It Say?*, p. 6.
[19] Ibid., p.11.
[20] This comes across in Brettschneider's narrative of how the Hateful Society develops. Cf. Sharon R. Krause, "Beyond Non-Domination: Agency, Equality, and the Meaning of Freedom, *Philosophy & Social Criticism* 39, no. 2 (February 2013), 187-208, who argues that "much of the racism and sexism and other cultural biases that currently constrain the life-chances of members of subordinate groups in the USA are largely unconscious and unintentional, and they do not always involve control."
[21] Brettschneider, *When the State Speaks, What Should It Say?*, p. 44.

thinks that, in this respect, all good things go together, he does not see any need to specify whether goals such as state non-complicity with individual racists and protecting the mental health of members of stigmatized groups are more, less, or equally important as persuading racists to change their minds. I return to this issue below. The important point for now is that, while he gestures toward broader issues, Brettschneider's primary concern appears to be altering the conscious hateful viewpoints of individual extreme racists.

Brettschneider's focus on explicit hate speech by individuals has an important further implication. Most liberal states do not engage in extensive explicit hate speech, at least of the kind that concerns Brettschneider. Brettschneider therefore ends up worrying about the state being too invasive, but not about it being racist.[22] As we will see, this inattention to the state as a potential source of racism becomes more problematic if we broaden our focus to include forms of racial bias other than hate speech, of which liberal democratic states are regularly guilty.

II

Democratic Persuasion

As I noted above Brettschneider's proposed strategy for altering the hateful viewpoints of individual racists is DP. The core of DP is reason-giving, especially giving "reasons for rights."[23] It might therefore seem that the next question we should ask is: how well does reason-giving work as a strategy for addressing institutional, structural, hidden, and other forms of racial bias? However, while reason-giving is the central core of

[22] I thank Jacob Levy for discussion of this point.
[23] Brettschneider, *When the State Speaks, What Should it Say?,* p. 4.

DP, Brettschneider also states that DP includes forms of expression other than reason-giving (e.g. visual images, rousing song, dramatic storytelling); DP is also "*not limited to pure expression*. [It] is a term of art meant to describe the various capacities of the state and citizens that can be employed to transform hateful viewpoints…"[24]

Even though Brettschneider sometimes suggests that DP encompasses a wide range of non-coercive state practices, at other points he seems deeply ambivalent about extending DP beyond reason-giving. For example, he argues that "democratic persuasion should always include reasoning,"[25] and he discusses only a few state "capacities" to transform hateful viewpoints other than expression, most notably the state's capacity to provide subsidies, grants, and tax privileges to civil society organizations.[26] Moreover, in discussing these capacities, Brettschneider frequently emphasizes their expressive, rather than conceive, aspects. For example, after clearly distinguishing "state subsidies" from "expression," Brettschneider nonetheless writes that "the state rightly *uses grants to advance a message* of respect for democratic values…"[27]

On my reading, then, Brettschneider is ambivalent about using a) forms of expression other than reason-giving, and b) non-coercive strategies other than expression, to change individual hateful viewpoints. One place where this is especially clear is in the stark contrast that Brettschneider draws between "coercion" and "expression." Setting up what will be a central theme of the book, Brettschneider writes that we should "distinguish between a state's coercive power, or its ability to place legal limits on hate

[24] Ibid., p. 109. My italics.
[25] Brettschneider, *When the State Speaks, What Should It Say?*, p. 109.
[26] Ibid., Ch. 4, esp. p. 111.
[27] Ibid., pgs. 110 and 111, my emphasis.

speech, and its expressive power, or its ability to influence beliefs and behavior by 'speaking' to hate groups and the larger society."[28] Crucially, this dichotomy between coercion and expression elides the very existence of non-coercive activities other than expression. This elision, in turn, prevents Brettschneider from following through on the implications of his deeper argument about the role of the state in a liberal democratic society. He tells us that the state should seek to prevent the rise of a "Hateful Society" without being too "invasive," and that it can do this by persuading racists to change their minds. But there are many ways for states to fight racial bias non-coercively other than through persuasion— or expression more generally. These "capacities" are relevant to efforts to fight explicit hate speech; they are absolutely essential when we expand our inquiry to include other forms of racial bias. By implying that expression is the main alternative to coercion, Brettschneider makes it more difficult to notice and examine the full range of these non-expressive, non-coercive capacities. To summarize: as a strategy for fighting all forms of racial bias, DP has three main limitations. First, it construes liberal democratic states primarily as potential solutions for racial bias, not as potentially racist themselves. Second, because DP privileges reason-giving over other forms of expression, and expression over other non-coercive strategies for transforming hateful viewpoints, it does not say enough about non-expressive, non-coercive strategies for changing hateful viewpoints. As a result—this is the third problem— it does not attend to possible ways in which strategies for fighting racial bias might compete or conflict with each other.

[28] Ibid., p. 3. Brettschneider also writes that "democratic persuasion should focus on giving reasons as an alternative to state coercion" (Ibid., p. 43).

III

Democratic Induction

In light of these limitations, I turn now to sketching an alternative that is inspired by Brettschneider's account, but that largely avoids the three problems just described. Drawing on a term that Brettschneider uses in passing, I call this alternative "Democratic Induction" (DI).[29]

While DP focuses on explicit hate speech, DI is a response to all forms of racial bias. Therefore, while DP highlights how non-racist states can reform racist citizens, DI highlights how the state can work on its citizens and on itself, and how citizens can work on the state. Likewise, while DP focuses on *extreme* cases, where "extreme" means loudest and/or most disparaging, DI focuses instead on cases that are most *serious,* because forms of racial bias such as institutional racism, hidden racism, and implicit bias are most troubling when they are hidden.

In Figure 1, circle (1) represents reason-giving aimed at changing the hateful viewpoints of individual racists.

[29] E.g. Brettschneider mentions "an inducement that goes beyond pure expression" (*When the State Speaks, What Should It Say?,* p. 109*)*. See also pgs. 112, 165, 166. "Induce" is from the Latin *indūcĕre*, meaning "To lead (a person), by persuasion or some influence or motive that acts upon the will" ("Induce," The Oxford English Dictionary(December 2014 Edition), URL = < http://www.oed.com/view/Entry/94758?redirectedFrom=induce&>, myitalics). In ordinary language, however, induction does not always act on the will. For example, doctors induce labor, and exercise induces asthma. I mean induction in this broader sense. While my concept of "Democratic Induction" excludes manipulation and coercion by definitional fiat, I am happy if the term induces some discomfort about how one distinguishes between manipulative and non-manipulative and coercive and non-coercive state action.

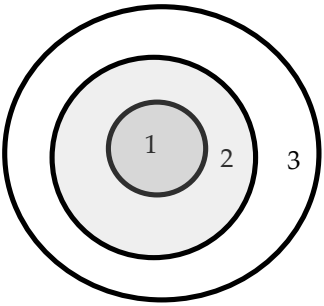

Figure 1. Contents of DP and DI

Circle (2) is broader; it includes not only reason-giving, but also other forms of expression aimed at changing the minds of individual racists. Circle (3) is broader still; it includes not only expression aimed at changing the minds of individual racists, but also other non-coercive activities aimed at changing the minds of individual racists. It also includes strategies for reducing other forms of racial bias. For example, circle (3) includes:

- Non-expressive (or, not only expressive) efforts to change the *viewpoints* of individual racists, such as state provision of incentives to encourage people to live in integrated neighborhoods and attend integrated schools. These incentives can also reduce individuals' subconscious biases and improve other outcomes, such as graduation rates.

- Efforts to change the *behavior* (even if not the viewpoints) of individual racists, for example, state speech aimed at altering what is seen as socially acceptable.

- Efforts to change the *subconscious biases* of individuals, for example, anti-bias training for police officers, teachers, and other public officials; efforts to create institutional mechanisms to mitigate the effects of such biases, and efforts

to ensure that media regulations do not suppress portrayals of diverse characters on television.[30]

- Other non-coercive efforts (grants, voluntary programs, "nudges,") to alter institutional structures, practices, and/or substantive outcomes.[31]

As I discussed above, (1) is the central core of DP; Brettschneider mentions, but ultimately seems ambivalent about, (2) and (3). In contrast, DI unambiguously includes all of (1), (2), and (3). That is, it encompasses all non-coercive state action to reduce racial bias. While Brettschneider's question is, When the state speaks, what should it say?, DI asks a broader question: When the state is acting non-coercively, what should it do (and say)?

III

Navigating Conflicting Strategies of Democratic Inducement

Because it is intended to fight many different types of racial bias, DI includes many kinds of non-coercive activities aimed at reducing racial bias. It therefore foregrounds the possibility that

[30] In a recent speech, FBI director James Comey argued that "many people in our white-majority culture have unconscious racial biases" and that police departments should "design systems and processes" to mitigate the effects of these biases. This is an example of a state official seeking to induce better adherence to the principle of free and equal citizenship on the part of a state institution. Text of speech by James B. Comey, February 12, 2015, URL = <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

[31] Thaler, Richard and Sunstein, Cass, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

these activities might conflict with each other, and that states (and citizens) might need to develop the practical judgment necessary to navigate these conflicts. In this respect, DI does not merely complement DP. It suggests that the characterization of the challenge that states face in fighting racism implied by DP—that is, the characterization that is suggested by the kind of solution that DP is—is highly incomplete. For example, after police officers killed an unarmed Black man, Eric Garner, on the street in Staten Island, New York Mayor Bill de Blasio spoke publicly about how he and his wife "had to literally train [their son, who is biracial]… in how to take special care in any encounter he has with the police officers..."[32] This statement by a high-profile white public official might have educated some white Americans about the everyday experience of African-Americans. Perhaps it was also comforting to some African-Americans to hear that de Blasio, in some respects at least, understood their experience. However, de Blasio's comment also seems to have contributed to a significant backlash among police officers, who demonstrated their displeasure by turning their backs on him at several public events and engaging in a work slowdown. If this response was not what de Blasio desired, then he was in a position of having to juggle different and to some extent competing goals: educating white Americans and publicly acknowledging the experience of African-Americans on the one hand, and not alienating the police, on the other.[33]

[32] See "Transcript: Mayor de Blasio Holds Media Availability at Mt. Sinai United Christian Church on Staten Island," December 3, 2014, URL = <http://www1.nyc.gov/office-of-the-mayor/news/542-14/transcript-mayor-de-blasio-holds-media-availability-mt-sinai-united-christian-church-staten>.

[33] I am not suggesting that the slowdown or back-turning episodes were directly harmful to the cause of free and equal citizenship; rather, they are prima facie evidence of resentment that is likely to be harmful.

Contrary to what Brettschneider sometimes implies, then, when it comes to fighting racial bias, good things do not necessarily go together; strategies can conflict with each other or have negative externalities. Even if we look only at the realm of expression (rather than other forms of non-coercive state action), public officials will often need to choose between two kinds of rhetorical strategies: those that are most likely to convince extreme racists to change their minds, and those that clearly express the state's commitment to free and equal citizenship, convey this commitment to members of stigmatized groups so as to reduce their psychological distress, and/or reinforce social norms against the expression of racist viewpoints.[34]

For example, Josiah Ober argues that a direct implication of *When the State Speaks, What Should It Say?* is that we must study the "emotional force of great public speeches that have actually had a meaningful impact on citizens in terms of transforming attitudes," such as Lyndon B. Johnson's 1965 "We Shall Overcome" speech to Congress.[35] Brettschneider agrees. [36] Yet Ober and Brettschneider's discussion of this speech differs dramatically from Bryan Garsten's account of how Johnson actually changed racists' minds. According to Garsten, "[Johnson's] accent, his stories and manner of speech, *and even sometimes his characterizations of the races* all conformed more closely to southern ways than those of the northern civil-rights activists who had come south to preach their cause."[37] Garsten does not

[34] There might be conflicts among these latter three objectives as well; I leave those aside for now.

[35] Josiah Ober, "Democratic Rhetoric: How Should the State Speak?" *Brooklyn Law Review* 79, no. 3 (2014).

[36] Brettschneider, "Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies."

[37] Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Cambridge: Harvard University Press, 2006), pp. 193-4.

specify what these "characterizations of the races" were, but his broader argument suggests that they did not clearly express the state's commitment to free and equal citizenship, nor did they likely do much to challenge African-Americans' perception that most white Southerners saw them as second-class citizens. Indeed, Garsten's broader argument is that "a politics of persuasion—in which people try to change one another's minds by appealing not only to reason but also to passion *and sometimes even to prejudices*—is a mode of politics that is worth defending."[38]

If Garsten is correct that this sort of politics is sometimes the most effective way, or even the only way, to transform the hateful viewpoints of individual racists, then states and other actors will sometimes have to choose between Garsten's "politics of persuasion," i.e., appealing to existing prejudices to change the minds of individual racists, and Brettschneider's "democratic persuasion," i.e., clearly expressing the state's commitment to free and equal citizenship. In addition to these direct conflicts, liberal democratic states will also have to juggle indirect conflicts among different initiatives that all require funding, e.g. incentivizing school integration and mitigating the effects of the implicit biases of state officials. This picture—of a state juggling different and sometimes competing initiatives to fight various types of racial bias, including its own—is quite different from the picture that Brettschneider paints of a state teetering on a liberal tightrope. This is the main point I want to bring out.

Nonetheless, DI retains a defining feature of DP: its thematization of non-coercive state action as a valuable tool in fighting racial bias. The state is, of course, sometimes justified in using coercion to fight racial bias. But non-coercive state action is also an important part of the picture—one that, after reading

[38] Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment*, p. 3. My italics.

When the State Speaks, What Should It Say?, I think is insufficiently explored by political theorists. The question is not only *whether* the state is permitted, or even obliged, to engage in non-coercive action to fight racial bias. It is also and perhaps more pressingly *how* the state should do so: what are the different strategies available to states for non-coercively fighting racial bias—including the state's own racial bias? In what ways do these strategies support or undermine each other and/or strategies for fighting other forms of bias? These are the vitally important questions that *When the State Speaks, What Should It Say?* raises, but does not fully answer. In raising them, Brettschneider shows us that liberal democratic states are not merely wobbly funambulists, struggling to maintain their balance on the liberal tightrope. They are also co-participants, with their citizens, in a high-wire juggling act.[39]

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[39]Thanks to Andrew Gates, Jacob Levy, Jennifer Petersen, Allison Pugh, and Melvin Rogers for helpful comments on a previous version of this response.

If you need to cite this article, please use the following format:

Rubenstein, Jennifer, "Inducing Democracy in the Age of Eric Garner" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 39-54, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

DEMOCRATIC EQUALITY AND FREEDOM OF RELIGION: BETWEEN COERCION AND PERSUASION

BY

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© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 55-65
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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Democratic Equality and Freedom of Religion: Between Coercion and Persuasion

Annabelle Lever

According to Corey Brettschneider, we can protect freedom of religion, and promote equality, by distinguishing religious groups' claims to freedom of expression and association from their claims to financial and verbal support from the state. I am very sympathetic to this position, which fits well with my own views of democratic rights and duties, and with the importance of recognizing the scope for political choice which democratic politics offers to governments and to citizens.[1] This room for political choice, I believe, is necessary if people are to have any chance of reconciling the conflicting moral and political obligations they are likely to face, however idealized our conception of democracy or morality. Granted that no amount of personal and political choice will ever guarantee that we do not encounter tragic choices, and painfully conflicting moral demands, it is an important feature of democracy – or so I believe – that its rights reflect the importance

[1] Annabelle Lever, 'Taxation, Conscientious Objection and Religious Freedom', *Ethical Perspectives*, 20.1, (March, 2013), 144-153. 'Symposium and Debate'. http://poj.peeters-leuven.be/content.php?url=article&id=2965130&journal_code=EP and 'Equality v. Conscience? Ethics and the Provision of Public Services', *forthcoming*, the *Philosophers Magazine* 69. (July, 2015).

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Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

of mitigating these conflicts so that people are able, as a rule, to act as they ought, and do not experience their moral sentiments, beliefs and capacities simply as grounds for recrimination, alienation and despair. I therefore believe that democracies have good reason not to force the consciences of the undemocratic and the intolerant, where it is possible to accommodate such people without threatening the rights of others.

However, the fact that I share many of Brettschneider's intuitions and beliefs does not mean that I share them all. In particular, I find his conception of democracy narrow, and unduly based on a rather idealized conception of the American constitution, which is unlikely to appeal to those whose conceptions of democracy are more republican, more socialist, more pragmatic and more international than his own. I have explained these worries elsewhere and drawn out some of their implications for his arguments about privacy and judicial review.[2] There is no need to repeat them here. I will also set to one side my worries about his uninflected, overly abstract and rather reified characterization of the State, in the hope that others will discuss this and that, in the end, a more nuanced conception of the State and a more lively appreciation of the conflicting people, institutions, histories and norms which make up most states, will prove consistent with his arguments.

Finally, I do not propose to enter into a detailed discussion of the difficulties of Brettschneider's overly abstract and reified conception of State 'speech' and 'expression' which, while

[2] Annabelle Lever, 'Privacy and Democracy: What the Secret Ballot Reveals', forthcoming *Law, Culture and the Humanities*, 11 (2), (June 2015) Available in 'online first' version at http://lch.sagepub.com/content/early/2012/10/12/1743872112458745 and 'Democracy and Judicial Review: Are They Really Incompatible?' *Perspectives on Politics* 7.4. (Dec. 2009) 805-822.

motivated by the language of American constitutionalism, appears to cover pretty much anything a government might do, from raising and spending taxes, to accepting judicial interpretations of contested constitutional provisions, or to affirmatively pronouncing on the goals that will animate its legislative agenda and its aspirations for citizens' lives. Again, while I would have wished for a more nuanced and analytical discussion of so central a concept as 'expression' and, in particular, expression by 'the State', I am uncertain that anything fundamental in Brettschneider's account of citizen rights and duties would be altered in the process. Instead, then, I want to focus on points in Brettschneider's argument that intrigue and, sometimes, puzzle me the most, and where issues of nuance and clarification might make a substantial difference to our views of equality and religious freedom.

The key theoretical claim that animates Brettschneider's book is the idea that we can reconcile freedom of religion with equality if we adopt 'viewpoint neutrality' as the proper way to determine when coercion can be used to limit religious freedom, and take 'democratic persuasion' as our guide to the ways that we may permissibly act, as citizens, within those broad, but not infinitely permissive, constraints. (p. 3, 170, 173).

Broadly speaking, Brettschneider argues, states and the citizens that they are supposed to represent, have two forms of political action open to them: 'coercion' and 'persuasion'. What is required to justify coercion is very much more onerous than what is necessary to justify non-coercive policies which may significantly affect people's lives, liberties and social standing, but which stop short of forcing people to change their behavior. Following the plausible intuition that it takes much more to justify coercion than persuasion, because coercion is so much greater a threat to our autonomy and equality than are efforts to persuade us –

annoying and constraining those these may be – Brettschneider believes that political power cannot be used to force us to affirm one particular religious or secular point of view, however democratic or otherwise appealing, nor can it be used to proscribe public statements of faith on the grounds that these rest on beliefs which are false, hateful or undemocratic. We are not, of course, entitled to libel others, to intimidate or threaten them, to engage in blackmail or to invade people's privacy simply because these acts involve the use of words. These are all acts that we should prevent and, if necessary, punish even when (or if) they take non-verbal forms, and the fact that they sometimes involve words, rather than pictures or other forms of communication, is no reason to change our judgment of them. However, according to Brettschneider, the fact that we can influence people's behavior by persuasion, rather than by coercion, means that public officials, rules and institutions can, and sometimes should, be used to shape individual behavior in democracy- promoting ways, even if such persuasion foreseeably has the result of favouring some people's beliefs, ideals, associations and ambitions over others.

Brettschneider's position, here is generally persuasive. It avoids the twin evils of supposing that governments must stand helplessly by, unable to encourage or promote democratic principles, simply because they may not ram these down the throats of the unwilling. But it also accepts that respect for citizens precludes governments from actively engaging in proselytism or propaganda for one of the many different, but reasonable, approaches to morality that democratic citizens may adopt. Of course, there is a fine line between citizens organizing in order to contest political power with a vision of the collective good, or of the proper way to use collective resources, and the activities of proselytism and propaganda. Clearly, at the borders these distinctions may be difficult to make, as will the differences

between coercive offers and threats, on the one hand, and persuasion, on the other. Still, the lines along which Brettschneider hopes to reconcile claims to religious freedom and to equality are reasonably clear, and appear to reflect both the difficulty, and the importance, of protecting both democratically.

But does the dichotomy between persuasion and coercion adequately capture the variety of ways in which political power shapes or constrains people's beliefs? Is public education, for instance, adequately characterized as *either* an instance of state coercion or an example of state persuasion? Democracies tend to force parents to send their kids to school – though generally parents are entitled to send their kids to a variety of quite different types of school, and even to create new schools and forms of education for them. The reasons why parents are forced to send their kids to school, however, are varied, in ways that illuminate the limits of the coercion/persuasion distinction. Some governments may believe that their job is to promote educated citizens and that compulsory attendance at public schools or their equivalents is an appropriate expression of their political rights and duties. On such a view, education requirements are frankly coercive but the justification for such coercion, if it exists, is assumed to lie in the political mandate that the government was given when it was elected.

However, other governments may not see education requirements this way. Instead, they may believe that compulsory education is merely a means to ensure that vulnerable parents and children are not forced to eschew educational opportunities that they value because it is inconvenient for the rich and powerful, or because education is looked on unfavourably by their social group, their religion or their families. On such a view, the coercive aspects of laws that require parents to educate their children are incidental to the goal of protecting the freedom of

parents and children to act as they wish, and it may be an open question whether, in fact, any kids are forced to be educated in the face of their parents' opposition. Put simply, what looks like coercive regulations from one perspective may simply be permissive ones from another; and the fact that legislation which looks paternalistic may have an egalitarian rationale – protecting against free-riding, for example, or undue social pressure – suggests that government action is not reducible to the dichotomy of either impermissibly *requiring* or *forbidding* a particular viewpoint (as with paternalism or perfectionism), or permissibly *encouraging* democratic values. This is because governments can affect our behavior – and our beliefs –by *creating new opportunities* for us, which enable us either to act on our underlying preferences in ways that were previously impossible, or because new options create new desires, and reorder our preferences and beliefs in ways that are not reducible to coercion or persuasion.

It would therefore help me to understand how far Brettschneider is willing to allow governments to promote egalitarian values, and discourage inegalitarian ones, if he would explain whether or not States are entitled to subsidise more democratic religious sects, as compared to their less democratic, but more established, competitors; and whether he believes that citizens can ask their representatives to use public money actively to *solicit* the formation of more democratic religious variants of established religious churches or organisations? Put simply, are democratic states entitled to deprive the Catholic Church of subsidies, on the grounds that its public and organized opposition to contraception and abortion devalues the lives of women and cost millions of needless deaths worldwide, but actively to support and fund existing 'reformist' movements in the Catholic Church which seek to make its teaching and practices more democratic? And if the answer to that question is 'yes', may states

actively seek to create, through funding opportunities and support, such 'reformist' movements where they do not exist, or are too small yet to take organized form?

As Brettschneider persuasively argues, Catholic agencies have no right to state subsidies for their adoption activities, in so far as Catholic agencies insist that they cannot place children for adoption with gay parents (p. 167) What is unclear to me, however, is whether Brettschneider believes that the state may *never* subsidise such agencies – for example, in cases where enough gay-friendly adoption agencies, but where there is insufficient provision for heterosexual adoptions[3] - and whether he thinks it would be wrong for the state to fund 'breakaway' adoption agencies made up of people who see and call themselves 'Catholic', but who actively contest and seek to change Catholic teaching on contraception, abortion, gay marriage and adoption? In short, I am curious about the extent of political choice available to citizens, their representatives and agents, in responding to conflicts between religious freedom and equality, given that the case for allowing religious practice, but refusing to subsidise it, leaves open a variety of quite different avenues by which states might seek to promote equality, while protecting freedom.

I take it that our answers to these questions do not depend on particular hostility or support for the Catholic Church, but would have to be applicable to other established and important religious groups, and to any secular equivalents which seek to respond to the spiritual needs, aspiration and beliefs of their members. Thus, my question can be rephrased to apply to the differences between Orthodox and, especially, Ultra-Orthodox, and Reform Jews. Granted, a democratic state must allow people to practice their

[3] For a discussion of this issue see A. Lever, *Philosophers Magazine* 69, forthcoming July 2015.

religion, even though that religion may actively discourage the exercise of democratic rights – while not openly challenging democratic norms – how far can a democratic state subsidise such religious organisations, in order to make certain health or social services available and acceptable to its members? And how far, if at all, may a democratic state actively seek to support reformist and more democratic currents within the religion, as a counterweight to its more powerful, established, but discriminatory forms?

These questions strike me as important, but I do not find them easy to answer. However, I am struck by Brettschneider's reluctance to say that democratic states may remove all subsidies from the Catholic Church, despite its active opposition to abortions necessary to protect the health of women; and the willingness of some members of its hierarchy to threaten prominent Catholic politicians with excommunication for not publicly adopting the official Church line on abortion when acting civically. Thus, at p. 136 he states that 'democratic persuasion is not appropriate in the form of denying non-profit status to the Catholic Church or to the Orthodox [Jewish] community, since they do not dissuade women from participating in the broader democratic society as equal citizens…'—a claim that begs the question of how 'Orthodox' as distinct from 'Ultra-Orthodox' Jews are defined, and how far he wants to treat them differently. However, it is hardly *encouraging or promoting* democracy to insist that 'no group should receive the subsidies of non-profit status if it opposes the ideal that all citizens are to be equal under law' (p. 137)—a statement that treats the bare minimum necessary for democratic government as a statement about what is in the public interest. But it is also unclear why a group must qualify for a special tax-exempt status in order to be deemed worthy of receiving government funds for some specific, targeted, purpose.

Thus, from a democratic perspective I wonder whether the constraints that Brettschneider would put on governments are not at once too loose and too tight. They seem too loose, in so far as the qualifications for charitable or tax-exempt status seem excessively weak (even if an improvement on what currently applies). On the other hand, they seem unreasonably tight, in so far as they treat the claim to charitable or tax-exempt status as a requirement for *any* government use, support or subsidy of a religious group, however limited. Moreover, the extent of permissible government action, on Brettschneider's view, still needs clarification. It is one thing to say that no more than bare toleration is owed to discriminatory religious groups which seek to undercut democratic rights and duties; and it is another to say what the state may do to *redress* the balance of power amongst groups, whether discriminatory or not, given that this existing balance of power arguably has little, if anything, to do with democratic principles. It is therefore likely that government action could enlarge and facilitate democratic action by citizens without itself seeking to persuade people to act democratically, or forcing them to do so.

Consider the case of the Catholic Church in America, and the very significant hold that it has had over public life, public officials and over citizens. As Garrow shows, the Catholic Church was not reluctant to wield that power in order to prevent the liberalization of state regulations on marriage, divorce, contraception and abortion in those states, such as Connecticut and Massachusetts, where it had traditionally held a great deal of influence.[4] Whatever else one might wish to say about it, the current strength and wealth (though greatly diminished) of the Catholic Church is not a tribute to democratic principles or

[4] David J. Garrow, *Liberty and Sexuality and the Making of* ***Roe v. Wade***, California University Press, 1998) especially ch. 22

support. So democratic principles give us no reason to favour it over other providers of public services, or to suppose that the state should not remove any subsidies it receives and, instead, offer them to religious or secular groups whose message and/or organization fit better with democratic principles.[5] Indeed, it would seem to be legitimate to remove such subsidies and to offer them elsewhere even if we imagine the case of a revised and fully democratic Catholic Church, since its current ability to provide needed public services (hospitals, adoption services, food kitchens) better than other groups, if it exists, is largely the result of unjustified benefits in the past, along with unjustified constraints on other types of association.

Of course, the problems for religious freedom and democratic equality, caused by the legacy of our undemocratic pasts, applies as much to secular as to religious groups – to unions and political parties, as well as to Churches and religious associations. So whatever 'state action' or 'state expression' is justified by a commitment to democratic principles, it is important to insist that the state is not a privileged agent of democratic action, or immune to the problem that dubious and discriminatory beliefs risk obscuring, or actively undermining, democratic principles. That is why it is important, I think, to recognize that the state can *facilitate* democratic values without itself promoting them through education or persuasion, or trying to nudge or force them on those who do not already accept them.

Now one might suppose that the fact that our state institutions and competitive political organizations suffer from many of the same problems as religious groups and associations

[5] For arguments to this effect see Lever *Ethical Perspectives* and *Philosophers Magazine* supra. see also Lever, *forthcoming*, 'Equality and Conscience: Ethics and the Provision of Public Services', in *Religion in Liberal Political Philosophy* (eds). Cécile Laborde and Aurélia Bardon, (Oxford University Press, 2017).

means that we should try to limit the discretion of state actors, and to narrow down, as far as possible, the scope for political choice in the regulation of religion. But though this makes sense intuitively, I think it would be a mistake. It is often genuinely difficult to know how best to protect people's freedom and equality, whether one is concerned with problems generated by ideal theory, or thrown up by our rather un-ideal world. It is by no means clear that strictly limiting political choice, or official discretion, improves rather than impedes our understanding of democratic freedom and equality, and our hopes correctly of identifying and protecting both. It is therefore possible that more sophisticated forms of political accountability, combined with broader scope for political choice and action, might better protect democratic values than dichotomizing 'viewpoint neutral coercion' and 'democratic persuasion'. It is doubtful that there is only one democratic response to hate speech and holocaust denial, or even to pornography that celebrates violence and makes it look sexually exciting and fulfilling. In addition, democracy seems to involve acceptance of the ways that mutually incompatible collective choices can be legitimate and an expression of people's freedom, equality, solidarity and rationality. If that is so, it is uncertain that democrats must adopt the dichotomy between viewpoint neutrality and democratic persuasion that Brettschneider favours, or that we can adequately understand what democracy requires without considering which demands for redistribution, redress or, even, for revolution may be justified on democratic principles by the long shadow of our societies' undemocratic pasts.

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If you need to cite this article, please use the following format:

Lever, Annabelle, "Democratic Equality and Freedom of Religion: Between Coercion and Persuasion," *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 55-65, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

RESPONSE TO RUBENSTEIN, CONLY, VALLIER, AND LEVER

BY

COREY BRETTSCHNEIDER

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 67-74
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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Response to Rubenstein, Conly, Vallier, and Lever

Corey Brettschneider

It is an honor to respond to these four excellent essays on my book, *When the State Speaks*. I begin with the contributions from Jennifer Rubenstein and Sarah Conly, who embrace my idea of democratic persuasion. Although they embrace my core arguments, they argue that democratic persuasion should be made more robust in combating viewpoints that are racist or otherwise opposed to the ideal of free and equal citizenship. Kevin Vallier and Annabelle Lever take the opposite view of democratic persuasion in their contributions. They argue that democratic persuasion is too aggressive. I defend a middle ground between these two contrasting views.

I

Rubenstein and Conly on How Democratic Persuasion Can be Made More Robust

Jennifer Rubenstein addresses the fundamental question of unconscious racial bias in her essay. She proposes an idea of "democratic induction" to complement the idea of "democratic persuasion" that I develop in *When the State Speaks*. Democratic persuasion seeks to convince citizens to adopt the democratic principles of free and equal citizenship. It encourages citizens to engage in a process that I call "reflective revision." Members of a

 Philosophy and Public Issues (New Series), Vol. 6, No. 1 (2016): 67-74
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

democratic society should reflectively revise their personal beliefs, amending them to be consistent with the principles of free and equal citizenship. For example, citizens should reflective revise hateful racist beliefs in favor of endorsing equality for minorities.

Citizens, however, may be unaware of how their beliefs may conflict with public commitments to freedom and equality. Part of the process of reflective revision should include citizens discovering or becoming more aware of this conflict between their beliefs and democratic principles. For example, in the book I discuss a town councilman who publicly supports gender equality, but does not realize that he discriminates against his daughters. He deprives them of opportunities he gives to his sons, but he is not aware of the effect of his actions. The bias in this example is unconscious instead of being overt and publicly declared. It is only through reflective revision of this previously unnoticed bias that the conflict can be recognized.

Rubenstein wants a more developed account of how the state might prompt reflective revision about unconscious beliefs and actions. She argues that democratic persuasion with its focus on explicit racism is not sufficient. Rubenstein introduces an idea she calls 'democratic induction' to supplement what I call democratic persuasion. On this view, citizens have an obligation to examine their own unconscious biases.

Democratic induction is a welcome addendum to the idea of democratic persuasion. Rubenstein agrees with me that democratic induction should be subject to what I call the means based limit. "Democratic induction should not use coercion to force citizens to examine their unconscious biases. I would add, however, that it is also essential that democratic induction also have "substance-based limits." The content of democratic induction should not conflict with the principles of free and equal citizenship.

I am potentially troubled by some of the admittedly effective ways that unconscious racism might be fought according to Rubenstein. To turn to one of her cases, she cites the personal style that President Lyndon B. Johnson used to pass legislation. But President Johnson often invoked stereotypes in private to bring about greater changes in racial equality. Johnson's biographer, Robert Caro, describes how Johnson would use racial epithets when speaking with Southern legislators about civil rights bills. Johnson used this racist language to gain credibility with Southern legislators, in an attempt to disarm their opposition.

My only concern is that even if such methods are effective in combating racism, the state should not invoke racial stereotypes in its official rhetoric. It is essential to distinguish between official and unofficial speech. On my view, the state can never invoke prejudicial speech at odds with free and equal citizenship, even in the hopes of eradicating unconscious bias in the long term. Thus I am skeptical of the appeal to Johnson's personal style as a model of democratic persuasion or induction by the state.

Sarah Conly shares Rubenstein's concern that the substance based limit will hinder the effectiveness of democracy persuasion. Unlike Rubenstein, Conly expresses skepticism about the means based limit on coercion. She believes that democratic persuasion must respect rights, but she argues for weakening the substance and means based limits if it would make democratic persuasion more effective. For instance, Conly suggests that highlighting examples of suffering from racism or sexism will be more effective than reasoning alone.

So far I agree that pointing to examples of suffering from discrimination would be compatible with the means and substance-based limits. There is nothing in the limits that requires that the state refrain from using effective examples. An argument for democratic principles can appeal to emotion and narrative.

But I am opposed to effective rhetoric by the state that goes beyond what I call the substance-based limit on democratic persuasion. As with Rubenstein, my concern is that effective democratic persuasion should not conflict with the principles of free and equal citizenship. Conly disagrees with such limits. Democratic persuasion, she argues, should attack beliefs that can have "public effects" that are detrimental to free and equal citizenship, even if such beliefs are themselves consistent with that ideal.

My worry about such a "public effects" principle is that it is too broad. It does not specify how direct or serious the effect of a belief on democratic citizenship must be to qualify for being subject to democratic persuasion by the state. The public effects principle could then potentially subject any viewpoint to democratic persuasion, no matter how innocuous the viewpoint might be. For example, Marxists claimed that any belief in God had the eventual effect of weakening a commitment to certain forms of democratic action. They thought that religion was a source of comfort, which made it somewhat less urgent to act politically. The public effects principle would then have the unacceptable implication that belief in God would be subject to transformation, even if religious citizens endorsed democratic principles.

II

Vallier and Lever on

Why Democratic Persuasion is Too Aggressive

Kevin Vallier suggests that my account of transformation commits me to a state role in making theological judgments.

Vallier believes that when the state criticizes religious groups that engage in hate speech, the state engages in theology.

However, one can criticize hate speech or other views that are opposed to democratic values without engaging in theology. I am focused on defending a set of democratic values that might or might not conflict with theological values. That does not require that the state become a theologian, although it might impact theological institutions, notably churches like Westboro. My aim is to have the state promote a set of democratic values, and not to make theological judgments about the existence or nature of God. I am seeking to defend the reasons for rights, including the reasons that undergird the right to freedom of religion. That right is based on an ideal of free and equal citizenship. To defend religion, we must uphold the values of freedom and equality that ground religious rights, even in the face of religious opposition. This defense of free and equal citizenship engages in reasoning about the meaning of religious freedom, but it does not make theological judgments about the existence or nature of God.

But I do think Vallier is correct that some religious groups will find that democratic persuasion impinges on their theological commitments. Some religious groups have no trouble seeing how their theology leads them to endorse an ideal of free and equal citizenship. But others, such as the Westboro Church, will find their theological commitments at odds with the state's promotion of the ideal of free and equal citizenship. Their central commitment, as they see it, to the idea that God hates gays is opposed to the principle of equality for gay citizens under law. To the extent that the government promotes an ideal of equality, it inevitably criticizes homophobia, whether the discrimination is grounded in secular beliefs or the Westboro's view of theology.

I take Vallier's point to be that we know these effects will happen. They are foreseeable. But recognizing that democratic

persuasion might impact theological viewpoints is not the same as saying that democratic persuasion is itself theological or engages in theology. The state is not endorsing a belief in Christianity, Islam, Buddhism, or any religion at all. Rather, the state is promoting a set of democratic political values even when they conflict with other values, including those grounded in some theologies.

The idea that the state should refrain from actions that will have any impact on religious viewpoints would have the implausible implication that the state could never act at all. Almost all actions by the state will have some impact on religious viewpoints. Take supporting a food stamp program to prevent hunger. State support for food stamps may tend to lead citizens to look more favorably at religious viewpoints that require help for the poor, and less favorably at religious viewpoints that would abandon them. But the fact that state speech in favor of food stamps would have some impact on religious viewpoints does not mean that the state is engaging in theology.

Vallier also raises a further objection. It is not just that the state will itself engage in theology. He argues further that democratic persuasion targets reasonable theological doctrines. In particular he thinks that my claim that democratic persuasion in defense of gay rights inevitably take a stand on matters of reasonable theology.

Here Vallier shifts the terrain from his concern about theological reasoning by the state to one about interventions into reasonable theology. Thus he seems to acknowledge that there is some way to draw the line between reasonable and unreasonable religious beliefs by appealing to a theologically independent standard. But this was precisely what he denied in accusing me of engaging in theology.

I suspect that what is really at issue between Vallier and me is not a disagreement about the role of the state in regard to religious belief, but rather a substantive disagreement about the reasonableness of the concept "love the sinner, hate the sin." By "reasonableness," I mean whether the concept or belief should be the concern of a theologically independent, public standard of respect for free and equal citizenship. Some religious believers who oppose gay marriage claim that they do respect free and equal citizenship. They portray themselves as accepting of gay citizens, but as being critical of the act of gay sexual relations. What I take to be unreasonable about this position is that it suggests that being gay is not a status that should be protected from discrimination. It instead treats being gay as defined merely as a discrete set of sex acts. This would be as unreasonable as suggesting that those who engaged in heterosexual sex acts could be reduced to those acts, without regard for the love that exists in long-term heterosexual romantic relationships. While there is not room here to fully explore this issue, I think I have shown that the debate concerns the content of the reasonable, and not theology.

Like Vallier, Annabelle Lever is concerned that my view of democratic persuasion is problematically non-neutral toward religion. She worries that it will be seen as taking sides between religions in internal disputes between different sectarian constituencies. For example, she claims that my view would seem to affirm liberal Catholicism versus a more conservative variant, or Reform over Orthodox Judaism. She argues that even if I seek to avoid taking sides in such disputes, any intervention by the state will be interpreted this way.

In my earlier response to Vallier, I argued that democratic persuasion was not theological, but instead advances a set of public democratic commitments that do not address the

theological questions of the existence or nature of God. Unlike Vallier, Lever does not accuse me of engaging in theology. But she worries about the perception that I am doing so, especially by groups that will interpret themselves as disfavored.

I think that Lever points to the need to further theorize how democratic persuasion should take place; she is not making a challenge to the idea itself. For instance, democratic persuasion might need to explicitly affirm the rights of groups to dissent from core democratic values. It also must make clear that it is advancing a set of secular values, and not affirming or disaffirming particular theologies.

Of course, even with clear attempts to clarify the meaning of state expression some might be misconstrued. In the United States, the First Amendment ban on state endorsement of particular religions has been regarded by some as a "war on Christmas." But the state cannot guarantee a way to ensure that it will always be understood. It can only make a good faith effort to clarify its message.

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If you need to cite this article, please use the following format:

Brettschneider, Corey, "Response to Rubenstein, Conly, Vallier, and Lever" *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 67-74, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

HATE AND RACIST SPEECH IN THE UNITED STATES

A CRITIQUE

BY

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© 2015 – *Philosophy and Public Issues (New Series)*, Vol. 5, No. 3 (2015): 77-123
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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Hate and Racist Speech in the United States
A Critique

Raphael Cohen-Almagor

This article attempts to explain why the United States is exhibiting the most liberal stand on protecting freedom of expression. It is argued that the American credo is comprised of strong belief in liberty and individuality and of strong anti-government sentiment. The First Amendment is enshrined in its culture and tradition. The protection of political speech is fundamental to the American democracy. As United States Constitution strongly protects political speech, it confers protection also on hate speech that is included in the broad definition of political speech. It is emphasised that incitement is outlawed in the democratic world, including the USA, and that all forms of hate speech should be weighed carefully as they might result in hate crimes. The article further criticizes the American 'viewpoint-neutrality' concept and argues that a balance needs to be struck between competing social interests. Freedom of expression is important as is the protection of vulnerable minorities.

I
Introduction

In June 1990, several teenagers burned a cross on a black neighbour's lawn. The teenagers were prosecuted and

 Philosophy and Public Issues (New Series), Vol. 6, No. 1 (2016): 77-123
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

subsequently convicted by a Minnesota court for violating a St. Paul, Minnesota Bias-Motivated Crime Ordinance (1990), which prohibits the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[1] The petitioners appealed to the American Supreme Court and obtained a reversal of the conviction, on the grounds that the ordinance was *prime facie* invalid under the First Amendment. The Supreme Court held that the government may not regulate speeches based on "hostility, or favoritism, towards a nonproscribable message they contain."[2] The St. Paul, Minnesota Bias-Motivated Crime Ordinance targeted speech that would not amount to incitement to violence, and it was based on impermissible viewpoint discrimination. While the Ordinance criminalized expressions likely to incite violence on the basis of race or religion, it did not criminalize similar expressions equally likely to incite violence on other grounds, such as homosexuality. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavoured subjects."[3] Speech should not be silenced on the basis of its viewpoint.

It is hard to imagine that such a decision, with this reasoning, could be made in another Western democracy. Most democracies apply protective mechanisms and restrictions on racist hate speech, even when certain publications do no more than denying the Holocaust (which is protected speech in the USA).[4]

1 *R.A.V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992).
2 *Ibid.*
3 *Ibid.*
4 Holocaust denial is illegal in many countries including Austria, Belgium, the Czech Republic, France, Germany, Israel, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia and Switzerland. In 2008, the twenty-seven-member European Union adopted a resolution declaring that "Racism and xenophobia are direct violations of the principles of liberty,

The aim of this essay is to explain and criticize the American stance on racism and hate speech. It has been suggested that European countries are less tolerant of racism and hate speech because of their traumatic experience in overcoming Nazism, but this argument is insufficient to explain their restrictive line-drawing. Canada, Australia and New Zealand were not under the Nazi boot or threat, yet all three opted to adopt a policy that is more akin to the European than to the American. Like the United States, Canada, Australia and New Zealand are countries of immigration but unlike the United States their line-drawing weighs more heavily on the side of preserving the mosaic of multiculturalism and protecting vulnerable third-parties than on the side of freedom of expression. Most countries in the free world are not willing to pay the price that the United States is willing to pay for protecting freedom of expression.

The United States is exceptional in its belief that the harm of restricting hate speech is more weighty and dangerous than the harm of hate speech. According to the American liberal culture, freedom of speech is essential for democratic self-rule. Also important are the democratic processes, and putting constant checks on government against its potential attempts to restrict individual liberties. American liberals conflate different

democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States". Consequently, the resolution calls upon member states to take the necessary measures to ensure that the following intentional conduct is punishable publicly condoning: "denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes … directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group". See Council Framework Decision 16771/07, Brussels, February 26, 2008,
http://register.consilium.europa.eu/pdf/en/07/st16/st16771.en07.pdf

approaches to make the strongest possible protection of free expression. We indeed should be worried about government's tendency to abuse its powers. We have seen that this fear is founded.

I will make the following arguments:

- Hate speech is repugnant. We should not be neutral about it. Instead, we should take a strong stand against it. Hate speech creates a virulent atmosphere of "double victimization": The speakers are under attack/misunderstood/marginalized/delegitimized by powerful forces (governments, conspiratorial organizations); the answer to their problem is the victimization of the target group. Their victimization is the speakers' salvation.
- Liberal democracies have an obligation to protect vulnerable minorities and to act against hate mongers.
- Often time, taking a stand need not resort to legal means. Education, public rebuke and condemnation should be invoked to counter bigotry and hateful expressions.
- At the same time, we need to acknowledge that counter-speech might be insufficient to fight bigotry. All forms of hate speech should be taken seriously and sometimes there is a need to resort to legal means against radical forms of hate speech that incite violence.
- The use of the criminal law should be confined to cases when there is likelihood that the hateful expressions will result in tangible harm to the target group.
- The United States is willing to pay a high price to protect hate speech. Its very liberal attitude is unique in the western world. The USA confers legal protection on speech that is vile in essence and that might lead to hate crimes.

Hate speech in its various forms should be taken seriously because it is harmful. It could potentially silence the members of target groups, might cause them to withdraw from community life, and interferes with their right to equal respect and treatment. Hateful remarks are potentially so hurtful and intimidating that they might reduce the target group members to speechlessness or shock them into silence. The notion of silencing and inequality suggests great injury, emotional upset, fear and insecurity that target group members might experience. Hate might undermine the individual's self-esteem and standing in the community.[5] While the United States tolerates forms of hate short of incitement, other countries limit the scope of tolerance for bigots as they weigh freedom of speech against the harm it produces and assign more weight to protecting vulnerable minorities.

Hate is a social evil that offends the two most basic Kantian and Millian principles that underlie any democratic society: respecting others, and not harming others.[6] Kant argues that each person has dignity and moral worth. People should be respected qua being persons and should never be exploited. Kant wrote: "Such beings are not merely subjective ends whose existence as a

[5] See Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press 2000): 127; R. Moon, "The Regulation of Racist Expression," in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (Ann Arbor: University of Michigan Press, 2000): 182-199; R. Cohen-Almagor, "Harm Principle, Offense Principle, and Hate Speech," in Cohen-Almagor, *Speech, Media, and Ethics* (Houndmills and New York: Palgrave-Macmillan 2005): 3-23.

[6] Appleby's comment is most revealing. The former president of the American Historical Association writes that liberal democracy is about limiting the power of government in deference to individual liberties. Neither the Declaration of Independence nor the Preamble to the U.S. Constitution include the principles of respecting others, and not harming others, though one might infer them from the idea of "promoting the general welfare." Appleby is writing from an American perspective while I write from a European perspective.

result of our action has value for us, but are objective ends, i.e. things [Dinge] whose existence is an end in itself."[7] In turn, the Millian Harm Principle holds that something is eligible for restriction only if it causes harm to others. Mill wrote in *On Liberty*: "Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind."[8] Whether an act ought to be restricted remains to be calculated. Hence, in some situations, people are culpable not because of the act that they have performed, though this act might be morally wrong, but because of its circumstances and its consequences. While Kant spoke of unqualified, imperative moral duties, Mill's philosophy is consequentialist in nature. Together the Kantian and Millian arguments make a forceful plea for moral, responsible conduct: Always perceive others as ends in themselves rather than means to something, and avoid harming others. As the American First Amendment scholar Ronald Dworkin suggests, the concept of dignity needs to be associated with the responsibilities each person must take for her own life. Dignity requires owning up to what one has done.[9]

[7] Immanuel Kant, *Groundwork for the Metaphysic of Morals*, http://www.earlymoderntexts.com/assets/pdfs/kant1785.pdf, p. 29. For further discussion, see Graham Bird (ed.), *A Companion to Kant* (Oxford: Blackwell, 2006).

[8] John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* (London: J. M. Dent. Everyman's edition, 1948), chapter 3 of *On Liberty*, or http://www.bartleby.com/130/3.html. For further discussion, see Piers Norris Turner, "'Harm' and Mill's Harm Principle," *Ethics*, Vol. 124 (2014): 299-326.

[9] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011), chapter 8, esp. pp. 210-211. For further discussion, see Jeremy Waldron, "Is Dignity the Foundation of Human Rights?," SSRN: http://dx.doi.org/10.2139/ssrn.2196074.

My aim is to promote and provoke debate, especially in the United States, about the culture in which every person can hate anybody and everybody, usually people who are very different from the one who spouts hatred. This free speech culture results in a culture full of hatred and bigotry. The American people who are paying a high price for this freedom should ask themselves whether this price is (a) affordable, (b) justified, and (c) whether the freedom to hate should not be confined in some more limited boundaries. Hate speech can and does lead to hate crimes. Hate is self- and other-destructive. If it is left to flourish, it might consume the hater as well as the targets of hatred.

II

American Culture

The most important values in the United States are liberty and individuality. Liberty is the bedrock of the American political culture. Influenced and inspired by the thought of classical liberals – Locke, Montesquieu and Rousseau – emphasis is put on negative liberty – on freedom from state restraints.[10] The value of liberty is enshrined in the culture, education, political processes, legal system and state symbols. The 14th Amendment to the Constitution holds that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."[11] The United States has a long tradition, stemming from its struggle for independence and freedom, fighting against the coercive British

[10] Nigel Bowles and Robert K. McMahon, *Government and Politics of the United States* (London: Palgrave-Macmillan, 2014): 17.

[11] 14th Amendment, Section 1, http://www.law.cornell.edu/constitution/amendmentxiv

Empire. The Declaration of Independence (1776) speaks of Life, Liberty and Pursuit of Happiness.[12] Life provides us with liberties, and liberties, in turn, enable the pursuit of happiness. These are the most important values in the American Constitution.

The American anthem speaks of "the land of the free". Another national symbol is the Liberty Bell in Philadelphia. In the same city, President Roosevelt said upon accepting his re-nomination for the Presidency in 1936: "That very word freedom, in itself and of necessity, suggests freedom from some restraining power. In 1776 we sought freedom from the tyranny of political autocracy."[13] In the Civil War, Americans were divided over their understanding of liberty and who is entitled to enjoy it. Afterward, new visions were promoted about the scope of liberty, enlarged to include people who had formerly been excluded from a free society – African-Americans, American Indians, and immigrants. The twentieth century saw liberty tested by external (and some suspected also internal) enemies and contested at home, yet it brought the greatest outpouring of new visions, from Franklin Roosevelt's "Four Freedoms" Speech to Martin Luther King's "I Have a Dream" Speech. The education system, from young age to university, emphasises individual freedoms.[14]

Liberty is a necessary condition for individuals to exercise their capabilities independently. It is required in order to enable people to discover, from the open confrontation of the ideas that are

[12] The Declaration of Independence: A Transcription
http://www.archives.gov/exhibits/charters/declaration_transcript.html
[13] Franklin D. Roosevelt, "Acceptance Speech for the Renomination for the Presidency," (July 27, 1936),
http://teachingamericanhistory.org/library/document/acceptance-speech-for-the-renomination-for-the-presidency/
[14] Eric Foner, *Give Me Liberty! - An American History* (NY: W. W. Norton & Company, 2011), Vols. 1 and 2; David Hackett Fischer, *Liberty and Freedom: A Visual History of America's Founding Ideas* (NY: Oxford University Press, 2004).

cherished in their society, their own stand, their beliefs, their future life plans, and their autonomy. The central idea of autonomy is of self-rule, or self-direction. Individuals are perceived as being more important than society and must retain their liberty in the face of attempts to limit it.[15] Accordingly, the view is that individuals should be left to govern their own affairs without being overwhelmingly subject to external forces. Liberty thus means freedom from authoritarian and institutional powers.

The principle of limited government was central to the American Founding Fathers and this principle remains *en vogue* and most important today.[16] The danger to liberty is power and here a delicate balance has to be drawn between vesting government with the power to rule, a precondition to furthering individual liberty and autonomy, and preventing officials from abusing that power. In the language of James Madison, "The Father of the American Constitution", "it is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience."[17]

When freedom of expression is concerned, the American founders did not believe in equilibrium between government authority and freedom. The balance, from the very beginning, was tilted to freedom of expression. In 1787, Thomas Jefferson, who later became the third American president, wrote: "The basis of our government being the opinion of the people, the first object

15 Nigel Bowles and Robert K. McMahon, *Government and Politics of the United States*: 17.

16 Ibid: 33.

17 James Madison's Letter to Thomas Jefferson (October 17, 1788), http://www.revolutionary-war-and-beyond.com/james-madison-letter-to-thomas-jefferson-october-17-1788.html

shall be to keep that right; and were it left for me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to choose the latter."[18] Freedom of the press provides an indispensable check on government.

III

American Trust in Government

Trust refers to expectations of future behaviour and is based on beliefs about the trustee's competence and sense of fiduciary responsibility. Mistrust results from the gap between expectations and perceived outcomes.[19] The American public exhibits suspicion of government precisely because past governments have abused their powers. Experience has shown that different governments did not use their powers only in legitimate ways and that sometimes they were tempted to promote partisan interests and undermine their opposition. The first Sedition Act was enacted in 1798 (known as the Alien and Sedition Acts[20]).

[18] Jefferson's letter to Edward Carrington, in Henry J. Abraham, *Freedom and the Court* (NY: Oxford University Press, 1982, 4th Edition): 160.

[19] Bernard Barber, *The Logic and Limits of Trust* (New Brunswick, NJ: Rutgers University Press, 1983); Jack Citrin and Samantha Luks, "Political Trust Revisited: Déjà Vu All Over Again?", in John R. Hibbing and Elizabeth Theiss-Morse (eds.), *What Is It About Government that Americans Dislike?* (Cambridge: Cambridge University Press, 2001): 9-27.

[20] The first law, the Naturalization Act, extended the time immigrants had to live in the United States to become citizens from five to 14 years. The Alien Enemies Act provided that once war had been declared, all male citizens of an enemy nation could be arrested, detained, and deported. The Alien Friends Act authorized the president to deport any non-citizen suspected of plotting against the government during either wartime or peacetime. The Sedition Act provisions seemed directly aimed at those who spoke out against the Federalists. See The Alien and Sedition Acts: Defining American Freedom,

President Adams declined to prosecute anyone with it but the very enactment of this law shows how fragile the notion of free speech was. First Amendment advocates objected to the Alien and Sedition Acts, arguing that the government was seeking more power than it can be justified, that treasonable activity was vaguely defined, was defined at the discretion of the president, and would be punished by heavy fines and imprisonment.[21]

During the 19th Century, the anti-Masonic movement, the nativist and anti-Catholic movement attracted the support of reputable statesmen who had only mild sympathy with its fundamental biases, but they used these movements to evoke fear and to condemn what was conveniently tagged as "un-American" or "anti-American". They exploited those notions to advance their own power.[22] In the name of liberty, they sought to undermine freedom of speech and religious freedom.

During the 20th Century, such abuses were manifested during the "red scares" periods in the early 1900s, 1917-1920 and during the 1950s-1960s. The 1918 *Sedition Act* and the 1940 *Smith Act* were particularly notorious. The Sedition Act prohibited to "willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the

Constitutional Rights Foundation, http://www.crf-usa.org/america-responds-to-terrorism/the-alien-and-sedition-acts.html

21 Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Belknap Press, 1992); "1798 Adams passes first of Alien and Sedition Acts", *History*, http://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts

22 Richard Hofstadter, "The Paranoid Style in American Politics", *Harper's* (November 1964): 77-86, http://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/3/

military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute".[23] The Act further prohibited to "willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies",[24] to "willfully display the flag of any foreign enemy",[25] or to "willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of war".[26] Furthermore, the Act criminalized to "willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated", and to "support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein". [27] The *Alien Registration Act* of 1940,[28] commonly referred to as the *Smith Act* after Representative Howard W. Smith of Virginia who drafted the anti-sedition section, was used for a number of political prosecutions against isolationists, pro-fascists, and communists in

23 The Sedition Act of 1918, http://www.pbs.org/wnet/supremecourt/capitalism/sources_document1.html

24 The Sedition Act of 1918

25 Ibid

26 Ibid

27 The Sedition Act of 1918. See also Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (NY: Norton, 2004).

28 54 *Statutes at Large* 670-671 (1940). The Act has been amended several times and can now be found at 18 *U.S. Code* § 2385 (2000).

the 1940s and 1950s, including one of the early leaders of the American Civil Liberties Union (ACLU).[29]

Still the American trust in their government used to be ambivalent and not necessarily negative up until the mid-1950s.[30] As a result of the "Red Scare" from the Cold War between the United States and the Soviet Union, Senator Joseph McCarthy directed investigations towards Hollywood and the intellectual community. During the McCarthyism period (1947-1957) basic civil rights of out-of-favour individuals were harmed by the government.[31] American historian Tom Bender noted in his comments on a draft of this article that after McCarthyism and perhaps because of McCarthyism political speech has become more and more extended with fuzzy boundaries. McCarthy's "patriotic" activities eroded trust in government. In 1966, public

[29] Anthony D. Romero, "Internet Terror Recruitment and Tradecraft: How Can We Address an Evolving Tool While Protecting Free Speech?," Statement before the Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment (Washington, May 26, 2010).

[30] Stephen Earl Bennett, "Were the Halcyon Days Really Golden? An Analysis of Americans' Attitudes about the Political System, 1945-1965," in John R. Hibbing and Elizabeth Theiss-Morse (eds.), *What is it About Government that Americans Dislike?*: 47-58; Russell Duncan and Joseph Goddard, *Contemporary America* (NY: Palgrave-Macmillan, 2013). In another book, *Congress as Public Enemy* (Cambridge: Cambridge University Press, 1999), Hibbing and Theiss-Morse make a general claim (p. 18), that Americans tend to dislike virtually all of the democratic processes. They dislike compromise and bargaining, they dislike committees and bureaucracy, they dislike political parties and interest groups, they dislike big salaries and big staffs, they dislike slowness and multiple stages, and they dislike debate and publicly hashing things out, referring to such actions as haggling or bickering.

[31] Maldwyn A. Jones, *The Limits of Liberty* (Oxford: Oxford University Press, 1992): 517-542; Albert Fried, *McCarthyism, The Great American Red Scare* (NY: Oxford University Press, 1996); Ellen W. Schreker, *The Age of McCarthyism* (Bedford: St. Martin's, 2001); David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (NY: Oxford University Press, 2005).

trust was restored, reaching a peak of 61% who voiced trust in government. But public trust in government has plummeted since then, to 45% in 1968, 38% in 1972, and continued to drop to 26% in 2008 (see Table 1 below). In eight years (1967-1974), the public became mistrustful of its government. There were attempts to stifle speech during the Vietnam War (1959-1973) and during the days of the Nixon Administration (1969-1974) that ended under the heavy cloud of the Watergate scandal, when Nixon became the only U.S. President ever to resign. These episodes certainly did not relax the growing suspicions towards government. During the 21th Century, the George W. Bush Administration (2001-2009) was criticized for undermining basic civic and human rights under the pretence of the "war on terror". The war waged on Iraq for unclear motives further undermined American trust in their government. According to a recent Pew Research Report, only 19% of Americans say they are basically content with the federal government.[32] In fact, polls have shown that only twice since 1970 the level of trust in government was higher than 40%: in 1986, and in 2002. During significant periods of time, the level of trust was lower than 35% (see Table 1, below).

A CNN poll is most revealing. It compared public trust in government in 1958 and 2011, showing that in 1958 16% of the

[32] *Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably* (October 18, 2013), http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably/; see also Gallup, *Trust in Government,* http://www.gallup.com/poll/5392/Trust-Government.aspx; PewResearch, Public Trust in Government: 1958-2013, http://www.people-press.org/2013/01/31/majority-says-the-federal-government-threatens-their-personal-rights/. *How Americans View Government -Deconstructing Distrust* (March 10, 1998), http://www.people-press.org/1998/03/10/how-americans-view-government/

American public trusted its government "just about always", compared to 2% in 2011; in 1958 57% trusted its government "most of the time", compared to 13% in 2011; in 1958 23% trusted its government "only some of the time", compared to 77% in 2011, and 8% never trusted their government in 2011, compared to 0% in 1958.[33]

IV

The First Amendment

The First Amendment is enshrined in the American legal and political culture. It explicitly instructs: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[34] This is a sharp and uncompromising statement. Leading American scholars and judges have argued that "no law" means no law. One of the preeminent American justices of the Supreme Court, Hugo L. Black, asserted in a classic article his belief that the Constitution "with its absolute guarantees of individual rights, is the best hope for the aspirations of freedom which men share everywhere."[35] Another iconic legal authority, Alexander Meiklejohn, asserted that the First Amendment declares that with respect to belief, political discussion, political advocacy, political planning, the citizens are the sovereign, and the Congress is their

[33] The American, *Trust in Government*, http://www.american.com/archive/datapoint-entries/trust-in-government (no longer available).

[34] http://caselaw.lp.findlaw.com/data/constitution/amendment01/

[35] Hugo L. Black, "The Bill of Rights," *NY University Law Review*, Vol. 35 (1960): 879.

subordinate agent.[36] The First Amendment condemns with its absolute disapproval any suppression of ideas. Meiklejohn coined the saying that "to be afraid of any idea is to be unfit for self-government."[37]

According to this view, the public responsibilities of citizenship in the free world are in a vital sense beyond the reach of any legislative control. Consequently, freedom of expression in the American tradition occupies an especially protected position. Generally speaking, expression is perceived as doing less injury to other social goals than action. It has less immediate consequences, and is less irremediable in its impact.[38] Only when expression might immediately translate into harmful action, when one is able to prove a clear link between the harmful speech and the resulting harmful action, is it possible to consider restrictions on freedom of expression. This approach sets a very high threshold to satisfy. Only in clear and exceptional cases are there grounds to limit expression.[39] Only hate *crimes* are criminalized.

36 Alexander Meiklejohn, *Political Freedom* (NY: Oxford University Press, 1965): 107.

37 *Ibid.,* p. 124.

38 Thomas I. Emerson, *The System of Freedom of Expression* (NY: Random House, 1970): 9, 292. See also Lillian R. BeVier, "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle," *Stanford L. Rev.*, Vol. 30, No. 2 (1978): 299-358; Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994), esp. chapter 5; Owen Fiss, "Freedom of Speech and Political Violence," in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance* (Ann Arbor: University of Michigan Press, 2000): 70-78.

39 Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate," *Harvard Law Review*, Vol. 123 (2010): 1596-1657; Steven J. Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008), esp. pp. 164-183; Frederick M. Lawrence, "The Hate Crime Project and its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement,"

Alexander Meiklejohn, who received the Medal of Freedom for his many contributions to the fostering of American liberties, argued that in a democracy, individuals are sovereign judges of whether their government properly pursues the public good and respects the rights of individuals.[40] He wrote that any suppression of ideas about the common good, "the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged".[41] In order to confer the widest possible tolerance on the most problematic forms of expression, Meiklejohn lumps together different categories of speech as if they were one and the same when in essence they are not. He asserted: "When men govern themselves, it is they – and no one else - who must pass judgment upon un-wisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American".[42] The major concern of less tolerant liberals (the majority of whom are non-Americans) is not with the unwise, unfair and un-American (*contra* McCarthy) expressions but with the *dangerous* ones. By utilizing this lumping methodology, Meiklejohn aimed to recruit adherents to his very liberal views.

American liberals are suspicious of their government but they trust the people. American liberals trust the general population to make the correct decisions but not the small number of people who are elected to govern. They think that power tends to corrupt and therefore should be put under continual scrutiny. Meiklejohn believed that the US citizens are fit to govern

GWU Law School Public Law Research Paper, No. 216 (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921923.

[40] Alexander Meiklejohn, *Political Freedom* (NY: Oxford University Press, 1965): 16-17.

[41] Alexander Meiklejohn, *Political Freedom*: 28.

[42] *Ibid.,* p. 27.

themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favour of those institutions as well as everything that can be said against them. People are capable to withstand any challenge. With their debating powers, they will offset any danger. There is no need for legal tests to restrict speech, not even for a very limited test such as the clear and present danger test.[43] Meiklejohn articulated forcefully his belief in the American people and in seemingly absolute freedom of expression: "The unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any clear and present – or, even, terrific – danger".[44]

It is *seemingly* absolute freedom of expression because even Meiklejohn had to acknowledge that some forms of expressions should be excluded from the protection of the First Amendment: "Libellous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must dealt with as such. Sedition and treason may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare."[45]

With the growing distrust in government, the courts expanded the boundaries of freedom of expression, of association and of demonstration. Two landmark decisions during the 1960s were *NY Times v. Sullivan* (1964)[46] and *Brandenburg v. Ohio* (1969).[47] In

[43] Alexander Meiklejohn, *Political Freedom*: 75-76.
[44] Ibid: 77.
[45] Ibid: 21.
[46] *NY Times v. Sullivan* 376 US 254 (1964). On the importance of the decision, see Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (NY: Random House, 1991). Another important precedent is *Garrison v. Louisiana* 379 U.S. 64 (1964) which reiterated *Sullivan* by saying that the Constitution limits state power to impose sanctions for criticism of the official

the *Sullivan* decision, the Supreme Court ruled that the First Amendment protects all statements concerning public officials unless made with malice. The *Brandenburg* decision established that only incitement, harmful speech that is directly linked to harmful acts, is not protected under the First Amendment.

The rise of the civil rights movement was also significant during that period of time. The civil rights legislation of the 1960s, including the *Civil Rights Act* that came into force in 1964, formed the basis for affirmative action programmes that promoted liberty and increased opportunities for vulnerable minorities, disabled people and women. In the Pentagon[48] and Landmark Communication[49] cases which concerned the publication of sensitive information, the US Supreme Court made it clear that it will not allow restraints upon, or subsequent punishment for, publications that publishers had lawfully acquired. By the late 1970s, the Supreme Court refused to provide a hearing for an appeal against the Illinois Supreme Court ruling that allowed Nazis to march in Skokie.[50] The argument for

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conduct of public officials to false statements concerning official conduct made with knowledge of their falsity or with reckless disregard for the truth.

[47] *Brandenburg v. Ohio* 395 US 444 (1969). Other important precedents of the same period are *Tinker v. Des Moines* 393 U.S. 503 (1969) concerned with the constitutional rights of students in public schools, and *Street v. New York* 394 U.S. 576 (1969) in which the Supreme Court rejected the characterization of flag burning as an act of incitement, holding that Street's conviction for burning the flag furthered no government interest.

[48] *NY Times Co. v. United States* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822, 1971 U.S (1971),
http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/decision.pdf

[49] *Landmark Communications Inc. v. Virginia* 435 U.S. 829 (1978), https://supreme.justia.com/cases/federal/us/435/829/case.html

[50] *Smith v. Collin* 439 US 916 (1978); R. Cohen-Almagor, *Speech, Media, and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave-

viewpoint-neutrality (discussed below) became accepted as a guiding standard.

Much of the First Amendment scholarship is based on the notion that all people have an equal right to express their views and to engage in open public debate.[51] In *R.A.V. v. City of St. Paul*, the Supreme Court said that the government may not regulate speech based on hostility or favouritism towards the underlying message expressed.[52] The government should not discriminate against certain expressions, thereby effectively driving them from the marketplace of ideas.[53] The Supreme Court has reiterated that "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

Macmillan, 2005): Chap. 1; Erik Bleich, "Freedom of Expression versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe," *Journal of Ethnic and Migration Studies* (November 2013). For further discussion, see Aryeh Neier, *Defending My Enemy* (New York: E. P. Dutton, 1979). Tom Bender commented: "Aryeh Neier, who is an old friend who still suffers psychologically from his family's escape from Nazi Germany, which included his being separated from his family as a 3 or 4 year old during the process, should consider the psychological costs of such events, but he held absolutely to an Enlightenment idea of freedom of expression. As the head of the American Civil Liberties Union he defended the marchers. He was and remains consistent in that regard."

51 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2002); Robert C. Post, "Equality and Autonomy in First Amendment Jurisprudence," *Michigan L. Rev.*, Vol. 95 (1997): 1517; K. L. Karst, "Equality as a Central Principle in the First Amendment," *U. Chi. L. Rev.,* Vol. 43 (1975): 20.

52 *R.A.V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992).

53 *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S. 105 (1991); *Leathers* v. *Medlock,* 499 U. S. 439, 448 (1991); *FCC* v. *League of Women Voters of Cal.,* 468 U. S. 364, 383–384 (1984); *R. A. V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992).

disagreeable,[54] and that "Viewpoint discrimination is censorship in its purest form."[55]

V

Hate Speech

A Rasmussen poll conducted in 2008 asked whether it would be "a good idea for the United States to ban hate speech". 53% of respondents said "No" while 28% of respondents said "Yes". When asked "which is better, allowing free speech without government interference or letting government decide what types of hate speech should be banned" only 11% chose government intervention. 74% preferred unfettered free speech.[56] The Americans who are suspicious of their own government more than most other people in the democratic world[57] prefer to suffer hate speech than let their government serve as a censor.

Ronald Dworkin makes several arguments that may support the bigot's right to freedom of expression and here I consider four of the main arguments. The first argument is the *argument for fairness*. Democracy is based on majority rule. But there is nothing inherently right in the majoritarian counting-heads principle. Majority decisions can be wrong and they can be unfair. We must provide opportunities for minorities to challenge majority decisions. It is fair to hear all opinions, especially those that wish

54 *Texas* v. *Johnson,* 491 U. S. 397, 406 (1989), at 414.

55 *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37, 62 (1983).

56 Abraham H. Foxman and Christopher Wolf, *Viral Hate* (NY: Palgrave-Macmillan, 2013): 78.

57 Gary Silverman, "Europe's public trust in government plunges", *Financial Times* (January 20, 2014), http://www.ft.com/cms/s/0/d5bd10da-812f-11e3-95aa-00144feab7de.html#axzz374ZE4d1p

to affect society at large.[58] Being wrong, of course, is not the prerogative only of the majority. Minorities might be wrong as well. The argument for fairness is presented in general terms notwithstanding the *content* of the speech. But, of course, the content of the speech is very much material to society. If the content is patently discriminatory then by definition it is not fair and it is self-contradictory. It does not serve societal general interest in providing fair hearings to all opinions.

The second argument is the *argument for responsibility*. In *Law's Empire*, Dworkin argues that the community as a whole has obligations of impartiality towards its members, and that public officials act as agents for the community in exercising that responsibility. Democratic officials act in the name of the community of which we are all members, bearing a responsibility we all share.[59] In *Justice for Hedgehogs*, Dworkin emphasizes time and again the importance and moral value of social responsibility. Responsibility seeks coherence and integration.[60] Responsibility requires that we will be true to ourselves as well as to others. All this sounds very ideal. Dworkin speaks about the "ought" rather than the "is". In reality, not all people act responsibly for the best interests of society. Dworkin does recognize the possibility of spoilers and briefly discusses ways not to be responsible.[61] But astonishingly he remains committed to his ideal world.

Dworkin presents the claim that terrorist atrocities show the need for a new balance between liberty and security. Those who argue for this new balance say that we must curtail the individual rights we normally respect in the interest of greater protection

[58] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011): 385-388.
[59] Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1991): 175.
[60] Ronald Dworkin, *Justice for Hedgehogs*: 113.
[61] *Ibid*., pp. 104-107.

from the terrorist menace. But, Dworkin asks, does that opinion match our convictions about "the character and value of personal courage? Courage, we think, requires that we accept increased risks in order to respect principle".[62]

The *principle* that guides Dworkin is freedom of expression. It is not responsibility. Responsibility dictates taking the threat of terror most seriously and protecting our society, especially securing those who might be in a more precarious position. Courage, one may argue, is to recognize the need for drawing boundaries of liberty and tolerance. Being risky is neither courageous nor prudent. Courage should lead us to understand that the very principles of democracy might bring about its destruction.[63] These cherished principles of liberty and tolerance can be easily exploited and we have the responsibility to fight against abuse. We, as a society, have responsibility to take measures against the threat of terrorism. We, as a society, have responsibility to protect vulnerable minorities from the poisonous venom of the bigot. A balance needs to be stuck between freedom of expression and social responsibility. Somehow Dworkin does not recognize that freedom of expression might clash with moral responsibility. He is not cognizant of the possibility that such a conflict might arise and *ipso facto* he fails to provide guidelines as to how we should resolve the dilemma.

The third argument is the *argument for political legitimacy*. Free speech is part of the price we pay for political legitimacy no matter how foul and vicious the hatemonger's speech is. Dworkin writes: "It is as unfair to impose a collective decision on someone who has not been allowed to contribute to that moral environment, by expressing his political or social convictions or

62 *Ibid.,* p. 106.

63 Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994).

tastes or prejudices informally, as on someone whose pamphlets against the decision were destroyed by the police."[64]

According to this view, the right of the speaker to utter opinions enjoys special status above and beyond the rights of the target group. It is unfair to enforce a collective decision on the hate monger; it is fair to impose degradation on the vulnerable minority. Furthermore, Dworkin fails to see that by permitting wide scope for the bigot to openly utter the degrading speech, a gate is opened to undermine trust in the working of democracy that allows that kind of attack. Dworkin wishes to achieve legitimacy but by affording wide scope for hateful speech he might hinder the legitimacy of the whole political system. We spoil the democratic justification, one may argue, more by insisting on protecting hate speech. As Dworkin has only ideas but no substantive scientific evidence to support the argument about the relationships between tolerance and political legitimacy one way or another, it can be argued that the democratic legitimacy might be hindered equally or worse by permitting hate speech. Moreover, Dworkin's legitimacy argument helps conferring legitimacy on hate mongers and it undermines minority's status in society.

Ronald Dworkin argues that hate speech is the price we pay for enforcing anti-discrimination laws. We can legitimise such laws by allowing free debate that includes hate speech.[65] The state is legitimate if it acknowledges the responsibility and right of

[64] Ronald Dworkin, "Foreword," in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009): viii.

[65] Ronald Dworkin, "Foreword," in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy*: v-ix. See also Dworkin, "A New Map of Censorship," *Index on Censorship*, Vol. 35 (2006): 130; Padraig Reidy, "Ronald Dworkin: a new map of censorship", *Xindex* (February 14, 2013), http://www.indexoncensorship.org/2013/02/ronal-dworkin-free-speech-censorship/

citizens to make their own decisions about the ethical values that will shape their lives, and it judges the fates of all citizens as equally important. All people should have an opportunity to affect the decision-making process.[66] Dworkin does not speak about the scope of the "price". It seems that he is willing to risk any price in order to protect principle – freedom of expression.

The fourth argument is the *argument for self-government*. Dworkin explains that free speech must be part of any defensible self-government because self-government requires free access to information and, equally of importance, government is not legitimate unless "*all* those coerced have had an opportunity to influence collective decisions" (my emphasis).[67] Dworkin elucidates that government does not compromise its citizens' dignity when it forbids them to kill one another. A collective decision to impose a duty not to kill and to threaten a serious sanction for any violation is not in itself an insult to the dignity of the person. On the contrary, preserving dignity requires that government protects you.[68] Now, why speech that harms the dignity of the person, that undermines peoples' equal status in society, that degrades them and that could potentially lead to hate crime should be protected? Are the statements "A Good Muslim Is A Dead Muslim" and "Jews should be gassed" merely an expression of (political) opinion that are shielded by the Free Speech Principle? In themselves, those statements are harmful and they might lead to killing.

66 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011): 321-323, 372-373.

67 Ibid: 372.

68 Ibid: 367. For further discussion, see Susanne Sreedhar and Candice Delmas, "State Legitimacy and Political Obligation in Justice for Hedgehogs: The Radical Potential of Dworkinian Dignity", *Boston University L. Rev.*, Vol. 90 (2010): 737-758.

The line-drawing of what constitutes intolerable hate is not always simple. On the one hand, statements that assert "Jews are money hungry," "gays are immoral," "Blacks go back to Africa," "Arabs are dirty", "A Woman's place is in the Kitchen!", "Thai women are whores", "Israel is an apartheid state"[69] and calls to boycott Israel[70] are all unpleasant yet I think speech that should be tolerated. It is noted that some of these statements might be actionable hate speech in some countries. The problem is that there is no single definition of hate speech and hate speech legislation varies from one country to another.[71] On the other hand, calls that provoke violence against target groups fall under the definition of *incitement*; here the context is of harmful speech that is *directly linked* to harmful action. However, hate speech is fuzzier than incitement and concretely more damaging than advocacy which is speech designed to promote ideas.

In other words, it is argued that all forms of hate speech should be taken seriously. Generally speaking, two forms of hate speech are distinguished: those that should be countered with positive speech, and those that are closely linked to hate crime and thus can be characterised as incitement. The first form of hate speech is disturbing yet tolerable. When speaking of hate speech I refer to malicious speech that is aimed to victimize and dehumanize its target, often (but not always) vulnerable

[69] Steve Newman commented that there are Canadian critics of hate speech who see the utterance "Israel is an apartheid state" as code for blatantly anti-Semitic opinions. To these critics, like the former Canadian Minister of Justice Irving Cotler, anti-Zionism is the new antisemitism. The critics believe that people who go around complaining that Israel is an apartheid state are really trying to incite hatred of Jews. Although this might be true, I do not think that such utterances should be banned. I will explain below.

[70] BDS Movement, http://bdsmovement.net/

[71] Erik Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racis*m (NY: Oxford University Press, 2011).

minorities. However, hate speech designed to bring about hate crime is beyond the scope of tolerance. *Incitement* should not be tolerated. It is not tolerated also in the United States. I have mentioned the *Brandenburg* decision that established the principle that racist hateful speech is protected as long as it does not produce imminent lawless action.[72]

Hate speech should be taken seriously because, generally speaking, hate is derived from one form or another of racism, and modern racism has facilitated and caused untold suffering. It is an evil that has acquired catastrophic proportions in all parts of the world. Notorious examples include Europe under Nazism, and since then Yugoslavia, Cambodia, South Africa and Rwanda. Elsewhere I argued that in hate messages, members of the targeted group are characterized as devoid of any redeeming qualities and are innately evil. Banishment, segregation and eradication of the targeted group are proposed to save others from the harm being done by this group. By using highly inflammatory and derogatory language, expressing extreme hatred and contempt, and through comparisons to and associations with

[72] *Brandenburg* has been cited time and again by American courts. See, for instance, *Hutchin v. State of Florida* 290 So.2d 35 (1974); *Communist Party of Indiana v. Whitcomb* 414 US 441, 94 S. Ct. 656 (1974); *Miller v. State of Delaware* 374 A.2d 271 (1977); *Collin v. Smith* 447 F.Supp. 676 (1978); *Blitz v. Donovan* 740 F.2d 1241, 239 US App. DC 138 (1984); *Herceg et al v. Hustler Magazine* 814 F.2d 1017 (1987); R.*A.V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992); *Gay Lesbian Bisexual Alliance v Sessions* 917 F.Supp. 1548 (1996); *Gay Lesbian Bisexual Alliance v Pryor* 110 F.3d 1543 (1997); *Rice v. Paladin Enterprises Inc.,* No. 96-2412, 128 F.3d 233 (November 10, 1997); *Planned Parenthood of the Columbia/Willamette Inc. et al v. American Coalition of Life Activists,* U.S Court of Appeals for the Nine Circuit (May 21, 2002). For further discussion, see Steven J. Heyman (ed.), *Controversies in Constitutional Law*: *Hate Speech and the Constitution* (New York and London: Garland Publishing Inc., 1996).

animals, vermin, excrement and other noxious substances, hate messages dehumanize the targeted groups.[73]

Indeed, hate messages undermine the dignity and self-worth of the targeted group members and they erode the tolerance and open-mindedness that should flourish in democratic societies committed to the ideas of pluralism, justice and equality. Hate speech might lead to mental and emotional distress, racial discrimination and political disenfranchisement.[74] Furthermore, hate speech might lead to hate *crimes*. I reiterate: Hate speech that calls for violent action is akin to incitement and should not be tolerated.

Jeremy Waldron notes that Britain has laws that prohibit racial and religious hatred (Public Order Act 1986) and racial discrimination (Race Relations Act 1976). Are these laws illegitimate? Was their enactment inappropriate and their enforcement morally wrong? Furthermore, almost all democracies have hate speech laws which Dworkin thinks undermine anti-discrimination laws. Are they all wrong and only the United States, which protects hate speech, right?[75]

The differences between the United States and the European continent become abundantly clear when we read Meiklejohn's critique of General Dwight D. Eisenhower. On December 16,

73 Raphael Cohen-Almagor, "In Internet's Way", in Mark Fackler and Robert S. Fortner (eds.), *Ethics and Evil in the Public Sphere: Media, Universal Values & Global Development* (Cresskill, NJ: Hampton Press, 2010).

74 Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberly W. Crenshaw (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Co.: Westview Press, 1993): 89-93; Ishani Maitra and Mary Kate McGowan, "On Racist Hate Speech and the Scope of Free Speech Principle," *Canadian Journal of Law and Jurisprudence*, Vol. XXIII, No. 2 (July 2010): 364.

75 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012): 185.

1944, Meiklejohn wrote, Eisenhower issued a proclamation prescribing plans for education in Germany during military occupation. This proclamation, Meiklejohn asserted, would be "utterly intolerable" in the USA.[76] He criticized Eisenhower in strong words, saying that the nation that had fought for freedom denied freedom of speech to the German teachers. Consequently, German teachers, "unlike Socrates, unlike the teachers of our American schools and colleges, have no political right to teach what they believe true".[77]

This sounds quite horrible. But what was Eisenhower's proclamation that made Meiklejohn so upset? It read as follows:

"German teachers will be instructed to eliminate from their teaching anything which: (A) Glorifies militarism, expounds the practice of war or of mobilization and preparation for war, whether in the scientific, economic, or industrial fields, or the study of military geography; (B) Seeks to propagate, revive, or justify the doctrines of Nazism or to extol the achievements of Nazi leaders; (C) Favors a policy of discrimination on grounds of race or religion; (D) Is hostile to or seeks to disturb the relations between any of the United Nations".[78]

For many non-American liberals, these dictates may seem quite reasonable. But not for Meiklejohn. His liberalism is detached from the horrific European reality of 1944 in which more than 60 million people lost their lives. But it is not only the remoteness from the bloody European scene that shaped Meiklejohn's reasoning. It is his deep-seated belief in human reason to make the right choices, although just eleven years prior the people of Germany elected the dictator that brought on

[76] Alexander Meiklejohn, *Political Freedom*: 85.
[77] *Ibid*: *Ibid.*
[78] *Ibid*: *Ibid.*

Europe the unprecedented destruction and death of WWII. Meiklejohn is prepared to take his chances and allow German children to continue learning Nazism, racism, militarism, bigotry and hatred of other nations. Many Europeans may find this quite extraordinary. Meiklejohn's reasoning would seem odd to many non-American ears. Meiklejohn was probably unaware just how alien his reasoning was from the reasoning espoused by other people so soon after WWII. And if he was aware, it was immaterial for him. Meiklejohn held unshaken belief in the virtue of liberty. Without this liberty, the American spirit would be lost. It did not occur to Meiklejohn that with this absolute, limitless liberty, democracy, liberty and fundamental human rights might be lost. Democracy, liberty and fundamental human rights were lost in Nazi Germany and in the many countries that the short-lived Nazi Empire had conquered.

VI

Viewpoint Neutrality

Some restrictions on speech are content-neutral, meaning that the content of the expression is irrelevant to whether the speech is restricted. Think of trains' quiet cars. The prohibition applies to all kinds of speech irrespective of whether the expression is trivial or ideological, pleasant or offensive. The restriction applies notwithstanding the content of the speech or conversation.

Some restrictions on speech are based on the viewpoint of the speaker. The government may decide to impose restrictions on specific points of view. Sometimes, the government may take initiative to protect one side of a given debate and ban the side to which it objects. Examples are expressions designed to promote Fascism and Nazism. The government may take active steps

against those who promote such ideas because it deems them not only offensive but also dangerous.

Some restrictions on speech are viewpoint-neutral but content-based. For instance, the government may proscribe all political polls during the last 24 hours prior elections notwithstanding the potential results of the poll. The speakers have certain viewpoints which would have been manifested in the poll, but the government applies a restriction across the board and denies utterance irrespective of the viewpoints.

Viewpoint-based restrictions are a subset of the category of content-based restrictions. American First Amendment scholar Cass Sunstein explains that all viewpoint-based restrictions are, by definition, content-based. The government cannot silence one side in a debate without making content crucial. But not all content-based restrictions are viewpoint-based. Content-based restriction need not make the restriction depend on the speaker's view.[79]

In the United States, there is a very strong presumption against viewpoint-based restrictions. All such restrictions are perceived as *prime facie* unconstitutional. American egalitarianism accentuates the concept of neutrality. Methodologically, the idea of neutrality is placed within the broader concept of *anti-perfectionism*. The implementation and promotion of conceptions of what people may perceive as good ways of life, though worthy in themselves, are not regarded as a legitimate matter for governmental action. The fear of exploitation, of some form of discrimination, leads to the advocacy of unrestrained variety and pluralism.

Consequently, the government should not act in a way that might favour some ideas over others. Any attempt to discriminate

[79] Cass R. Sunstein, *Democracy and the Problem of Free Speech* (NY: Simon and Schuster, 1995): 12.

views would undermine democratic credentials, even if that speech might itself undermine democracy. All people have their own interest in acting according to their own beliefs; everyone should enjoy the possibility of having alternative considerations; there is *no single* belief about moral issues and values that should guide us all and, therefore, each has to enjoy autonomy and to hold their ideals freely.

The government is required to make sure that its actions do not help acceptable ideals more than unacceptable ones; to see that its actions will not hinder the cause of ideals deemed false more than they do that of ideals deemed true. The government is forbidden to act for partisan reasons. The fact that some conceptions of the good are true or valid should never serve as justification for any action. Neither should the fact that a conception of the good is false, invalid, unreasonable or unsound be accepted as a reason for a political or other action. The doctrine prescribes that government refrain from using one's conception of the good as a reason for state action. The government should not hold partisan (or non-partisan) considerations about human perfection to foster social conditions.[80]

In their striving to convince us of the necessity of the doctrine, advocates of neutrality are conveying the assumption that the decision regarding the proper policy is crucial because of its grave consequences. Neutrality entails pluralism, diversity, freedom, public consensus, non-interference, vitality etc. If we do not adhere to viewpoint-neutrality, then we might be left with none of these virtues. This picture leads to the rejection of subjectivity (or perfectionism), while I suggest a rival view that observes conduct of policies on a continuous scale between strict

[80] Joesph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986): 110-111.

perfectionism, on the one hand, and complete neutrality on the other. The policy to be adopted does not have to be either the one, or the other. It could well take the *Aristotelian Golden Mean*, allowing plurality and diversity without resorting to complete neutrality; involving some form of perfectionism without resorting to coercion. For perfectionism does not necessarily imply abuse of power or uniformity of ideas, as neutralists fear.

My mid-ground position is influenced, even dictated, by the above-mentioned Kantian and Millian principles. Any liberal society is based on the idea of respect for others, in the sense of treating citizens as equals, and on the idea of not harming others. Accordingly, restrictions on liberty may be prescribed when threats of immediate violence are voiced against some individuals or groups. Thus I submit that liberal government should adhere to the basic principles that underline liberal democracy rather than to neutrality. It is within state interest to adhere to the basic ideas of respect for others and not harming others and to apply judgement in promoting them in their free speech policies. Viewpoint-neutrality on important social issues that concern the safeguarding of democracy might be very risky. At the heart of ethics are two questions: What should I do? And what sort of person should I be?[81] We humans are capable of discerning between good and evil. Ethics requires us to care about the consequences of our actions and to take responsibility for them.

Liberal thinkers see the aim of a just governmental system as furthering liberty and egalitarian values.[82] They differ over the

[81] Russ Shafer-Landau (ed.), *Ethical Theory* (Oxford: Wiley-Blackwell, 2013): xi.
[82] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971); Ronald M. Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1985); Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven and London: Yale University Press, 1980); Charles Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987).

permissible ways by which the common good may be promoted. In "The Priority of Right," Rawls writes that even if political liberalism can be seen as neutral in procedure and in aim, *it may still affirm the superiority of some forms of moral character and encourage some moral virtues*.[83] Dworkin sees neutrality as derived from every person's right to equal concern and respect and insists on moral neutrality *to the degree that equality requires it*.[84]

Brettschneider suggests that viewpoint neutrality be complemented by the state's use of democratic persuasion in defense of free and equal citizenship, accentuating the need to promote democratic values and criticize hateful viewpoints.[85] I argue that hate speech legislation is warranted to address unequivocal harmful speech that is likely to lead to harmful action. As the American Political Scientist Stephen Newman notes, there is a strong prudential justification for suppressing hateful utterances when there are good reasons to anticipate that the possible harms associated with such utterances are likely to be realized. If the anticipated harms are remote, it is better to deal with hateful expression through education, critical counter-speech and rebuke. While much of the time we can deal with the evil of hate speech via conventional means outside the criminal law, sometimes we do need to rely on the coercive power of the

[83] John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy & Public Affairs,* Vol. 17:4 (1987): 263. For further discussion, see Alan Patten, "Liberal Neutrality: A Reinterpretation and Defense," *Journal of Political Philosophy*, Vol. 20, No. 3 (2012): 249–272.

[84] As a result, Dworkin also argues that governments must provide a form of material equality for everyone. They should ensure citizens an initially equal distribution and should assist them to increase their welfare. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*; *idem*, *Taking Rights Seriously* (London: Duckworth, 1977).

[85] Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton, NJ.: Princeton University Press, 2012): 75.

criminal law.[86] Such laws have indeed been adopted in many democracies across the world.[87]

VII

From Hate Speech to Hate Crimes

Those who oppose hate speech regulation argue that it is better to allow hatemongers and racists to release their pent-up emotions, in the form of speech, rather than through violent action. If they give vent to their feelings this way, their targets will be much safer. Further arguments are that regulation of hate speech is ineffective, futile, makes martyrs out of haters and might lead to abuse and the suppression of other forms of

[86] Stephen L. Newman, "American and Canadian Perspectives on Hate Speech and the Limits of Free Expression," in S.L. Newman (ed.), *Constitutional Politics in Canada and the United States* (Albany, NY: State University of New York Press, 2004): 153-173, and Stephen L. Newman, "What Not To Do About Hate Speech," Ronald Beiner & Wayne Norman (eds.), *Canadian Political Philosophy* (Oxford: Oxford University Press, 2001): 207-215. See also R. Cohen-Almagor, "Ethical Considerations in Media Coverage of Hate Speech in Canada", *Review of Constitutional Studies*, Vol. 6, No. 1 (2001): 79-100, and R. Cohen-Almagor, "Is Law Appropriate to Regulate Hateful and Racist Speech: The Israeli Experience", *The Israel Studies Review*, Vol. *27*, Issue 2 (Winter 2012): 41–64.

[87] Erik Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racis*m (NY: Oxford University Press, 2011); Michael Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," in Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012): 241–289; Eric Barendt, *Freedom of Speech* (New York: Oxford University Press, 2007); James Whitman, "Enforcing Civility and Respect: Three Societies," *Yale Law Journal*, Vol. 109, No. 6 (2000): 1279-1398; Wojciech Sadurski, *Freedom of Speech and Its Limits* (Dordrecht: Kluwer, 1999).

speech.[88] Those who are making these arguments ignore the direct links between hate speech and hate crimes. The foremost arena to spout hatred nowadays is the Internet. Empowered by technology, bigots can easily interact with like-minded people and spread their hatred freely and easily against their target groups.[89] Chan *et al* found that online access is increasing the incidence of racial hate crimes executed by lone wolf perpetrators and that positive relationship between Internet penetration and offline racial hate crime is most evident in areas with higher levels of racism, as indicated by higher levels of segregation and higher propensity to search for racially charged words.[90]

In 1999, 21-year-old Benjamin Nathaniel Smith, an avowed Aryan supremacist, went on a racially-motivated shooting spree in Illinois and Indiana over the July 4th weekend. Targeting Jews, African Americans, and Asian-Americans, Smith killed two and wounded eight before taking his own life, just as law enforcement officers prepared to apprehend him.[91] Smith embarked on his killing spree after being exposed to Internet racial propaganda.

[88] Nat Henthoff, *Free Speech for Me – But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (New York: Harper Collins, 1992): 134; exchanges with Internet expert Mr. Tony Rutkowski (2008); interviews with media and technology expert Mr. Adam Thierer (January 15, 2008), Mr John Morris, Center for Democracy & Technology (February 7, 2008), Ms. Leslie Harris, President/CEO, Center for Democracy & Technology (March 14, 2008); Rep. Rick Boucher (April 16, 2008).

[89] R. Cohen-Almagor, "Fighting Hate and Bigotry on the Internet", *Policy and Internet,* Vol. 3: Iss. 3, Article 6 (2011) and R. Cohen-Almagor, "Countering Hate on the Internet", *Annual Review of Law and Ethics*, Vol. 22 (2014): 431-443.

[90] Jason Chan, Anindya Ghose and Robert Seamans, "The Internet and Racial Hate Crime: Offline Spillovers from Online Access", *NET Institute Working Paper No. 13-02* (July 15, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335637

[91] Anti-Defamation League, *Hate on the Internet* (Washington DC.: ADL, December 2003): 22.

He regularly visited the World Church of the Creator (WCOTC) website, a notorious racist and hateful organisation founded in Florida in the early 1970s.[92] Smith was so consumed by the hate rhetoric of WCOTC that he was willing to murder and to take his own life in pursuit of his debased hate devotion. Smith said: "It wasn't really 'til I got on the Internet, read some literature of these groups that… it really all came together". He maintained: "It's a slow, gradual process to become racially conscious".[93]

The same year there were several other hate-motivated murders. Buford Furrow used to visit hate sites, including Stormfront.org and a macabre site called Gore Gallery, on which explicit photos of brutal murders were posted. Whether inspirational or instructional, the Internet supplied information that clearly helped fuel the explosion of a ticking human time bomb.[94] Furrow decided to move to action. He drove to the North Valley Jewish Community Center and shot an elderly receptionist and a teenage girl who cared for the young students attending the summer day school. He continued shooting, hitting

92 For information on 'World Church of the Creator', see http://www.nizkor.org/hweb/orgs/american/adl/cotc/; http://www.wcotc.com/; http://www.adl.org/poisoning_web/wcotc.asp; http://www.apologeticsindex.org/c171.html; Prepared Statement of Howard Berkowitz, Hate Crime on the Internet, Hearing before the Committee on the Judiciary, United States Senate (Washington, 14 September 1999); Teal Greyhavens, "Creating Identity: The Fragmentation of White Racist Movements in America", *The Spark* (Fall 2007), http://www.whitman.edu/spark/rel355fa07_Greyhavens.html

93 Christopher Wolf, 'Regulating Hate Speech Qua Speech Is Not the Solution to the Epidemic of Hate on the Internet', OSCE Meeting on the Relationship Between Racist, Xenophobic and Anti-Semitic Propaganda on the Internet and Hate Crimes (Paris, 16-17 June 2004). Discussion with Wolf, Washington DC (October 19, 2007).

94 Brian Levin, "Cyberhate", *American Behavioral Scientist*, Vol. 45, No. 6 (2002): 959.

three children, one as young as 5 years old, before leaving the facility. Shortly thereafter Furrow fatally shot a Filipino American postal delivery worker because he worked for the federal government and was not White.

Matthew Williams, a solitary student at the University of Idaho, turned to the Internet in search of a new spiritual path. Described as a "born fanatic" by acquaintances, Williams reportedly embraced a number of the radical-right philosophies he encountered online, from the anti-government views of militias to the racist and anti-Semitic beliefs of the Identity movement. He regularly downloaded pages from extremist sites and continually used printouts of these pages to convince his friends to also adopt these beliefs. At age 31, Matthew Williams and his 29-year-old brother, Tyler, were charged with murdering a gay couple, Gary Matson and Winfield Mowder, and with involvement in setting fire to three Sacramento-area synagogues. The police discovered boxes of hate literature at the home of the brothers.[95] Rabbi Abraham Cooper of the Wiesenthal Center argued that the Internet provided the theological justification for torching synagogues in Sacramento and the pseudo-intellectual basis for violent hate attacks in Illinois and Indiana.[96]

On June 10, 2009, James von Brunn entered the U.S. Holocaust Memorial Museum in Washington DC and opened fire, killing Security Guard Stephen Tyrone Johns before he was stopped by other security guards. Von Brunn, a die-hard white

[95] Anti-Defamation League, *Hate on the Internet* (Washington DC.: ADL, December 2003): 22.

[96] Statement of Abraham Cooper, *Hate Crime on the Internet*, Hearing before the Committee on the Judiciary, United States Senate (Washington, 14 September 1999). Discussion with Cooper, Jerusalem (December 17, 2009). For further discussion, see R. Cohen-Almagor, *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway* (NY and Washington DC.: Cambridge University Press and Woodrow Wilson Center Press, 2015).

supremacist anti-Semite, was an active neo-Nazi for decades long before the Internet became a viable public platform during the early 1990s. He utilised the Internet to publish his tracts and to spew hatred. Von Brunn ran a hate website called holywesternempire.org and had a long history of associations with prominent neo-Nazis and Holocaust deniers. For a period of time, he was employed by Noontide Press, a part of the Holocaust denying Institute of Historical Review, which was then run by Willis Carto, one of America's most prominent anti-Semites.[97]

In his self-published book, *Kill the Best Gentiles*, von Brunn railed against a Jewish conspiracy to destroy the white gene pool, offering a plan to remove "the cancer from our Cultural Organism".[98] A raging anti-Semite, von Brunn blames "The Jews" for the destruction of the West. I don't intend to quote in length from this hateful long tract. Suffice is to say that Jews, according to von Brunn, belong to "a dark and repulsive force". The Jews "are a nefarious and perverse sect". "Satan has prevailed upon them".[99] As a Holocaust denier, this angry, 88 year-old man, possessed with hatred, decided to wage an attack on the Holocaust Museum. He was not interested to visit the museum and to see the thousands of documents that reveal the magnitude of the horror. Von Brunn was beyond the point of deliberation, the exchanging of ideas, or speech. He was boiling inside with poisonous rage. In his mind, it was time for violent action and the most appropriate place for the shooting was the museum that served the greatest hoax of all time.

97 H. Beirich, "Holocaust Museum Shooter Had Close Ties to Prominent neo-Nazis", *Southern Poverty Law Center* (June 10, 2009).
98 J. W. von Brunn, *"Kill the Best Gentiles!" or "Toh Shebbe Goyim Harog!"* (Easton, Md.: Holy Western Empire LLC 2002): 28.
99 *Idem,* pp. 21-22.

On April 13, 2014, 73-year-old American Nazi Frazier Glenn Miller murdered three people at two separate Jewish Community Centers in Overland Park, Kansas. Miler founded the Carolina Knights of the Ku Klux Klan and was its "grand dragon" in the 1980s. In 1985, he founded another white supremacist group, the White Patriot Party.[100] Miller had spouted his venomous hatred against Jews on hate websites, including his own, and in his self-published book, *A White Man Speaks Out*. On Vanguard News Network (VNN) alone, Miller had more than 12,000 posts. The slogan of this anti-Semitic and white supremacist site is "No Jews, Just Right." VNN founder Alex Linder has openly advocated "exterminating" Jews since December 2009.[101]

During his long career as an outspoken, blunt racist activist, Miller did not hide his disgust and hatred to Jews whom he described as the greatest threat to white civilization. Jews are "swarthy, hairy, bow-legged, beady-eyed, parasitic midgets."[102] Adolf Hitler, on the other hand, was "the greatest man who ever walked the earth."[103] Miller's website http://www.whty.org/

[100] Heidi Beirich, "Frazier Glenn Miller, Longtime Anti-Semite, Arrested in Kansas Jewish Community Center Murders," *splcenter.org* (April 13, 2014), http://www.splcenter.org/blog/2014/04/13/frazier-glenn-miller-longtime-anti-semite-arrested-in-kansas-jewish-community-center-murders/

[101] *Ibid.*; "Hate—and Hitler—in the Heartland: The Arrest of Frazier Glenn Miller," *The Daily Beast* (April 14, 2014), http://www.thedailybeast.com/articles/2014/04/14/hate-and-hitler-in-the-heartland-the-arrest-of-frazier-glenn-miller.html

[102] Heidi Beirich, "Frazier Glenn Miller, Longtime Anti-Semite, Arrested in Kansas Jewish Community Center Murders," *splcenter.org* (April 13, 2014).

[103] Emma G. Fitzsimmons, "Man Kills 3 at Jewish Centers in Kansas City Suburb," *NY Times* (April 13, 2014), http://www.nytimes.com/2014/04/14/us/3-killed-in-shootings-at-jewish-center-and-retirement-home-in-kansas.html?hp&_r=0&assetType=nyt_now

espoused views of white supremacy, virulent anti-Semitism and eschewed racial mixing.[104]

In his book, which was freely available to download on his website, Miller warned against Jewish domination of the media, art, music, literature and culture of the Western World, "which has brought upon us the epidemics of drugs, venereal diseases, crime, pornography, ignorance, immorality, and yes, racial hatred."[105] Miller openly declared "total war" on ZOG (Zionist Occupation Government) because war is the only hope for the survival of the white race. "Together," Miller wrote, "we will cleanse the land of evil, corruption, and mongrels. And, we will build a glorious future and a nation in which all our people can scream proudly, 'This land is our land. This people is our people. This God is our God, and these we will defend — One God, One Race, One nation.'"[106] Miller called upon his fellow "Aryan warriors" to strike now: "Strike for your homeland. Strike for your Southern honor. Strike for the little children. Strike for your wives and loved ones. Strike for the millions of innocent White babies murdered by Jew-legalized abortion, who cry out from their graves for vengeance. Strike for the millions of our people raped or assaulted or murdered by mongrels. Strike for the millions of our Race butchered in Jew wars."[107] Miller was very explicit: "Let the blood of our enemies flood the streets, rivers, and fields of the nation in holy vengeance and justice."[108] Miller published this call in 1987, and repeated it frequently. For many years, he encouraged his followers to kill blacks, Jews, judges and

[104] http://www.whty.org/
[105] Glenn Miller, *A White Man Speaks Out* (1999), https://heavyeditorial.files.wordpress.com/2014/04/awmso.pdf
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*

human rights activists.[109] Thus it should not surprise anyone that Miller acted upon his own call and went on a racially-motivated killing spree.

A speech that mobilizes a crowd to burn down a building owned by a hated religious group and to murder people praying is not protected speech also in the USA. On June 17, 2015, 21-year-old Dylann Storm Roof entered the Emanuel African Methodist Episcopal Church in Charleston, one of the oldest, most storied black congregations in the South of the United States, and murdered nine people in cold blood. The murderer had a history of anti-black views which he uttered on his social networks and also during the murderous attack.[110] People who knew him

[109] Steven Yaccino and Dan Barry, "Bullets, Blood and Then Cry of 'Heil Hitler'," *NY Times* (April 14, 2014), http://www.nytimes.com/2014/04/15/us/prosecutors-to-charge-suspect-with-hate-crime-in-kansas-shooting.html?hp

[110] Hatewatch Staff, "Charleston Shooter's Alleged Manifesto Reveals Hate Group Helped to Radicalize Him Online, *Southern Poverty Law Center"* (June 20, 2015), http://www.splcenter.org/blog/2015/06/20/charleston-shooters-alleged-manifesto-reveals-hate-group-helped-to-radicalize-him-online/; Jacob Siegel, "Dylann Roof, 4chan, and the New Online Racism", *The Daily Beast* (June 29, 2015), http://www.thedailybeast.com/articles/2015/06/29/dylann-roof-4chan-and-the-new-online-racism.html?via=newsletter&source=DDMorning . This brings to the fore another important matter, which I will not consider here. Wannabe murderers need to vent their hostilities. In recent years, they often do it on the Internet. I call it "The Columbine Phenomenon". For discussion, see R. Cohen-Almagor and Sharon Haleva-Amir, "Bloody Wednesday in Dawson CollegeThe Story of Kimveer Gill, or Why Should We Monitor Certain Websites to Prevent Murder", *Studies in Ethics, Law and Technology*, Vol. 2, Issue 3*,* Article 1 (December 2008); R. Cohen-Almagor and Sharon Haleva-Amir, "Why Monitor Violent Websites? A Justification", *Beijing Law Journal,* Vol. 3, No. 2 (June 2012): 64-71; R. Cohen-Almagor, "People Do Not Just Snap: Watching the Electronic Trails of Potential Murderers", *Journal of Civil & Legal Sciences*, Vol. 3(1) (2014): 113-118.

testified that he harboured racist views and made violent statements about attacking black people.[111] Unfortunately, this is one attack in a very long list of similar attacks targeting predominantly black churches in the United States. A number of past cases involved the burning of churches by Ku Klux Klan members including setting on fire the Macedonia Church of God in Christ in Springfield, Mass. (November 5, 2008), the Rising Star Baptist Church, Greensboro, AL (June 2, 1996), the Matthews-Murkland Presbyterian Church, Charlotte, NC. (June 7, 1996), the Macedonia Baptist Church in Manning, S.C. (June 21, 1995), the Rock Hill Baptist Church, Aiken County, SC. (February 19, 1994), the Rocky Point Missionary Baptist, McComb, MS. (April 4, 1993), the Tucker Baptist Church, Union, SC. (October 21, 1992), the Sandhill s Freewill Baptist Church, Hemingway, SC. (October 8, 1991), the Apostolic Faith Assembly Church, Louisville, KY. (January 5, 1990), the Mount Zion

[111] Frances Robles, "Dylann Storm Roof Photos Found on Website", *NY Times* (June 20, 2015), http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html?emc=edit_na_20150620&nlid=33802468&ref=cta&_r=0; Frances Robles, Jason Horowitz and Shaila Dewan, "Dylann Roof, Suspect in Charleston Shooting, Flew the Flags of White Power", *NY Times* (June 18, 2015), http://www.nytimes.com/2015/06/19/us/on-facebook-dylann-roof-charleston-suspect-wears-symbols-of-white-supremacy.html?&moduleDetail=section-news-1&action=click&contentCollection=U.S.&region=Footer&module=MoreInSection&version=WhatsNext&contentID=WhatsNext&configSection=article&isLoggedIn=false&pgtype=article; Nick Corasaniti, Richard Perez-Pena and Lizette Alvarez, "Church Massacre Suspect Held as Charleston Grieves", *NY Times* (June 18, 2015), http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html?_r=0

A.M.E. Church in Longdale, Miss. (June 16, 1964), and the 16th Street Church in Birmingham, Ala. (September 15, 1963).[112]

VIII

Conclusion

American society has been willing to pay a substantial price for allowing hate mongers to spread their racist ideology on the streets as well as on the Internet. In 2013 alone (the most recent year for which federal data is available at the time of writing), the FBI identified 3,563 victims of racially motivated hate crimes. Black victims constituted 66% of the total. 21% were victims of anti-white bias. 4.6% were victims of anti-Asian bias, and 4.5% were victims of anti-Native American bias.[113] American egalitarian viewpoint-neutrality enables the pursuit of every idea. Paradoxically it might enable the flourishing of inequality rather than equality. There is correlation between hate speech and hate crime.

[112] "Violent History: Attacks on Black Churches", *NY Times* (June 18, 2015), http://www.nytimes.com/interactive/2015/06/18/us/19blackchurch.html; Center for Democratic Renewal, *Black Church Burnings: Research Report Hate Groups Hate Crimes in Nine Southern States* (June 1996), http://www.hartford-hwp.com/archives/45a/121.html; "Ku Klux Klan", *New World Encyclopedia*, http://www.newworldencyclopedia.org/entry/Ku_Klux_Klan; President Obama's Eulogy at Charleston Shooting Funeral of Clementa Pinckney, *YouTube* (June 26, 2015), https://www.youtube.com/watch?v=RK7tYOVd0Hs

[113] FBI, *2013 Hate Crime Statistics*, https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/topic-pages/victims/victims_final. See also Conor Friedersdorf, "Thugs and Terrorists Have Attacked Black Churches for Generations", *The Atlantic* (June 18, 2015), http://www.theatlantic.com/politics/archive/2015/06/thugs-and-terrorists-have-plagued-black-churches-for-generations/396212/

Democracy is founded on two basic principles: respect for others, and not harming others. These principles are the lighthouse according to which democratic morality and policies are formed. As we are able to discern between good and evil, we need to analyse expression per content, observing the consequences of certain expressions and apply judgement when speech might lead to a harmful action.

This article's promotional approach holds that liberal governments should not be neutral regarding different conceptions of the good. A promotional approach of the liberal-democratic values should be in place instead of complete neutrality. Governments should safeguard the basic tenets of democracy which enable and facilitate their operations. It is within our common interest to adhere to the basic liberal-democratic ideas of respect for others and not harming others, and to apply judgement in promoting them in society.[114] Thus the promotional approach calls upon governments to safeguard the basic tenets of democracy which enable and facilitate civic life. Sometimes, for whatever reasons (laziness, economic considerations, dogmatism, incuriosity, lack of care, contempt), we refrain from doing the right moral thing. But we should. This is not a free speech issue as we are not free to inflict harm on others. It is about taking responsibility for stopping those who abuse democratic principles for their partisan, vile purposes.

There *is* right and wrong. There *is* a standard, a moral compass that guides our reasoning. Not all views have equal standing in society, just as not all actions have equal standing. As we know it is wrong to kill another person, we also know it is wrong to use racist diatribes in order to incite others to kill. Absolute viewpoint-neutrality should be replaced by the promotional

[114] Raphael Cohen-Almagor, *The Scope of Tolerance: Studies on the Costs of Free Expression and Freedom of the Press* (London and New York: Routledge, 2007).

approach which follows the two basic principles of respecting others and not harming others. It is the democratic duty to protect third-parties, vulnerable people. Indeed, often the litmus test for the extent of democratization of any given society is the status of its minorities. The more equal the minorities are, enjoying equal standing in society like any other member, the more democratic the society usually is.

The United States is the only country in the world that permits the operation of a Nazi party. Nazism had brought about an untold suffering on humanity, resulting in millions of life lost in a racially-motivated war, aimed to eradicate certain people deemed inferior according to the Nazi hierarchy of races from the face of the earth. Once a certain speech is designed to undermine the rights of others, it becomes questionable. Questions then arise about its legitimacy. The state ought to weigh the costs of allowing hate speech as well as the risks involved, and balance these considerations against the costs and risks to democracy and free speech associated with censorship. Supporters of free expression may insist on proving a direct link between the harmful expression and the resulting harmful action: the government has to establish a nexus of harm linking the proscribed utterance to some grave and imminent threat of tangible injury. This would require that the government perform a contextual analysis drawing on empirical data. Who was harmed? How were they harmed? It is similar to what we demand of the plaintiff in a libel case. And if the argument also brings in society's right of self-defense, then we should seek evidence of a real threat to individuals. Hate mongers such as von Brunn, Miller and Roof should have been stopped before translating their ideas into action.

Whenever we come to restrict speech, the onus for limiting free expression is always on the one who wishes to limit

expression, and that one should bring concrete evidence to justify restriction. The speech must be dangerous and/or harmful. The danger and/or harm cannot be implicit or implied. If speech would be prohibited only because its danger might be implied from an unclear purpose that is opened for interpretations, then the scope for curtailing fundamental democratic rights is too broad, and the slippery-slope syndrome becomes tangible. The implicit way is not the path that liberals should tread on when pondering restricting of freedom of expression. This does not mean that we should not be vigilant in protecting our democracy and fellow citizens. But mere suspicion ("bad tendency") will not do to override basic freedoms. In other words, we should not take hate speech lightly and, at the same time, we should not rush to restrict freedom of speech. What I have been advocating in this paper is the Aristotelian Golden Mean between freedom of expression and social responsibility: the default position is freedom of expression but it has to have limits. The Respect for Others Principle and the Harm Principle should help us define the appropriate boundaries, applying our discretion in the context of time and circumstances. [115,116]

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115 I thank Richard Collin, Steve Newman, Erik Bleich, Tom Bender, Joyce Appleby and the *PPI* referees for their constructive comments. All website were accessed on February 21, 2016.

116 In memory of Jack Pole (March 14, 1922-January 30, 2010), Friend, intellectual, scholar.

If you need to cite this article, please use the following format:

Cohen-Almagor, Raphael, "Hate and Racist Speech in the United States. A Critique," *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 77-123, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

THE LIMITS OF DEMOCRATIC PERSUASION

BY

CARL FOX

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 125-157
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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The Limits of Democratic Persuasion

Carl Fox

No matter how hard we work to make our democracies tolerant and inclusive, there will always be citizens who reject the basic idea that we should give everyone an equal say in the first place. They want to tear down the whole system and replace it with something designed to exclude those groups that they deem to be unworthy of the standing of free and equal citizenship, and they just won't stay quiet about it. They write blogs, make speeches, organise marches, and, sooner or later, some of them graduate to violence. So far, so depressingly familiar. But what should we do about these radical dissenters? In particular, how are we to reconcile the liberal principle of free speech with our duty to protect the rights and freedoms of all citizens? Corey Brettschneider's main aim in his original and insightful book is to find a way to stand firm on the principle of free speech, as he believes that this "right gives citizens an entitlement to say and believe whatever they wish",[1] without conceding that a liberal state is impotent to resist the spread of hateful doctrines that deny the freedom and equality of all citizens. The solution Brettschneider proposes is to distinguish between the coercive and expressive roles of the state. He argues that although the state must permit the expression of discriminatory and objectionable beliefs, it has a responsibility to

[1] C. Brettschneider, *When the State Speaks, What Should it Say? How Democracies Can Protect Expression and Promote Equality,* (New Jersey: Princeton University Press, 2012), 37. Unless otherwise stated, parenthetical references are to this text.

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 125-157
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

articulate its foundational principles, rebut hateful viewpoints, and, ultimately, to persuade citizens to adopt its values as their own. The problem that I wish to raise in this paper is that he is insufficiently sensitive to the dangers of non-rational persuasion.

Brettschneider argues that liberal democratic states are not value neutral in the sense that they have no values of their own and serve only to impartially defend a maximal set of liberties for all of their citizens. Instead, he advocates 'value democracy,' the view that the state "should engage in democratic persuasion, actively defending the democratic values of freedom and equality for all citizens" (4). He points to Martin Luther King Day and Black History Month as examples of how the state can emphasise its commitment to the principle of equal civil rights and thereby speak up for associated values such as tolerance, dignity, and equality (46). He is careful to set limits on how democratic persuasion can be pursued, and the ends it should be used to achieve. He sets a substance-based limit which proscribes state action to combat inegalitarian beliefs that do not themselves challenge the ideal of free and equal citizenship. However, I will be primarily interested in his means-based limit, which "requires that the state not pursue the transformation of citizens' views through any method that violates fundamental rights, such as freedom of expression, conscience, and association" (87). In particular, Brettschneider asserts that this "does not mean that it must avoid emotion or rhetorical persuasiveness" (89). I think this leads him into trouble. Although he rejects "subconscious or subliminal methods" (89), he does not rule out non-rational persuasion, which is a powerful tool that Aristotle warned could be open to abuse. Even if we set aside that issue, we still have two important grounds for concern about the use of non-rational persuasion. The first is autonomy, and the second is stability.

One way of thinking about the relationship between autonomy and authority is that submission to the authority of a state can enhance citizens' autonomy by helping them to respond to reasons as part of a collective. We can best respond to our reasons for averting climate change say, or for guaranteeing civil rights to everyone, as a political community. However, many of our reasons do not mandate collective action and this is true of our reasons for adopting moral principles and values and, indeed, making them a part of how we think about ourselves and our communities. When the state deploys non-rational persuasion it might well be successful in inculcating its core values in its citizens, but those citizens do not take up those values as a response to reasons. The state is not helping them to be autonomous in a sphere where I shall argue it is particularly important to be autonomous—the construction of one's moral identity.

I will argue that a necessary condition for being autonomously committed to a value or a principle is that one endorses it because of the considerations that count in its favour. It is only when commitments are endorsed for reasons that they constitute an expression of our nature as reason-responsive beings. Emotional appeals, rhetorical devices, and other non-rational means of persuasion look to be at odds with this conception of autonomy. My claim is that it matters to us that we select our values for reasons so there is, at the very least, a significant missed opportunity here if the state takes it upon itself to persuade us to embrace its values in a non-rational way.

More seriously, though, on a Razian model of authority it is not clear that the state has the authority to do this because it is moving beyond helping us to comply with our reasons by telling us what to do, and trying to help us to comply with our reasons by influencing what we care about, how we think, and even how

we understand ourselves.[2] This is an important departure because establishing the first does not necessarily establish the second. The expressive state needs its own answer to the question of how to reconcile authority and autonomy.

The next problem I will tackle is concerned with stability. Brettschneider suggests that value democracy will promote the stability of a liberal democracy by persuading citizens to adopt its core values (107). My argument will be that values that are autonomously adopted or endorsed have deeper roots and are for that reason more robust than values held non-rationally. In the absence of sufficiently good reasons to reverse an earlier decision to endorse a value, acting contrary to it calls into question one's identity as a reason-responsive agent. I shall argue that this is something that most of us care deeply about and so it generates a weighty sanction to tie us those values that we do autonomously adopt. Values that we do not endorse for reasons are much more fragile. When the effect of the rhetorician's repetition (or alliteration), for instance, wears off then it is hard to see what binds the citizen to the value if it is challenged.

Ultimately, I submit that Brettschneider needs to go beyond his substance and means-based constraints and think about what it means for citizens to adopt values and anchor them within their own identities. My suggestion will be that he introduce a third constraint on the use of non-rational persuasion to the effect that it should only be used to make citizens aware of considerations to which they might otherwise have been blind. In this way, value democracy will facilitate, rather than bypass, autonomy and the process of tangibly committing to values as a response to reasons.

I shall begin by explaining the basis and significance of democratic persuasion and then move on in Section II to look in

[2] J. Raz, *The Morality of Freedom,* (Oxford: Clarendon Press, 1986).

more detail at the limits that Brettschneider does, and doesn't place, on the expressive state. Section III will consider the nature of rhetoric and begin to lay out the potential pitfalls and drawbacks of extra-rational persuasion. I will explore this line of thought in the sections on autonomy, authority, and stability, before proposing my autonomy-based limit in Section VII.

I

Democratic Persuasion

Hateful viewpoints, Brettschneider tells us, express "an idea or an ideology that opposes free and equal citizenship" (1). Those who are committed to them typically "seek to bring about laws and policies that would deny the free and equal citizenship of racial, ethnic, or religious minorities, women, or groups defined by their sexual orientation" (1). Now, broadly speaking, there are two familiar approaches to dealing with people who are committed to such positions. We can insist that the state remain neutral and protect their right to express their noxious views up to the point where it amounts to threatening harm or inciting violence in a combustible situation. Mill's example of stirring up an already agitated mob is still a good example here.[3] Alternatively, we can legislate to outlaw hate speech and bring the might of the modern state to bear on those who express views that are incompatible with the core values that underpin liberal democracy.

The problem with option number one is that it lets extreme discriminatory speech go unchallenged. At best this seems to us

[3] See J. S. Mill, On Liberty *in* M. Warnock (Ed.) *Utilitarianism; On Liberty; Essays on Bentham: Together with selected writings of Jeremy Bentham and John Austin,* (Glasgow: Collins Fount, 1962), 184.

weak, but at worst it is dangerous - hateful ideologies have gained traction before. What kind of state would stand idly by while its core values are eroded? Targeted groups might also suspect a measure of complicity if their state quietly goes about the business of facilitating hurtful and poisonous speech. Hateful viewpoints cast a long historical shadow and it is not unreasonable for minority groups to be suspicious under such circumstances.

Option two is also unsatisfactory. It is, after all, a restriction on freedom, but more importantly it constrains debate when it is the debate about its own foundational values that characterises democracy. It was Mill again who argued that it is only by considering and confronting objections that we prevent our principles from lapsing into dead dogma. On that basis we can conclude that prohibition has the perverse effect of impoverishing both the actual and prospective proponents of democracy insofar as it robs them of the opportunity to develop their capacities for a sense of justice in the context of a full and frank exchange of views.[4]

Like any good showman, Brettschneider proceeds to offer us a third option. We can distinguish between the state's capacity to coerce its citizens[5] and its ability to influence behaviour by

[4] Rawls's conception of the moral person is based on what he calls the two moral powers. The first is the capacity for a sense of justice, which is the ability to judge things to be just and unjust and the willingness to propose and abide by fair terms of cooperation. The second moral power is the ability to form and revise a conception of the good. See J. Rawls, *Justice as Fairness: A Restatement,* (Cambridge: Harvard University Press, 2003), 18-19.

[5] See D. Knowles *Political Obligation: A Critical Introduction,* (Abingdon: Routledge, 2010), 19. This is what Knowles calls the "nasty face of the state" because states "threaten their citizens, fine, imprison, publicly shame and exact compulsory service from them. In some jurisdictions they inflict corporal punishment and the death penalty".

communicating with them instead. The latter is its "expressive power" (3) and it exercises this when it 'speaks' to us. This opens up a possible course of action for the state between the extremes of prohibition, and the heavy-handed tactics that must accompany it, and standing by idly twiddling its metaphorical thumbs. The state can permit, and indeed protect, the rights of dissenting citizens to give voice to their hateful viewpoints while at the same time rebutting those viewpoints and articulating, and thereby affirming, its commitment to the free and equal status of all of its citizens.

What Brettschneider has in mind, then, is a state that actively defends and promotes democratic values. This is where democratic persuasion comes in, the aim of which "is to change the minds of the opponents of liberal democracy, and, more broadly, to persuade the public of the merits of democratic values" (6). Indeed, the right we have been considering of all citizens, including the hateful ones, to advance their views is grounded in these very values.[6] Aside from the attractive middle ground that it opens up between prohibition and value neutrality, Brettschneider offers four reasons for the state to be in the business of promoting values.[7]

First, he claims that a state is less legitimate when there is a low level of congruence between the state's foundational values of free and equal citizenship and the popular beliefs held by the citizenry. This is not to say that a state cannot be morally justified without this congruence, but Brettschneider believes that there is something regrettable about such a situation (38). He is unfortunately vague on the exact nature of the democratic value

[6] Brettschneider refers to this as the paradox of rights (5-6).

[7] For Brettschneider, individuals have a duty first to adopt democratic values and then to promote them in dialogue with their fellow citizens (37; 41; 50; & 93).

of high levels of congruence, and, indeed, on precisely how we should understand legitimacy. However, as I shall show later, in Section IV, there are autonomy-based reasons for encouraging congruence since these are the appropriate values for citizens to adopt.

Diminishing levels of congruence also raise the spectre of an unstable state that lacks sufficient public support to make its laws stick. Stability requires general compliance, and the Rawlsian condition of stability for the right reasons is only satisfied when that compliance is firmly rooted in citizens' shared sense of justice. Brettschneider is surely right that there comes a point when a notional democracy cannot meaningfully be called a democracy at all if its members eschew the basic tenets.

Third, the status of free and equal citizenship can be hollowed out if contrary views and practices are widespread in a community. Whether in the home, the workplace, or out and about in the world, everyday instances of discrimination can make a mockery of the state's formal declarations. This is especially problematic if it is public officials who develop anti-democratic sentiments since they are the ones charged with delivering on the state's guarantees. Only when democratic values are widespread is it reasonable to trust that public officials will reliably enforce and protect free and equal citizenship.

Finally, as we have already discussed, the state has an obligation to not only preserve the free and equal citizenship of its members, but to do so publicly and in a way that dispels any reasonable suspicion of complicity with the expression of hateful viewpoints.

Democratic persuasion can take a number of forms. Perhaps the most familiar example is written judicial rulings where judges outline the basis of their decisions and trace a line back to

political values enshrined in the constitution. However, Brettschneider suggests that states are, in fact, much more proactive in fulfilling their expressive function. Another key example he offers is public apologies. For instance, in 2013 the Irish Taoiseach Enda Kenny issued a formal apology on behalf of the state for its role in supporting the now infamous Magdalene Laundries. Tens of thousands of women were effectively imprisoned and used as a source of free labour. Many were forced to give up their newborn babies. One of the reasons for issuing that apology was to distance the state from values that were incompatible with treating all of its citizens as free and equal, and to unambiguously declare that commitment for the future.[8]

States can also 'speak' simply by drawing attention to notable historical figures and honouring them for their embodiment of particular values and causes. Declaring public holidays can, therefore, be a form of state speech. So too with erecting statues, organising public events, and issuing special stamps, notes, and coins. And we should not forget education, since the state can place democratic values right at the heart of students' curricula.

So, the state can speak in a multitude of different ways and it can make its voice all but impossible to ignore. A key difference, then, between state speech and the speech of individuals is that

[8] "For we saw difference as something to be feared and hidden rather than embraced and celebrated. But were these our 'values'? Because we can ask ourselves for a State – least of all a republic: What is the 'value' of the tacit and unchallenged decree that saw society humiliate and degrade these girls and women? … in naming and addressing the wrong, as is happening here today, we are trying to make sure we quarantine such abject behaviour in our past and eradicate it from Ireland's present and Ireland's future. In a society guided by the principles of compassion and social justice there never would have been any need for institutions such as the Magdalene Laundries". http://www.thejournal.ie/full-text-enda-kenny-magdalene-apology-801132-Feb2013/ Accessed 1/6/15.

the state can speak so much louder.[9] Democratic persuasion must, therefore have limits and it is to these that we shall now turn.

II

Limits on the Expressive State

Brettschneider is aware of the danger that, as sometimes happens in its coercive role, the expressive state could become overbearing and intrusive. In order to buttress the rights to free speech and freedom of conscience he imposes two limits on state speech.

The first limit that I will discuss, although it is the second limit that Brettschneider enumerates, is the 'substance-based limit', which prohibits the state from confronting inegalitarian beliefs that do not challenge the ideal of free and equal citizenship. One example he uses is religious belief in the damnation of non-believers and members of other creeds (35). This is an inegalitarian belief, but it is not incompatible with a commitment to free and equal citizenship in one's political community. Neither is the inequality involved in being a bad friend and failing consistently to pay your way when out for lunch, since this does not imply hostility to free and equal citizenship (89).

The substance-based limit prevents an overzealous state from imposing a comprehensive doctrine, rather than promoting the political values for which it properly has responsibility. It would

[9] Brettschneider recognises the worry that the state's "massive power," means that its expression could be "in a sense overwhelming," although he ultimately concludes that so long as the state's voice does not drown out other voices this objection does not gain any traction (152). As we shall see, it is a little more complicated.

fail to respect its citizens as moral equals if it inserted itself into deliberations that are not strictly publically relevant.[10] So, "persuasive attempts at transformation should only be aimed at those beliefs that are openly hostile to or implausibly consistent with the ideal of public equality" (14). The state should, therefore, refrain from promoting a 'thick' conception of the good and ensure that its speech is consistent with all reasonable comprehensive doctrines that overlap on the principle of respect for persons as free and equal.

Brettschneider's other limit is the 'means-based limit' which concerns the methods that states can employ to get their message across. It requires "that the state not pursue the transformation of citizens' views through any method that violates fundamental rights, such as freedom of expression, conscience, and association" (87). He claims that on his view "the state can avoid crossing the means-based limit by confining its method of communicating its message to its expressive rather than its coercive capacity" (87), and he defines coercion as "the state threatening to impose a sanction or punishment on an individual or a group of individuals with the aim of prohibiting a particular action, expression, or holding of a belief" (88).

Citizens are to be respected as free and equal and this, he tells us, also "bars the kind of propaganda that avoids reasons, and relies on character assassination, mockery, or the denial of an individual's humanity" (89). Expanding on the idea that democratic persuasion must retain some kind of connection to reasons, Brettschneider goes on to say that the state should not

[10] Of course, while there is no necessary connection between some inegalitarian beliefs and hostility to free and equal citizenship, we may worry that it is psychologically easy to make that transition. Even so, the state must keep a proper distance and restrict its persuasive efforts for the sake of permitting citizens to develop and exercise their two moral powers.

"resort to subconscious or subliminal methods that shun reason altogether" (89). However, it is not difficult for persuasion to meet the condition that it not shun reason 'altogether', and this is where a problem starts to emerge.

Emotional appeals and rhetorical devices are permitted for the expressive state (89). Indeed, Brettschneider takes the position that it would be remiss of the state to refrain from such effective methods since it is now in the business of persuasion: "[g]iven the choice between expressing the values of freedom and equality in a non-persuasive or persuasive manner, all else being equal, the state should opt for forms of persuasion that are more convincing" (91). This is deep water, and I submit that Brettschneider charts the wrong course by effectively farming out his theory of rhetoric to Simone Chambers and Bryan Garsten (91 fn.35).

I say this for three reasons. First, it papers over a failure to adequately spell out the potential problems here for democratic persuasion. Second, Brettschneider is too quick to help himself to other theories without demonstrating that they are fully compatible with his own. Chambers, in particular, is primarily interested in mass deliberation and collective decision-making. This is, of course, relevant here, but Brettschneider is at least as interested in citizens' individual interests in cultivating their two moral powers. As such, Chambers' account of deliberative rhetoric, while helpful, cannot simply be plugged in. Having said this, Chambers' distinction between 'plebiscitary rhetoric'[11] and 'deliberative rhetoric' is instructive and points the way towards a third limit that I shall argue should be imposed on democratic

[11] See S. Chambers "Rhetoric and the Public Sphere: Has Deliberative Democracy Abandoned Mass Democracy?" in *Political Theory*, 2009, 37 (3), 337-339.

persuasion.[12] The former encompasses speakers, broadly understood, who are focused only on 'winning' some issue or campaign.[13] Deliberative rhetoric, in comparison, "makes people think, it makes people see things in new ways, it conveys information and knowledge, and it makes people more reflective".[14]

Third, skipping over the dangers of rhetoric detracts from one of the chief virtues of Brettschneider's articulation of value democracy. On the whole, *When the State Speaks* offers something that is still sadly rare in political philosophy: concrete guidance for the political sphere. Our governments do have to deal with the problems caused by unreasonable citizens spouting hateful viewpoints. Understanding and embracing the expressive role of the state instead of occasionally grasping at it would constitute genuine progress. Deploying non-rational means of persuasion is not without its dangers and drawbacks. An exhortation to go away and learn about rhetoric, instead of a frank discussion followed by an appropriate action-guiding principle, is not in keeping with the spirit of practical philosophy that motivates the rest of the book.

In truth, the charge that he is advocating non-rational persuasion is unfair to Brettschneider. Extra-rational persuasion is better since he is not suggesting that state methods shun reason altogether, but rather that they can, and should, go beyond presenting the relevant reasons themselves in a clear and accessible way. The aim appears to be persuasion, as opposed to

[12] See Section VII.

[13] See Chambers again: "[o]n this view, rhetoric, while able to cleverly defend itself, is not interested in engaging in debate or dialogue, which is to say, rhetoric is not interested in giving an account of itself. Rhetoric is interested in winning the day" Ibid, 327.

[14] Ibid, 335.

the facilitation of deliberation, and, if this is indeed what he means, then we are again led to the conclusion that his view does not map perfectly on to Chambers' view.

In the absence of clarity I think we need to work through the potential pitfalls and drawbacks of rhetoric and extra-rational persuasion. We will then be in a position to suggest a limit that unambiguously prohibits emotional appeals and other tricks and devices except when they are used to alert citizens to relevant considerations that might otherwise evade their deliberations. And so it is to the dangers of rhetoric that we shall now turn.

III

The Dangers of Rhetoric

For Aristotle, rhetoric was the skill of persuasion. A rhetorician possesses the ability to get individuals and groups to feel, believe, and, ultimately, to do things. Jamie Dow argues that, as Aristotle understands it, rhetoric aims at an epistemic good.[15] He claims that "an orator presents listeners with proper grounds for conviction of his conclusion just if what he presents to them is—by their lights—good reason for adopting the conclusion he is recommending."[16] We must distinguish, however, between the skill itself, and the ends for which it can be used.

[15] J. Dow *Passions & Persuasion in Aristotle's Rhetoric* (Oxford: Oxford University Press, 2015), 34.

[16] Ibid 51. There are three grounds that the speaker can provide: his character (ethos), standard premises (logos), and the emotions of his audience (pathos). Emotions are often picked on here as improper grounds for belief. Dow advances the view that Aristotle thought of emotions as complex states that included cognitive content, which is to say, roughly speaking, that a person in a state of fear takes her circumstances to be such that fear is warranted. If this is correct, then it is possible that an orator who can elicit fear of some person or

As with any skill, the ability to persuade can be abused for the sake of bad or misguided ends. Since we are talking about extending, or at least recognising a new kind of, state power, it is an important concern that it may be misused. We do not have to look very hard to find examples of persuasive politicians who proved to be completely unfit to hold this kind of power.

However, I want to leave this worry aside here for a similar reason to Aristotle's.[17] That a thing can be bent and twisted to nefarious purposes is not, by itself, a decisive reason to deny ourselves the benefits it offers. In the case of democratic persuasion, those benefits could be considerable. As Dow suggests: "From the point of view of the state, we value skilled speech-making because of its epistemic contribution to public deliberation in politics and law. From the point of view of the listener, when anyone sincerely pays attention to a speech, it is not in the hope of being duped or manipulated but in the hope of being informed and helped to a better-deliberated view".[18]

It is clear enough that the ultimate end of democratic persuasion is a good one. The goal is not simply to win the argument with hateful viewpoints, but to win over their adherents to the cause of free and equal citizenship, deepen the commitment of reasonable citizens, and create an atmosphere in

set of circumstances can thereby provide a listener with a premise for some argument. I will not examine this position here.

[17] "If it is argued that one who makes an unfair use of such faculty of speech may do a great deal of harm, this objection applies to equally to all good things except virtue, and above all to those things which are most useful, such as strength, health, wealth, generalship; for as these, rightly used, may be of the greatest benefit, so, wrongly used, they may do an equal amount of harm". Aristotle *The 'Art' of Rhetoric,* trans. by J. H. Freese, (London: Heinemann, 1926), 1355b2-7. See also J. Dow, *Passions & Persuasion in Aristotle's Rhetoric,* (Oxford: Oxford University Press, 2015), 51 fn.31.

[18] Ibid 83.

which everyone can deliberate and express themselves as a moral equal. Any politician who deployed her rhetorical skills for some other ultimate end would not be engaging in democratic persuasion.

The pursuit of noble ends, however, sometimes obscures inappropriate use of means. Individuals have an interest not only in greater levels of reflection and deliberation in general, but also in working through each step in the argument for democratic values for themselves. With this in mind we might be concerned when Brettschneider tells us that democratic persuasion "allows for certain forms of rhetoric to further the democratic values that underlie rights, provided that the rhetoric is truthful and combined with the promulgation of reasons" (91 fn.35). Specifically, we might worry that although the ultimate aim is one we can endorse, it is consistent with using psychological techniques and speechcraft to sweep citizens along when it comes to individual points and considerations. In fact, before we get to that point we must consider George Tsai's contention that there are some circumstances in which even the giving of reasons can count as objectionably paternalistic.[19] If it impinges on those areas of their lives over which they are ordinarily entitled to control then it can be problematic.

Offering reasons is often assumed to be the paradigm case of respect for agency, but Tsai worries about cases where an agent offers reasons to another but denies her a sufficient opportunity to engage with those reasons for herself.[20] In such cases, he

[19] G. Tsai, "Rational Persuasion as Paternalism," in *Philosophy & Public Affairs* 2014, 42 (1), 78-112.

[20] Ibid, 88. In fact, there are three necessary conditions for rational persuasion to count as paternalistic. Tsai worries about cases where an agent offers reasons to another, but is motivated to intervene by distrust and concern, conveys via this intervention the message that the other party is insufficiently

thinks, the giving of reasons can constitute a lack of respect. The pressure that rational persuasion might bring to bear can be such that an individual might justifiably feel that her agency has been usurped and that any subsequent decision or action is not really her own.

As Tsai notes: "[t]hinking for yourself involves having some control over your reasoning process. It involves having some independence—some space, some time—to exercise your reasoning capacities meaningfully, on your own terms".[21] If I have an important decision to make but you continue to bombard me with advice, even if it is good advice, I might struggle to work through it on my own. Agents of the state speak from a position of presumptive authority, have access to expertise beyond the reach of ordinary citizens, and can broadcast their message in a wide range of prominent formats. This problem is compounded by Brettschneider's rejection of what he calls the 'spatial metaphor of privacy' and its replacement with the idea of 'publicly justifiable privacy'. The upshot is that "private beliefs, communications, and actions are not immune to public evaluation" (29). He does consider the right to resist transformation (165-167), but in the context of discussing Bob Jones University's discriminatory practices he makes it clear that this does not extend to the right to be left alone "in the sense of never being criticized" (166). Brettschneider is wary of coercion because it would "impair the ability of citizens to determine autonomously which beliefs they wish to hold and defend" (88). Once we open up the definition of state speech to include such things as statues and public h0lidays, it becomes clear that the

capable of weighing reasons for herself, and when this action denies her an opportunity to engage with those reasons for herself. Considerations of space prevent me from engaging with the substance of Tsai's argument here.

[21] Ibid, 92.

state can ensure that its messages are pervasive and all but impossible to ignore. In that sense we might be concerned that democratic persuasion can prevent us from exercising appropriate control over our own deliberations.

Why is it so important for individuals to work through these matters for themselves? In the next three sections I will attempt to explain this by discussing autonomy, authority, and stability. It will emerge that extra-rational persuasion presents a distinct threat here, which is why we must be so cautious in setting the boundaries for the expressive state.

IV

Autonomy

In this section I will sketch an account of the autonomous life in terms of responding to reasons. When our deliberations are unduly influenced, either deliberately or unwittingly, we are denied an opportunity to express our rational natures by responding to reasons on our own. One of the most important ways in which we can respond to reasons is to fashion our own selves by constructing identities. Ultimately, democratic persuasion aims at identity formation (and transformation) since this is how democratic values can be anchored in citizens' own ways of thinking and being. My argument will be that democratic persuasion that encroaches upon citizens' own process of responding to reasons potentially robs them of the opportunity to be autonomous in a sphere where it is particularly significant. Extra-rational persuasion for the purpose of driving us towards a particular belief, commitment, or action straightforwardly satisfies this definition because it generates responses in a non-rational way.

Here is the idea: it matters to us that we live *intelligible* lives and the way to live an intelligible life is to act for reasons, indeed to act for good reasons. A very particular type of freedom consists in liberation from our limitations as embodied beings, determined by our natural drives and desires. Autonomy is often understood in opposition to heteronomy.[22] We are not autonomous, we might think, when we are driven by desires and appetites as opposed to what our reason tells us. The issue here is not so much that we have needs and wants as embodied creatures with a complex evolutionary past. It is true enough that I can exercise only limited control over my need to eat, for example. But this only undermines my ability to understand myself as a rational agent when my biological imperatives loom too large over my deliberations and obscure other, weightier, considerations for action. Excepting extreme circumstances of deprivation or stress, we can, as Christine Korsgaard emphasises, always "back up" from our drives and desires and reflect on the question of what we *should* do.[23] What would we make of a creature who possessed this capacity but was never moved to weigh considerations against one another in order to decide how best to act? Very little, I think, and if we do not want to be like that then we have an interest in being responsive to reasons.

We are also beings who persist over time and this affords us the opportunity to decide who we want to be and what we want to do with our lives. We can, I submit, form and revise our conceptions of our own selves, partly anyway, as a response to reasons. Our moral principles are particularly important elements

[22] For a classic statement of the contrast see I. Kant, *The Groundwork of the Metaphysics of Morals* trans. by M. Gregor (Cambridge: Cambridge University Press, 1998), 4:446-447.

[23] C. M. Korsgaard, The Sources of Normativity *in* O. O'Neill (Ed.) *The Sources of Normativity* (Cambridge: Cambdrige University Press, 1996), 93.

in our self-conceptions because of the deep regulative role that they play. Allow me to illustrate this with a trivial example. Consider the principle that when in the pub one should make some extra space for any valiant soul trying to carry more than two pints.[24] Now, sometimes we describe our commitments in terms of a personal set of rules that we observe but this makes a natural, elegant solution into something cumbersome. It is not so much that I have a rule about making some space for people trying to get away from the bar with more than two handfuls. Rather, I simply understand myself as the kind of person who makes a little more room for someone with a precarious load.

Incorporating moral principles into our identities in this way secures their place in our deliberations because it attaches a weighty sanction that is incurred in the event of a violation. To act contrary to a principle that forms part of how you think about and understand your self is to undermine your identity and compromise who you are. This is something that matters a great deal too almost all of us and it also explains the significance that Brettschneider attaches to what he calls 'reflective revision'.[25] Now, how does all of this bear on non-rational persuasion?

Brettschneider suggests that it is good for all citizens to hear a reasoned defence of public values (45). We can now tell a story about this in terms of autonomy as responsiveness to reasons. Individuals ought to acknowledge these values and they do better as reason-responsive agents when they do. For those individuals who already buy into the ideal of free and equal citizenship,

[24] Please drink responsibly.

[25] "Citizens engage in reflective revision when they endorse the idea of free and equal citizenship and appeal to it to evaluate more general beliefs… To the extent that public values might conflict with the existing worldview held by citizens, a political conception of free and equal citizenship requires reforming and changing existing beliefs" (52).

another hearing may clarify certain aspects or consequences of their commitment and so improve their ability to respond appropriately to those considerations that apply to them in their publicly-relevant deliberations and behaviour. However, insofar as the state engages in extra-rational persuasion, it robs its citizens of the opportunity to respond on their own to the considerations that count in favour of free and equal citizenship. This also explains the enhanced moral status of states that permit their citizens to express their political views, no matter how noxious they might be. And the ideal scenario is one in which citizens reason their way to free and equal citizenship for themselves and incorporate it into their worldviews. This is why congruence should be so highly prized.[26]

Effective non-rational persuasion will have an effect on our feelings, beliefs, and behaviour and, we may suppose, will result in respective changes that are fitting for citizens who have an obligation to uphold public values. The problem is that these changes will not be *responses* to reasons. Further, it presents a missed opportunity to facilitate the deliberate process of identity-creation.[27] This will turn out to impact negatively on stability, but for now the concern is simply that it is particularly important to us to respond to reasons by forging our identities and it is not an insignificant loss when this opportunity is taken away. This is not to say that it may never be better, all things considered, for the state to take a hand here, but it raises a clutch of questions about authority that cannot be ignored.

[26] See Section II.

[27] This is not to say that identity-formation must always be a conscious process. The thought is that there is, however, something special about working on yourself in this way, and this includes reflecting on your commitments and endorsing only those that withstand critical scrutiny.

V

Authority

Brettschneider is not primarily interested in questions of authority and so never articulates an account of citizens' duty of obedience to a suitably just state. In this section I will discuss Raz's normal justification thesis to illustrate my worry that Brettschneider's casual endorsement of extra-rational persuasion obscures a potentially serious lacuna in his theory. The worry is that if states take it upon themselves to help us to better comply with our reasons by controlling how we think and feel, then they have exceeded the scope of Razian authority and so we are led to wonder on what basis they could justify such power and how it could be reconciled with our interest in living autonomously.

For Raz, "the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly".[28] We should do what genuine authorities tell us to do because we will do better by all of our reasons, including our reasons for deciding what to do on our own, if we obey their orders.

It is important to understand two other key features of the Razian story. The first is the dependence thesis and the second is the exclusionary structure that he imposes on our relationship with the various reasons that might bear on any particular decision that we have to make. The gist of Raz's dependence thesis is that authorities do not spin out entirely new reasons

[28] J. Raz, *The Morality of Freedom,* (Oxford: Clarendon Press, 1986), 53.

when they issue commands.[29] Rather, what they do is create intermediary reasons that stand between us and the entire array of reasons relevant to the circumstances that call for action of some kind on our part. An individual is subject to someone else's authority just when acting on foot of the latter's directives will generally lead to them doing better by all of their reasons, and that is what provides the underlying justification for an authority relationship.

The second feature we need to appreciate is the exclusionary character of authoritative directives on the Razian scheme. Commands from genuine authorities mute the force of the original reasons that they sum up and replace, even though their own force is still ultimately derived from the balance of those original reasons. What this means is that the original reasons should no longer be taken as reasons for action, you ought to act only on foot of the command.

So, political authorities tell us what to do.[30] Indeed, this is their defining feature. In issuing orders, they demand us to surrender to their judgment of what to do. However, this does not entail that we surrender our judgment generally if that is to be understood as not deliberating for ourselves or coming to our own conclusions about the best course of action. What matters is that we *do* as we are told. As Raz points out, "[s]urely what counts, from the point of the view of the person in authority is not what the subject thinks, but how he acts."[31]

Another way to approach this point is to think about the value of preserving the mental space for individuals to have a good think and play around with the original reasons in the solitude of

[29] Ibid, 47.
[30] Or what not to do, which for our purposes here amounts to the same thing.
[31] Ibid, 39.

their own minds. For one thing, practice makes perfect, and they may develop as reasoners by revisiting state directives and working through them from various angles. For another, it seems like a sensible idea to maintain a healthy scepticism towards one's political authorities. States sometimes make grave errors and it is important both to be alive to them, so that one can recognise them when they occur, and to be disposed to challenge them if needs be.[32]

Finally, although citizens should do as they are told, it should still be up to them to decide which values they endorse and what kinds of people they want to be. There are some instances in which submission to authority is the best way to respond to reasons. Think of collective action problems like climate change. Rather than trying to solve climate change solely as individuals, we should submit (or perhaps institute and then submit) to a suitable authority. However, this does not apply to something like my own identity; that is something for me to develop on my own.

Democratic persuasion by non-rational means encroaches on this previously private space since political authorities would now be claiming the right to influence us through more than our critical faculties and exercise control over our thoughts and feelings. This would take Brettschneider beyond the scope of political authority as it is normally conceived. It is worth nothing that Raz does suggest that reflection on the merits of actions required by authorities could possibly "be prohibited by a special directive to that effect."[33] Perhaps there are some extreme circumstances in which our reasons support such total obedience that we should not even risk thinking for ourselves, but clearly

[32] Of course, we don't want to be too suspicious or we could lose the benefits of authority altogether. See Ibid, 61-62, for a discussion of kinds of mistakes that undermine state authority.
[33] Ibid, 39.

Brettschneider cannot think that this applies to our commitment to democratic values.

A natural objection here might be that this confuses the kind of authority that the expressive state needs. This objection relies upon the distinction that is sometimes made between practical and theoretical authority. Perhaps the state only claims to be a practical authority in its coercive role but in its expressive capacity it is better thought of as a theoretical authority. When it attempts to persuade its citizens it is just giving expert advice that we would do well to take, even though we don't have to. This interpretation would fit nicely with Brettschneider's concern to preserve the right to hold and express hateful viewpoints. But this response founders on emotional appeals and rhetorical devices.

If you are an expert on financial matters and I want to know how best to invest my money, I should listen to you, but if I don't you won't use the emotional associations I make with my national flag or anthem, say, or the psychological effect of the power of three to bring me around. You won't erect imposing statues of the poor hedge fund managers who had to make do without my money. Nor will you declare public holidays in honour of the investment opportunities that I have passed up. Democratic persuasion does not amount to coercion, but it goes far beyond the offering of advice. This point is especially pertinent in the case of extra-rational persuasion since this can have an effect without being subjected to critical scrutiny.

To maintain the theory of value democracy and the expressive state as it is, Brettschneider would need to provide an account of political authority that vindicates the state in intruding into our deliberations in such a comprehensive way. A more straightforward solution will be offered in Section VII. Before I get to my proposal, however, I wish to raise a further ground of concern about extra-rational democratic persuasion.

VI

Stability

Brettschneider is concerned about the stability of a liberal democratic system and sees this as one point on which militant democrats might hope to gain some ground.[34] In response, he contends that value democracy can secure stability by persuading citizens to adopt democratic values as their own. However, I think he proceeds too quickly. It is not uncommon for people to be persuaded of something only for the effect to wear off as the experience becomes less vivid in their minds. Most of us will have had the experience of changing our minds about something as the result of a persuasive talk or presentation only to find ourselves later unable to reproduce the arguments that seemed so convincing at the time. We may then slide back to our original position, particularly if pressed to take and defend a position by a new interlocutor.

Advertising works precisely by foisting irrational connections upon us and by eliciting emotions that we then associate with a particular product. If I turn on the television and sit through an ad break, no doubt I'll turn it off having acquired the idea that a soft drink will make me popular, a new car will make me sexually appealing, and big faceless corporations are as cuddly as cartoon animals. If challenged on any of these points the motivational potency of these ideas will (I hope) evaporate quickly. The more plausible the ideas, of course, the easier it will be to come up with ad hoc arguments or to latch on to existing ones. And, it must be said, democratic persuasion, as Brettschneider envisages it, will primarily be an exercise in rational persuasion. But, to the extent that it relies on extra-rational means, it will produce unstable

[34] See Brettschneider (17; 25; 38-39; 107).

results since the corresponding commitments will not be suitably anchored.

Writing about the dangers of relying on received opinion, Mill said: "Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote; or if any part, the shell and husk only of the meaning is retained, the finer essence being lost."[35] As Brettschneider acknowledges, it is the whole justification that is owed to the public, and it is not sufficient that it is, like the truth, simply 'out there.'

What Brettschneider really wants is for citizens to incorporate a commitment to free and equal citizenship into their own identities. This is why he speaks of a "duty for citizens to adopt democratic values as their own" (7) and argues that "the state should promote these values even when it requires seeking to persuade individuals to abandon or transform certain beliefs that are at odds with the ideal of free and equal citizenship" (13). The ultimate goal is not really to transform individual beliefs, but to inspire a transformation of the individuals themselves from people who understand themselves as, let's say, white supremacists to people who identify as partners in a common political enterprise underpinned by democratic values. "When they engage in reflective revision, citizens internalise the reasons and values that underlie rights, and they transform their beliefs to make them consistent with free and equal citizenship" (29). When this occurs each individual citizen is bound respect her fellow citizens as moral equals by the cost of fracturing her own self-conception.

[35] J. S. Mill, On Liberty *in* M. Warnock (Ed.) *Utilitarianism; On Liberty; Essays on Bentham: Together with selected writings of Jeremy Bentham and John Austin,* (Glasgow: Collins Fount, 1962), 166.

But why does extra-rational persuasion pose a threat here? Identity-formation often takes place at an unconscious level and it is, of course, true that large parts of our identities are imprinted on us from a young age. One might object that I am offering, an overly voluntaristic understanding of identity-formation and ignoring the possibility that extra-rational persuasion for the right reasons can supplement and guide this process.

For Rawls, the stability of a theory, and so conceivably of a state or a system, is largely about resisting temptations to act in ways that are contrary to its basic principles.[36] Insofar as elements of our identities come to be perceived by us either as alien or unsupported by reasons then we are very likely to repudiate them. This is not to claim that we can remake our identities at will, but generally we strive quite hard to regulate our behaviour only by those principles that we have adopted or reflectively endorsed on account of the considerations that count in their favour. When elements of our identities that are not supported in this way are challenged, they quickly become a problem for us and as such cannot be contribute reliably to the stability of the democratic state by effectively regulating our conduct.

Democratic persuasion can promote stability and efficacy only if it leads citizens to feel bound to support and comply with the institutions of a just state founded on the ideal of free and equal

[36] See J. Rawls, *A Theory of Justice: Revised Edition,* (Cambridge: Harvard University Press, 1999), 6. It is worth noting that Rawls saw a deep connection between stability, identity, and autonomy: "The most stable conception of justice, therefore, is presumably one that is perspicuous to our reason, congruent with our good, and rooted not in abnegation but affirmation of the self" Ibid, 436. See also J. Rawls, *Political Liberalism: Expanded Edition,* (New York: Columbia University Press, 2005): "as a liberal political conception, justice as fairness is not reasonable in the first place unless it generates its own support in a suitable way by addressing each citizen's reason, as explained within its own reason" 186.

citizenship. I have argued that this is best achieved by facilitating citizens in incorporating the values of free and equal citizenship into their identities as a response to reasons. In this way it can also establish obedience to the state as an autonomous response to reasons for individual citizens and secure for them the democratic state's meaning-giving role in creating and maintaining rational institutions and norms.

One possible way to proceed here is for the state to find ways to make citizens' own commitments transparent to them. If citizens can be assisted in drawing the connections between the principles with which they personally identify and the justification of the state then they will quite naturally feel bound to adhere to its rules when it acts justly.

Another key avenue for democratic persuasion is through education, particularly of children and young people. Here the state will have to start by encouraging children to form identities that include a regulative commitment to the principles underpinning the justification of the state. Given the nature and development of children this will necessarily involve a degree of compulsion. However, the goal should not be to produce obedient but unquestioning citizens. Rather, it should be to foster the development of a critical spirit so that individuals can come to voluntarily endorse the values of the state. Only then can the values of the state form a stable part of their attempts to live autonomous lives as a successful response to reasons.

As a child's education progresses the curriculum should change too and teachers should strive to engage their pupils as rational agents, as indeed many of them already do. There is also no good reason why civic education should suddenly stop at a particular age. If we are to take seriously the liberal exhortation that the justification of the state should be available to all then we

must be prepared to invest heavily in facilitating access to education for all citizens.[37]

In the end, it is for individuals themselves to make their democracies stable by identifying with those principles for which satisfactory justifications can be advanced and by policing their own commitments. In the next section I will offer a limitation on extra-rational means of persuasion that respects citizens as reason-responsive beings but permits emotional appeals and rhetorical devices when they are used to help citizens decide their political values by revealing to them relevant considerations that they might otherwise have missed.

VII

An Autonomy-Based Limit

Persuasion is hard, and encouraging citizens to undertake reflective revision not only of their beliefs, but also of their identities, is extremely challenging. As Mill noted, "[w]e often hear the teachers of all creeds lamenting the difficulty of keeping up in the minds of believers a lively apprehension of the truth which they nominally recognise, so that it may penetrate the feelings, and acquire mastery over the conduct" (167). It would be foolish to deprive ourselves of useful tools that can be used to enhance our sensitivity to the reasons that apply to us. In this section I will offer a third limit on democratic persuasion that permits appeals to emotion and other non-rational methods of

[37] Adults should not be forced to attend political philosophy courses, but the credentials of a state can certainly be enhanced by making civic education available to any and all who can be interested. For more in-depth treatment of civic education see A. Gutmann, *Democratic Education* (New Jersey: Princeton University Press, 1999) and E. Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997).

persuasion on the condition that they are used to increase sensitivity to considerations which are relevant to citizens' deliberations about their political values. With this small addition I believe that Brettschneider's important contribution to political theory can be fully embraced. Here is the limit I suggest:

> *Extra-rational means of persuasion should only be employed in order to make citizens sensitive to considerations that apply to their publically relevant deliberations.*

I shall call this the autonomy-based limit for the reason that it facilitates citizens in responding to reasons and prohibits bypassing their critical faculties.

Take as an example the production of a documentary video about the Magdalene Laundries I mentioned earlier. Let's imagine that this video is intended to form part of a state-sponsored museum exhibition open to the general public. One directorial decision that will need to be made is whether music will be used at key points. Music can elicit the whole range of emotions and we have been well-trained by cinema and television to make associations and suppositions depending on the various cues emanating from our surround sound systems. My proposal allows us to distinguish between the use of music to indicate the priority of certain poignant contributions or perhaps draw our attention to the special horror of particular events, and the use of music simply to make us feel what the director wants us to feel.

In the first instance, the aim is to assist the viewer in identifying those parts of the film that offer something of special significance for our appraisal of the historical actors and events, or that should bear on our deliberations about our political values. You might think that this is what charities do on a regular basis with their emotionally-charged television ads. Those of us

lucky enough to live in relatively safe, secure, and prosperous environments are informed about almost unimaginable hardship and loss on a daily basis. One response, which we almost all have, is to become inured to some degree. Charities need to break through this protective barrier if they are to have any immediate impact on our deliberations. This is, I think, acceptable just so long as the intention is to encourage us to acknowledge and reflect on upon particular considerations. It goes wrong when the purpose is to drive us towards a particular conclusion. This is when extra-rational persuasion risks robbing individuals of the opportunity to respond on their own by coming to their own conclusions and proceeding accordingly.

This is, of course, a fine line since my limit applies to the intentions with which someone may deploy extra-rational means. As such, the very same means might be permissible in one case but not another depending on the intention of the persuader. It is reasonable to hope that political authorities possessed of the appropriate intentions will also be likely to use extra-rational means in a more responsible way, but what really matters here is that they approach their expressive role in the right way. As Brettschneider rightly argues, democratic persuasion by the expressive state can perform a vital role in a healthy political community and contribute to the establishment of a democracy worthy of the name. The principal thought underlying the autonomy-based limit is that, ultimately, state intervention to improve our deliberations must only come from a place of respect for citizens as rational agents with a higher-order interest in developing and exercising their two moral powers.

VIII

Conclusion

In this paper I have sought to show that there is a potential problem with Brettschneider's important contribution. Specifically, he is too casual in endorsing extra-rational means of democratic persuasion. I argued that, as it stands, his theory can be interpreted in a way that permits the expressive state to deny important opportunities to its citizens to respond to reasons for themselves, calls into question the authority of the state, and fails to secure stability. I then proposed a third limit to slot in alongside the existing substance and means-based limits. This limit is the autonomy-based limit and it says that extra-rational means of persuasion should only be employed in order to make citizens sensitive to considerations that apply to their publically relevant deliberations. Adopting this limit would preserve the spirit of democratic persuasion and round out its appeal as a novel and action-guiding piece of practical philosophy.

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If you need to cite this article, please use the following format:

Fox, Carl, "The Limits of Democratic Persuasion," *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 125-157, edited by S. Maffettone, G. Pellegrino and M. Bocchiola

SYMPOSIUM

ILLIBERAL VIEWS IN LIBERAL STATES

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© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016): 159-193
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

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Testing Brettschneider's Value Democracy at the Supranational Level

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In *When the State speaks, What Should It Say?*, Corey Brettschneider aims to resolve the dilemma opposing two conceptions of the role of the liberal and democratic state in addressing hateful and/or discriminatory beliefs and practices: the Invasive State, on the one hand, and the Hateful Society, on the other. At one extreme, the Invasive State coerces its subjects by prohibiting the expression of certain discriminatory viewpoints that are inconsistent with the ideal of free and equal citizenship. 'Prohibitionists' would therefore use coercion to promote democratic values and thereby 'promote equality as its expense.'[1] In the Hateful Society, in contrast, 'neutralists' protect the expression of all opinions and may leave deeply discriminatory beliefs and practices 'thrive in a culture of rights'[2] and thereby make the state complicit in those beliefs and practices.

Faced with such dilemma, Brettschneider defends an alternative model, 'value democracy', which aims to avoid the 'dystopias' of coercion or neutrality. Rather than attempting to

[1] Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton: Princeton University Press, 2012), p. 168.
[2] *Ibid.*

 Philosophy and Public Issues (New Series), Vol. 6, No. 1 (2016): 159-193
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

change beliefs and practices by coercing individuals, the state and the citizenry should engage in 'democratic persuasion' by criticizing discriminatory beliefs and practices and persuade them to adopt the founding values of freedom and equality. The state's duty of democratic persuasion does not face the justificatory burden of both the 'prohibitionists' and the 'neutralists' because it is met by the *expressive* and not *coercive* capacities of the state. Democratic persuasion has the advantage that the state and the citizenry actively and publicly defend the 'reasons for rights' (free and equal citizenship) without limiting those rights.

In this article, I aim to test Brettschneider's value democracy at the supranational level. To specify what I mean by 'supranational', it is necessary to concentrate on one central state actor bearing the duty of democratic persuasion, namely courts. Indeed, Brettschneider assigns a central expressive role to courts in 'promulgating the reasons for rights.'[3] While no single state institution holds a monopoly on the expression of those reasons, the opinion of courts is a central and concrete requirement of value democracy. The courts' expressive function helps to resolve the tension between the interest of speakers and listeners in viewpoint neutral protections and the interest of the citizenry in ensuring that democratic values are publicly expressed and hateful views are combatted. Courts are generally asked to give reasons for their judgments, but they not are assigned the specific duty of democratic persuasion that their subjects deserve to know the reasons that underlie their legally protected rights.

Throughout the book, Brettschneider focuses on prominent cases at the U.S Supreme Court—an 'exemplar of public reason'[4]—either to illustrate its expressive role or to critically examine some predominant jurisprudence. In Europe, in contrast,

[3] *Ibid.*, p. 82.
[4] *Ibid.*

it is no longer possible to examine domestic courts without addressing the role of supranational courts. This is surely valid for the Court of Justice of the European Union (hereafter, the CJEU) established by the European Union (hereafter, the EU) but also for the European Court of Human Rights (hereafter, the Strasbourg Court), established by the Council of Europe (CoE), which adjudicates the civil and political rights enshrined in the European Convention on Human Rights (hereafter, the Convention). In supervising the implementation of the Convention and reviewing the domestic legislation (statutory provisions, case law, or executive acts) of forty-seven European state parties to the Convention, the Court bas become of utmost importance to the protection of basic human rights of more than 800 million people.

While it cannot 'strike down' domestic laws but only 'declare' the conformity of domestic law to the Convention, the Strasbourg Court can be qualified as 'supranational' based on its interpretive authority: it holds the final say over the interpretation—hence the content—of the Convention's rights (Article 46). Not only are the state parties to the Convention legally bound by the Court's judgments since the entry into force of Protocol 11 in 1998.[5] A vast majority of state parties also routinely attribute the Court's judgments *direct effect* in the domestic legal order implying that those judgments are directly

[5] The introduction of Protocol 11 amounts to the 'full judicialization' of the Court. It contains three major reforms: first, the old European Commission of Human Rights and its screening role is abolished. Second, the Court becomes a full-time judicial organ in charge of all the tasks previously performed by the Commission. Third, both the rights of individual petition and the acceptance of the Court jurisdiction become compulsory. For an overview, see Robert Harmsen, 'The Reform of the Convention System', in *The European Court of Human Rights Between Law and Politics*, eds. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011).

invocable before any public institution (legislative, executive, judicial) without any legislative step.[6] This makes the Court rather unique among international courts in general and among human rights courts in particular. The conjunction between its concentration on basic civil and political rights and its supreme interpretive role lays down a fertile terrain for an application of value democracy.

By 'testing' Brettschneider's argument at the European level, I aim first to show (in Section 3) how the Court has expressed the 'reasons for rights' in a way that mirrors Brettschneider's moral duty of democratic persuasion assigned to domestic courts. Rather than merely inducing the level of rights protection based on an existing consensus among state parties to the Convention, the Court has adopted a so-called 'teleological' approach that amounts to specifying, in substantive terms, the role that each right ought to play in a 'democratic society.' This approach applies most clearly to the Articles 8—11 of the Convention (privacy, conscience and religion, expression, assembly and association). This promulgation is not only necessary because those rights are in principle derogable—the Court being required to examine whether the interference with one or more rights was nevertheless 'necessary in a democratic society.'[7] As I shall

[6] This attribution of direct effect thereby goes beyond the strict legal obligation of state parties to Convention. As Polakiewicz explains, according to the Court, instead of imposing an obligation to give direct effect to the substantive provisions of the Convention, article 13 of the ECHR only guarantees the availability at the national level of an effective remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured (…).' In Jörg Polakiewicz, 'The Status of the Convention in National Law', in *Fundamental Rights in Europe: The ECHR and Its Member States 1950-2000*, eds. Robert Blackburn and Jörg Polakiewicz (Oxford: Oxford University Press, 2001), p. 32.

[7] 'Necessity in a democratic society' includes 'the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for

explain, this promulgation is the strongest in affirming what it takes to be the foundations of a 'democratic society.' The main implication is that the Court leaves no margin of appreciation to the respondent state party when such values are at stake.

To illustrate this point, I reconstruct (Section 3.1.) the Court's reasons for extending the scope of freedom of expression (Article 10) 'not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb' find a place in the public arena.'[8] This established principle derives from what the Court considers essential to a 'democratic society', namely 'pluralism'—a notion that has constantly helped the Court to fix the limits of all the derogable rights. In my view, the waves of duties required to meet the Court's demand of pluralism echoes Brettschneider's attachment to the interest of speakers and listeners in viewpoint neutral protections. However, while the Court tolerates the expression of those views, it explicitly affirms that they violate the Convention's founding values—and thereby meets its expressive and affirmative duty. I illustrative this role in the case of the public defense of Sharia law in Turkey. The Court's explicit affirmation can be viewed as an instance of democratic persuasion addressed both to the right-holders (individuals) and duty-holders (the respondent state party). However, value democracy also allows us to question the Court's judicial restraint on other rights (such as freedom of religion (Article 9) and

the protection of health or morals, for the protection of the reputation or rights of others, etc..' The grounds for restriction are identical for Articles 8 – 11. For an overview of their application, see Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', *International Journal of Constitutional Law* 7, no. 4 (2009): pp. 619–653.

[8] The seminal case is *Handyside v. United Kingdom,* App. No. 5493/72, 7 December 1976, §50.

privacy (8)) on which the margin of appreciation is more salient. Indeed, an important implication of value democracy is that religious beliefs and practices should not be exempt from the principle of public relevance. I suggest (Section 3.2.) that if the Court were to apply value democracy consistently, it should significantly revise its established case law. I examine in particular the recent case of crucifixes in Italian schools.

Moreover, if Brettschneider's value democracy can both illuminate the Court's rights-promulgation and suggest how to revise parts of its case law, the practice of international courts can also put in question some assumptions of his international model of democratic persuasion. In his (regrettably short) conclusive chapter ('Value Democracy at Home and Abroad'), Brettschneider considers the implications of the model for international law: 'a second implication of the book's view is that it can also serve as a model for understanding how to promote ideals of equality in international law without violating the rights of individuals or the rights of states."[9] Interestingly, however, Brettschneider seems to defend a more modest account of value democracy at the international level: in contrast to the domestic level, where courts play a central persuasive function, the mere fact of 'signing the treaty is one way for states to use their expressive capacities abroad.'[10] Referring mostly to UN human rights treaties, Brettscheider assumes that 'because there is no international state that can threaten coercion, international law often relies on mechanisms of persuasion.'[11]

[9] Brettschneider, *When the State Speaks, What Should It Say?*, p. 181.
[10] *Ibid*., 172.
[11] *Ibid*., 171.

This modest account is puzzling. As I explain in Section 4, what marks the development of international law over the last two decades is the establishment of judicial or quasi-judicial institutions protecting individual rights against standard threat(s) of their states. Should those institutions (e.g. UN Treaty Bodies, the Strasbourg Court, but also the International Criminal Court (hereafter, the ICC) and Special Tribunals play the same expressive role as constitutional courts? Beyond the question of the *function* of international courts, the question of the *content* that those organs should affirm is pressing. Surprisingly, in Brettschneider's account the central value to be expressed is identical to the domestic level: democratic citizenship. The extensive corpus of anti-discrimination norms can certainly support Brettschneider's preservation of equality as one founding value of international human rights law. But as the predominant literature in human rights theory suggests, the same is not necessarily true of democracy. I suggest in Section 4.1 that an important and intermediary step is missing—one that more clearly connects democratic citizenship to human rights. I argue that this connection can meaningfully obtain by appealing to a variant of what human rights theorists have called the 'political conception' of human rights in order to sustain a identity between the two levels of rights-promulgation: international courts should express values by which their state subjects (and the individuals those states serve) have reasons to abide domestically *qua* democratic states. With a view to develop value democracy further, I finally sketch in Section 4.2 how one can potentially apply democratic persuasion to international criminal courts by relying on a freedom- and equality-enhancing account of the criminal law. This identity thesis is facilitated by the primarily *declaratory*, and therefore *non-coercive*, function of international courts. This account therefore further develops the profoundly liberal attachment to persuasion.

II

Courts and the reasons for rights

The realization of value democracy depends on the expressive rather than coercive capacities of state institutions in combatting beliefs and practices that are at odds with the values of free and equal citizenship. When hateful and/or discriminatory viewpoints are expressed, state institutions must, on behalf of the citizens they represent, criticize and attempt to change those beliefs and practices by persuasion. Affirming the 'reasons for rights' is thereby crucial to the very possibility of an alternative to the Hateful Society and the Invasive State. If state actors remain neutral, 'they fail to answer the challenge that hateful viewpoints pose to the core democratic values of freedom and equality.'[12] If they prohibit the expression of those views (by law), they also fail to abide by the reasons why liberal rights are protected in the first place, namely the freedom and equality of their subjects. The promulgation of the reasons for rights is therefore a *moral* duty based on the deontological status of individuals: 'these reasons appeal to the entitlement of each citizen, whose is subject to coercion, to be treated as free and equal.'[13] As such, it is a 'diffuse duty incumbent in all state actors and citizens.'[14]

Is there nonetheless anything distinctive to the courts' expressive and persuasive role? It seems that there is. Courts have a general duty—a *legal* one—to publicly express reasons for their judgments. This duty does not derive from the particular ideal of value democracy but from the more general ideal of the rule of law. As Brettschneider puts it, 'the content of law should be publicized so that citizens can predict when their actions will be

[12] *Ibid*., p. 72.
[13] *Ibid*., p. 73.
[14] *Ibid*., p. 151.

sanctioned.'[15] This is also the case at the Strasbourg Court in reviewing domestic legislation.[16] But courts in the Hateful Society do not have to give the kind of 'reasons for rights' that Brettschneiders asks them to give: 'I would add that citizens should not only know their rights and the rules that are set out by law; they should also know what the reasons are for these rights and legal rules.'[17] This is where two distinct duties, one *legal-prudential* and one *moral-democratic*, happily meet. In addition to their recognized authority to strike down illegitimate laws, courts are particularly well placed to endorse the further *explanatory* task of democratic persuasion, that is, to explain 'why certain laws are legitimate or illegitimate and when it speaks in favor of the values of free and equal citizenship.'[18] This is even more the case of judicial authorities such as the U.S. Supreme Court and the Strasbourg Court given their particular position of ultimate interpreters of the law.

Now let us see how value democracy concretely applies in judicial practice by quickly recasting Brettschneider's evaluation of two important Supreme Court cases: *Virginia v. Black* (2003) and *Church of the Lukumi Babalu Eye v. City of Hielah* (1993). I choose to concentrate on freedom of expression (in *Virginia*) and freedom of religion (in *Lukumi*) as this continuum offers us

15 *Ibid*., p. 82.

16 The publicity of law is also found in the Strasbourg Court's criteria of legality. As the Court held in *Sunday Times v. United Kingdom*, 'the law should be accessible to the persons concerned and formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.' *Sunday Times v. United Kingdom (No. 1)*, App. No. 6538/74, 26 April 1979, §51. For a recent case, see e.g. *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, App. No. 33014/05, 5 May 2011, §65-66.

17 Brettschneider, *When the State Speaks, What Should It Say?*, p. 82.

18 *Ibid.*

strong reasons to criticize the dis-continuum that prevails in the Strasbourg Court's case law. In *Virginia v. Black*, the Supreme Court held that an act of cross burning is to be prohibited if it threatens particular individuals with the intention to intimidate. Brettschneider suggests—with the support of Justice O'Connor's opinion—to preserve the distinction between threats and viewpoints: while the threatening of particular individuals should be prohibited, the banning of cross burning without the intention to intimidate would imply departing from the core principle of 'viewpoint neutrality' and thereby fail to treat persons as free and equal. Indeed, 'respect is owned not to specific viewpoints per se, but to individual citizens.'[19] This explains why the act of cross burning should not be banned despite that it 'opposes the normative reasons that underlie its legality in the first place.'[20] But it is not enough to protect this founding principle by enforcing it. Courts should 'emphasize why the act of cross-burning is an affront to this ideal (…).'[21] If that affirmation is not provided, it runs the risk that the meaning of the rights-protection will be inverted. Hence the 'substance-based limit' according to which value democracy only promotes the shared value of free and equal citizenship is respected.

In *Lukumi*, the councilmen of the city of Hielah (Florida) had passed a law that prohibited the religious practice of animal sacrifice with particular reference to the Santeria religion. While the city's law may be seen as protecting animal welfare, it did not prohibit other forms of animal sacrifice deemed slow or painful. What raises Brettschneider's interest in this case is the kind of reasons invoked by the city's councilmen to pass the law, namely the intent to burden the Santeria religion specifically on the basis

[19] *Ibid.*, p. 80.
[20] *Ibid.*, p. 86.
[21] *Ibid.*

of their own Christian (and therefore discriminatory) religious principles. If the court did just protect the members of the Santeria religion, one could conclude that it is 'neutral and has no opinion about religious views.'[22] But in conformity with value democracy, courts should not only protect liberal rights (in this case freedom of religion) but also criticize views that oppose equal citizenship (in this case the councilmen's justification of the prohibition), which the Supreme Court did in its decision. Brettschneider points out that 'far from having no opinion about all religious beliefs, the Court is protecting one set of religious beliefs while criticizing another.'[23] One can concretely see here how courts can play this double function of both protecting the right and expressing the reasons for the right. The 'means-based limit' requires using the state's expressive and not coercive capacities.

Let us now view those judicial conclusions through the core moral principles of value democracy before turning to the European context. The first principle is the one of 'viewpoint neutrality', according to which rights should protect the expression of all opinions and beliefs without discrimination. This principle derivees from the interest of individuals to 'develop their own notion of justice and the good'[24] illustrated notably in Rawls' 'two moral powers' of the person. This applies to the act of cross burning in or to the practice of animal sacrifice. The individual interest in exercising those two moral powers forms the basis for legally protecting liberal rights for all. However, this goes for both the Hateful Society and value democracy. For the added value of the latter model to emerge, one must more closely examines the scope of the state's duty of viewpoint neutrality:

[22] *Ibid*., p. 147.
[23] *Ibid.*
[24] *Ibid*., p. 79.

'viewpoint neutrality requires that the state not coercively limit the free speech, but it does not give the state the obligation to be neutral when it comes to the defense and expression of the values central to its own legitimacy.'[25] As a result, viewpoint neutrality leaves a space open – a space that can be occupied by a collective interest derived from the same founding values of freedom and equality, namely the interest in 'seeing that the viewpoints consistent with the values of free and equal citizenship succeed while those inimical to those values fail.'[26] Because of its wide expressive capacities, the state should use that space to promote the values upon which its very legitimacy depends.

III

The 'reasons for rights' at the European Court of Human Rights

Having surveyed Brettschneider's value democracy in courts and traced back to its core principles, I now want to show how the model can illuminate an important component of the Strasbourg Court's case law. In order to smoothly switch from North American context to the European one, I concentrate on the same rights reviewed above, namely freedom of expression (Article 10) and freedom of religion (Article 9). Before reconstructing the Court's reasoning, let me mention in more general terms how central the value of democracy is to the Convention and to the institution from which it emerged, namely the CoE. Legal historians are clear that democracy played a significant role in supporting the creation of the Convention nascent system. More precisely, among the civil society activists and politicians in and around the European Movement in 1949,

[25] *Ibid*., p. 80.
[26] *Ibid.*

the priority was to install an intergovernmental 'alarm bell'[27] system against the return of totalitarian practices while drafting states aimed to 'lock up'[28] the democratic process against internal opponents. Article 2 of the first draft of the Convention prepared by the European Movement in 1948 (before it reached the legislative and executive levels of the CoE) required each state party 'faithfully to respect the fundamental principles of democracy' and to proscribe any action 'which would interfere with the right of political criticism and the right to organise a political opposition.'[29]

This historical point allows me to place another introductory remark about interpretation at the Court. It is now widely documented how the Court has over the years dismissed most of the conventional doctrines of treaty interpretation. That is, rather than fixing the level of protection of rights upon state intent (*intentionalism*), upon the ordinary meaning of treaty terms in the legal culture of the respondent state party (*textualism*) or upon an

[27] As Bates explains, the Court 'would be the conscience of the free Europe, acting like an 'alarm bell' warning the other nations of democratic Europe that one of their number was going 'totalitarian.' At this stage, then, the human rights guarantee was minimalist in its ambition.' In Ed Bates, 'The Birth of the European Convention on Human Rights-and the European Court of Human Rights,' in Ed Bates, 'The Birth of the European Convention on Human Rights,' in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011), p. 19.

[28] In his seminal article, Moravcsik argues that the explanation lies in the state's tactic to consolidate democratic institutions vis-à-vis internal political opponents in times of uncertainty: 'sovereignty costs are weighted against establishing human rights regimes, whereas greater political stability may be weighted in favour of it.' In Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,' *International Organization* 54, no. 2 (2000): p. 220.

[29] See *European Movement and the Council of Europe* (Published on behalf of the European Movement by Hutchinson, 1949).

existing consensus among state parties to the Convention (*consensualism*), the Court has progressively applied what has been called a 'teleological method' of interpretation that amounts to addressing the substantive content of the rights.[30] While I cannot retrace the precise evolution of its methodology, it appears that this substantive approach developed when the Court gained compulsory jurisdiction in 1998. In the following year, it for instance affirmed in *Matthews v United Kingdom* that 'the mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.'[31] While such approach is (yet) not valid for all the rights of the Convention—the Court has for instance not delineated the contours of what 'religion' precisely amounts to and accords a wide margin of appreciation[32], the Court has made a special effort in explaining the normative role of freedom of expression in a 'democratic society.'

[30] The teleological approach has its origins in the Vienna Convention of the Law of Treaties of 1969. The Court originally referred to the 'object and purpose' (Article 31(1) of the VCLT) of the Convention on the basis of the Preamble (and also Article 3 ECHR) that refers to the 'common heritage of the political traditions, ideals, freedom and the rule of law' of the states parties. On this point, see George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,' *The European Journal of International Law* 21, no. 3 (2010): pp. 509–41.

[31] *Matthews v. United Kingdom*, App. No. 24833/94, 18 February 1999, §39.

[32] This is for instance the case of scientology. In *Kimlya and Others v. Russia*, the Court held that 'the Court observes that the question whether or not Scientology may be described as a 'religion' is a matter of controversy among the member States. It is clearly not the Court's task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a 'religion' within the meaning of Article 9 of the Convention.' *Kimlya and Others v. Russia*, App. Nos. 76836/01, 32782/03, 1 October 2009, §79.

3.1. *Freedom of expression*

Indeed, the Court established from very early cases on how free expression *serves* democracy. In the seminal *Handyside v. United Kingdom*, which pertained to the publication of the Little Red School Book encouraging young people to reflect on societal norms including sex and drugs, the Court held that 'freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (…).'[33] The *individual* dimension of the right is therefore salient. However, since then the Court has not further specified this individual dimension. Rather, it has established (as a matter of principle) how freedom of expression benefits a 'democratic society' as a whole. To understand this relation, one should first capture the role that 'pluralism' plays in the reasoning: since the same *Handyside v. United Kingdom*, the Court routinely relies on the Preamble's passage that 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'"[34] to explain the importance of freedom of expression and extend its correlative duties. Indeed, to allow for an inherent pluralism to flow is clearly not enough to realize 'democratic society' in the Court's view. Another general and more significant principle of the case law is that such freedom

> 'is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[35]

[33] *Handyside v. United Kingdom,* App. No. 5493/72, 7 December 1976, §50.
[34] *Ibid.*
[35] *Ibid.*

This is where one can start testing the Court's principled reasoning against the tenets of Brettschneider's value democracy. As explained in Section 2 of the article, value democracy combines two interests, one individual and the other collective, that are both derived from the same 'reasons for rights.' The individual interest in exercising moral powers implies protecting the expression of all opinions and beliefs without discrimination—even those views that blatantly deny that same equality to others. This individual interest resonates rather well with the Court's widely established principle that 'freedom of expression constitutes (…) one of the basic conditions for its progress and *for the development of every man* (…)' (my emphasis). In more recent cases, the Court also refers to 'individual's self-fulfillment.'[36] In turn, the Court's second established principle that freedom of expression 'is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or offend (…)' can be viewed as embodying the doctrine of 'viewpoint neutrality' in the U.S. context.

Now it is one thing to establish those principles *in abstracto*, yet another to calibrate *in concreto* the situations to which they apply and therefore determine the extent to which one's views can be 'offensive', 'shocking' or 'disturbing.' The Court may indeed state those general principles but then retract itself (by granting a margin of appreciation) in the face of the lack of an existing consensus between members of the CoE. This is where a more fine-grain analysis of cases is necessary. I deliberately concentrate on the class of extremist political and religious groups. Those cases are particularly relevant because political or religious groups defending and promoting an openly illiberal and undemocratic agenda can reach a high number of citizens (as the American

[36] *Gündüz v. Turkey*, App. No. 35071/97, 4 December 2003, §37.

Nazi Party in Brettschneider's account). Let me concentrate on the case of *Gündüz v. Turkey*, which pertained to the leader of an Islamic sect defending Sharia law on an independent Turkish television channel. The National Security Court of Turkey found that the defendant's views violated the Turkish criminal code provision related to incitement to violence. More specifically, it held that the defendant

> 'describes concepts such as democracy, secularism and Kemalism as impious [*dinsiz*], mixes religious and social affairs, and also uses the word 'impious' to describe democracy (…). The Court is satisfied beyond reasonable doubt that the defendant intended openly to incite the people to hatred and hostility on the basis of a distinction founded on religion.'[37]

By relying on a particular religious doctrine as applicable to all, the defendant's view—the political project it contains—implies denying freedom and equality to non-believers on which the right to freedom of expression itself relies. In turn, the National Security Court's reasoning echoes Brettschneider's prudential justification of value democracy, namely that neutralism runs the risk of turning into a Hateful Society in which discriminatory beliefs and practices 'thrive in a culture of rights.'[38]

In its review of Turkish courts, the Strasbourg Court first acknowledged that the applicant's views can offend the Turkish people's attachment to secularism: 'the Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner.'[39] But despite those costs and the risk of a thriving

[37] *Gündüz v. Turkey*, §15.
[38] Brettschneider, *When the State Speaks, What Should It Say?*, 168.
[39] *Gündüz v. Turkey*, §49.

hostility, the Strasbourg Court found that Turkey violated Article 10. The main reason is that the Turkish court failed to consider the conditions in which those views were received in the debate – more precisely, that they were heavily counterbalanced:

> the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.[40]

I suggest that by emphasizing the reception of the applicant's view by the public (the other participants to the program), the Strasbourg Court points to the second (collective) interest that grounds value democracy, namely the state's interest (on behalf on all the citizens) 'in seeing that the viewpoints consistent with the values of free and equal citizenship succeed while those inimical to those values fail.'[41] But as we have seen, the duty of persuasion does not only fall upon citizens. In other words, the Turkish court should not only have allowed those views to be held. It should have criticized those views based on 'the reasons for rights.' While the Strasbourg Court did not assess the case based on this criterion, it explicitly affirmed the incompatibility of Sharia law with democracy, which points to the expressive capacity of the Strasbourg Court itself:

> As regards the relationship between democracy and sharia, the Court reiterates that in *Refah Partisi (the Welfare Party) and Others v. Turkey* (…), it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which

[40] *Ibid*., §51.
[41] Brettschneider, *When the State Speaks, What Should It Say?*, p. 80.

> faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts.[42]

Surely, one may say that the Strasbourg Court fulfilled half of its duty of 'democratic persuasion.' Indeed, the court merely *criticized* the view held but did not attempt (at least not explicitly) to *persuade* the sect's leader to adopt the values of freedom and equality. But by both respecting viewpoint neutrality and by explicitly and principally criticizing Sharia law, one may conclude that the Strasbourg Court made good use of its expressive capacities. One legal remark is needed here: when one uses 'capacity' in this context, one should not forget that the Strasbourg Court cannot 'strike down' domestic law as the U.S. Supreme Court. The international nature of the Court implies that it *declares*, but not *enforces*, its own judgments. The execution of judgments falls back on the state parties. Therefore, the capacities of the court are not coercive but only *expressive* and *persuasive*. Moreover, this expressive role is double: the court has to offer reasons not only to right-holders (individuals) but also to duty-holders (states). I come back to this distinction in Section 4 of the article when I examine Brettschneider's implication of international democratic persuasion.

3.2. *Freedom of religion*

Now what is distinctive of the model of value democracy is its extension to freedom of religion. That is, religious beliefs and practices should not be exempt from the principle of public

[42] *Ibid.*

relevance. I want now to show that this extension can help us questioning the Strasbourg's Court judicial restraint on Article 9 (freedom of religion) on which it has tended to accord a wide margin of appreciation. Value democracy applies to religion on the basis of the same 'reasons for rights': 'some of these religious practices and beliefs are at odds with religious freedom itself.'[43] Brettschneider is fully aware of the special character of religion (e.g. its 'insularity'). In treating it on a par with expression, value democracy puts in question the underlying thought that freedom of religion 'is endangered whenever religious beliefs are burdened or changed.'[44] For Brettschneider, in contrast, 'abandoning the discriminatory or hateful aspects of religious doctrines is not tantamount to abandoning religions belief itself.'[45]

For the Strasbourg Court, things are different. True, the Court has established a number of principles suggesting that religion and expression, given their centrality to 'self-development', are necessary to a well-functioning 'democratic society': 'it is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life (…).'[46] The exercise of inherent moral powers is here certainly implied. Further, the Court has derived the principle of viewpoint neutrality from that premise: 'the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed.'[47] So far, so good. But as indicated above, a key step of the Court's review is when it balances those established principles with the arguments put forward by the

[43] *Ibid*., p. 147.
[44] *Ibid*., p. 145.
[45] *Ibid*., p. 158.
[46] *Kokkinakis v. Greece*, App. No. 14307/88, 25 May 1993, §31.
[47] *Bayatyan v. Armenia*, App. No. 23459/03, 7 July 2011, §120.

respondent state party, which may terminate in the attribution of a margin of appreciation. This is seen in the much debated case of *Lautsi v. Italy* (2011), which pertained to the practice of hanging crucifixes in Italian classrooms. The applicants, a father and his two children, argued on the basis of viewpoint neutrality:

> The applicants contended that every democratic State had a duty to guarantee the freedom of conscience, pluralism, equal treatment of beliefs and the secular nature of institutions. The principle of secularism required above all neutrality on the part of the State, which should keep out of the religious sphere and adopt the same attitude with regard to all religious currents (…). By imposing religious symbols, namely crucifixes, in classrooms, the Italian State was doing the opposite.[48]

In contrast, the Strasbourg Court (the Grand Chamber) found that such practice fell within the margin of appreciation left to state parties and thereby did not find a violation of Article 9. This is all the more surprising as the Chamber previously found a violation of Article 9 precisely by relying on the state's positive duty of neutrality. To overrule the Chamber and justify its judicial restraint, the Grand Chamber listed a number of facts: the 'passive symbol' of the crucifixes and its weak influence on pupils; the fact that the presence of crucifixes is not associated with compulsory teaching about Christianity; the pupils' guaranteed freedom to wear religious symbols in class (such as headscarf); the fact that religious teachings were optional; and the absence of 'teaching practices with a proselytising tendency.'[49] In conclusion, the Court held that:

[48] *Lautsi v. Italy*, App. No. 30814/06, 18 March 2011, §47.
[49] *Ibid.*, §47.

> there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.[50]

It seems to me correct to hold that the state did not actively promote a particular religious doctrine *beyond the hanging of crucifixes itself*. Irrespective of that *activ*e neutrality, the *passive* practice of hanging crucifixes seems to me at odds with the commitment to freedom and equality that form the basis of religious freedom – 'reasons for rights' argument. Even if the facts were to point only to a weak influence on the formation of religious beliefs, this practice still gives one religious doctrine a widely institutionalized advantage over others and does not cohere with the state's wide secular efforts.

Further, in conformity with its duty of persuasion, the Grand Chamber should also have criticized the reasons provided by the Italian courts for preserving this practice. Indeed, central to the defense of the Italian Administrative Court (later confirmed by the Supreme Administrative Court) was the historical argument that the principle of secularism is inherent and was 'born out' of Christianity:

> it is easy to identify in the constant central core of Christian faith, despite the inquisition, despite anti-Semitism and despite the crusades, the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State.'[51]

While the Grand Chamber mentioned this passage in its review of Italian law, it did not address it in the balancing. To recall, democratic persuasion requires that courts *qua* state actors should not just rely on their power to strike down illegitimate

[50] *Ibid.*
[51] *Ibid.*, §11.6.

laws. It also should and criticizes the reasons that presided over the adoption of those laws. Therefore, I want to argue that the Grand Chamber should not only have found a violation of Article 9 on the ground of state neutrality. More subtly, it should also have explained that irrespective of the hypothesized *historical* and therefore *descriptive* relation between secularism and Christianity, secularism as a *normative* principle stands firmly on its foundations of the inherent moral powers of individuals—the 'reasons for rights.' In my view, the grounding of neutral principles (secularism) in historical considerations (Christian history) remains ambiguous. In other words, the Strasbourg 'voice' lost an occasion to defend the reasons and values that underlie basic liberal rights as the U.S. Supreme Court did in *Lukumi*.

IV

Democratic persuasion at the international level: what role for courts?

In the precedent section, I showed how Brettschneider's value democracy can help both illuminating the Court's rights-promulgation (on freedom of expression) and suggesting how to revise pans of its case law (on freedom of religion). As I explained earlier, the *prima facie* reason for screening the practice of the Court with value democracy is the founding role of democracy and its pregnant justificatory role in the case law. But if one wants to render justice to Brettschneider's book, one should also view the practice of the international courts through the lens of his conclusive chapter entitled 'value democracy at home and abroad.' Indeed, however important the reception of its judgments is domestically, the Strasbourg Court remains an international organ established by an international organization (the CoE) on the basis of an international treaty (the

Convention). As Letsas puts it, being an international treaty – the objection goes—the ECHR lacks the attribute of legality, as we know it in municipal law.[52] What quickly emerges from the last chapter is that while the *content* of the duty of democratic persuasion remains the same at the international level (equal citizenship), the *identity* and the *function* of the actor bearing this duty remains under-specified. For Brettschneider, the signing of an international human rights treaty or the discourse of governments are enough to count as instances of international persuasion. An important question is thereby left unanswered: should international courts (human rights courts, UN Treaty Bodies, but also international criminal courts) play the same expressive role as constitutional courts? And which values should they express *qua* international courts?

4.1. *Human rights law*

Let me first tackle the question of the *function* of international human rights law. Referring mostly to UN human rights treaties, Brettscheider claims that 'because there is no international state that can threaten coercion, international law often relies on mechanisms of persuasion.'[53] As a result, Brettschneider opens the class of expressive acts to the signature of international treaties or simply to discourses of governments. It is undoubtedly correct that international law in principle relies on states for its enforcement.[54] But it does not follow that international law—in

[52] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009), 31.

[53] Brettschneider, *When the State Speaks, What Should It Say?*, p. 171.

[54] For instance. It has been advanced that seventy per cent of the Views delivered by the Human Rights Committee (HRC) established by the ICCPR are not implemented. For a recent analysis of the effects of the decisions of UN treaty bodies, see Rosanne Van Alebeek and André Nollkaemper, 'The

particular human rights law—has not given rise to judicial or quasi-judicial organs empowered by those same states to promulgate what one may call 'the reasons for international rights.' This is not only true of the Strasbourg Court, which promulgates the reasons for rights and thereby attempts to provide democratic reasons to its subjects (states and individuals) as we have seen. Some UN human rights treaties (including the CEDAW to which Brettschneider refers) also have established quasi-judicial organs, namely Treaty Bodies, whose function is precisely to specify and hence potentially 'express' the content of abstract moral norms enshrined in treaties. The question is thereby whether those quasi-judicial organs—the 'principal interpreters'[55] of UN human rights treaties—should perform the same expressive function as domestic courts.

Brettschneider rightly explains that such a project is ambitious and cannot be fully developed in a conclusive chapter. Nonetheless, Brettschneider seems to assume that the current quasi-judicial framework, namely Treaty Bodies, suffices to meet to the duty of democratic persuasion. It is true that the Views and Recommendations adopted by Treaty Bodies ought to authoritatively guide the states' interpretation of human rights norms—'the Views have a judgment-like quality.'[56] They may even ask—similarly to constitutional courts—for structural reforms such the amendment or repeal of legislation, the reopening of national proceedings, the release of prisoners, an investigation to establish the facts, the restitution of property,

Legal Status of Decisions by Human Rights Treaty Bodies in National Law', in *Human Treaty Bodies: Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012).

55 *Ibid*., p. 358.

56 Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in *Human Treaty Bodies: Law and Legitimacy*, eds. Helen Keller and Geir Ulfstein (Cambridge University Press, 2012), p. 266.

etc.).[57] More importantly, they may optionally allow for an individual right of complaint (such as the CEDAW). As a result, the addressee of the rights-promulgation is not just states in the final report but also individuals in the procedure. But do Treaty Bodies thereby enjoy the same 'expressive' legitimacy as constitutional courts? Treaty Bodies are not judicial organs *stricto sensu*. International human rights law lacks anything close to a central supranational judicial organ for authoritatively adjudicating state-individual disputes similar to the one we have in constitutional or regional regimes. Moreover, the human rights experts forming Treaty Bodies are not constitutional judges. As a result, it would be worth asking Brettschneider about the criteria for an international human rights institution to count as an 'expressive' agent with an identical 'rights-promulgating' function to domestic courts in a world deprived of a global sovereign. The same question applies *in fine* to the Strasbourg Court too: despite its compulsory jurisdiction and the compulsory right to individual petition, the Court does not rule in the name of a supranational political community and rather offers 'democratic' reasons to states. As we have seen, the lack of consensus within the CoE justifies allocating a margin of appreciation as in the case of freedom of religion. Should international courts still affirm the same reasons for the same catalogue of rights or opt for an incremental approach—a form of 'judicial diplomacy' as in the case of the Strasbourg Court?[58]

[57] Van Alebeek and Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law', p. 361.

[58] In the case of the Strasbourg Court, Madsen described the Court's first fifteen years as a form of 'legal diplomacy': 'a very measured legal development over the first fifteen years where the objective of providing justice to individuals was carefully balanced with both national and geopolitical interests.' In Mikael Rask Madsen, The Protracted Institutionalization of the Strasbourg Court, in *The European Court of Human Rights Between Law and Politics*, eds. Jonas

It quickly appears that the argument for the 'identity thesis' between the national and international levels of right-promulgation directly depends upon the more vexing question of the content of human rights norms. Surprisingly, Brettschneider replicates the values promoted domestically onto the international level: democratic citizenship. Surely, the extensive corpus of anti-discrimination norms across human rights law support Brettschneider's preservation of equality as one founding value of international human rights law. The egalitarian dimension of human rights norms has also been developed in the recent philosophical literature.[59] Moreover, Brettschneider's concentration of CEDAW is also understandable given value democracy's deployment into the private sphere. But one may argue—in line with a still predominant literature—that what is valid for equality is not *prima facie* valid for democracy. Following a long Rawlsian tradition[60], it has been maintained that the right to democracy does not fall within the class of human rights. In the more recent literature, Charles Beitz defends a 'practical' conception of human rights in which the right to democracy does not pass his first criterion, namely that the right protects a fundamental interest 'across a wide range of possible lives.'[61] In

Christoffersen and Mikael Rask Madsen (Oxford: Oxford University Press, 2011), p. 50.

59 Allen Buchanan for instance argues that human rights 'foster the public recognition of equal basic status for all in all society.' In Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2014), p. 88.

60 John Rawls, *The Law of Peoples: With 'The Idea of Public Reason Revisited'* (Cambridge: Harvard University Press, 2001), Section 9. See also Joshua Cohen, 'Is There a Human Right to Democracy?' in *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, ed. Christine Spynowich (Oxford: Oxford University Press, 2006).

61 Charles Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), 111. The two other criteria of human rights are their 'advantageous protection by the state' and their suitability for some form of 'international

reaction to Beitz' excessively 'practical' conception, human rights theorists have recently articulated a modified 'political' conception of human rights in which democratic citizenship and human rights contribute to the quest for political equality. In my view, this intermediary step is needed to support the 'content-identity' thesis and thereby support Brettschneider's assertion that 'democratic persuasion, far from being out of place at the global level, is at the heart of much international human rights law.'[62] Let me articulate one suggestion below.

The driving thought is that human rights and democratic citizenship have in common the fundamental premise of the equal moral status of individuals in their moral-political communities—a status that ought to be recognized before all public institutions (legislative, executive, judicial at the domestic, regional or international levels). This is how Samantha Besson (among others) understands the 'point of passage' from a general and fundamental interest to a human right: 'the threshold of importance and point of passage from a general and fundamental interest to a human rights is reached, may be found in the normative status of each individual *qua* equal member of the moral-political community.'[63] One may further develop the point with Rainer Forst's reflexive argument that human rights protects and expresses the equal status of individuals as 'agents of justification' within any moral-political community – that is, human rights are all grounded in 'a right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political

concern.' See *Ibid*., pp. 138–139.

62 Brettschneider, *When the State Speaks, What Should It Say?*, p. 172.

63 Samantha Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation,' in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, eds., *Philosophical Foundations of Human Rights* (New York: Oxford University Press, 2015),p. 282.

structure or law that claims to be binding upon him or her.'[64] Two important implications follow. First, the individuals' equal interest in participating to collective decisions that affects them all is obtained. Human rights 'generate duties on the part of public authorities not only to protect equal individual interests, but also individuals' political status *qua* equal political actors.'[65] This is where one can find the connecting thread between human rights and democratic citizenship that Brettschneider assumes. Second, the complementary relation between international human rights and constitutional law as forming the 'dual-sourced sovereignty'[66] characteristic of international law post-1945 is also obtained. That is, human rights and constitutional rights operate as the basis *for* and the constraint *on* the self-determination of states. Interestingly, this relation is salient in the European context analysed earlier: the Strasbourg asserts its authority—leaving no margin of appreciation—by invoking the 'democratic reasons for rights' that places the conditions of the procedure of mutual justifiability to occur. This bridging link between human rights and democratic citizenship hopefully supports the 'content-identity' that Brettschneider presupposes.

Now there is a more general reason why Brettschneider's neglect of the increasingly important international judiciary is puzzling: the structure of international law's operation – in which courts promulgate and states enforce – fits Brettschneider's central attachment to persuasion over coercion particularly well. Brettschneider mentions it (p.173) but does not account for the various international judicial organs to which it could apply. In

[64] Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,' *Ethics* 120, no. 4 (2010): p. 719.
[65] *Ibid*., p. 283.
[66] *Ibid*., p. 280.

analogy to domestic courts attempting to convince individuals to conform to its founding values, international courts attempt to convince both duty-bearers (states) and right-holders (individuals) of conforming their beliefs and practices to the ideal of freedom and equality. I illustrated this structure in the European human rights context above: the Strasbourg Court is strongly promoting ideals of democracy and equality in trying to persuading their subjects (states and individuals) by offering 'democratic' reasons, while respecting those subjects sovereign rights of states—through the principle of subsidiarity—in analogy to the state not seeking to prohibit citizens from expressing hateful views. In other words, the very function of the international judiciary seems particularly well-suited to incorporate the model of democratic persuasion. Let me pursue this idea in the context of international criminal courts below.

4.1 *International criminal law*

With a view to further extend the expressive function to international courts, I finally want to test value democracy against other another fast-developing body of international law, namely international criminal law and its various judicial organs: the ICC, the Special Tribunals (ICTY, ICTR, etc.) or just state parties to the Rome Statute (on the basis of universal jurisdiction). Legal and political theorists have recently tackled the question of the moral reasons in virtue of which international criminal courts ought to 'pierce the veil' of state sovereignty in order to prosecute, adjudicate and enforce international criminal law. In the criminal context, the question more precisely pertains to the nature and scope of the moral community to which wrongdoers (e.g. perpetrators of crimes against humanity) ought to answer

under a non-instrumentalist account of the criminal law.[67] Here again, the world is deprived of a global political community to which wrongdoers could respond. The literature is rather divided. Anthony Duff for instance suggests that given the destructive effects of international crimes, 'there is no basis left on which to identify a political community to which their perpetrator ought to answer.'[68] The community cannot but be aspirational. Others argue that international crimes (e.g. crimes against humanity) are attacks on a substantive 'human dignity', the violation of which creates a universal moral community to which wrongdoers should respond. Crimes against humanity are distinctive crimes in that they 'deny their victims the status of being human.'[69]

I want to suggest that Brettschneider's account of 'international democratic persuasion' can help us delineate an alternative model of the expressive function of international criminal courts. Roughly put, the argument goes as follows: when the ICC's prosecutor delivers a warrant of arrest (usually the first step of the procedure), it does not only re-affirm the inherent status of individuals odiously attacked (such as Renzo's 'dignity') in the name of a universal moral community. While it cannot enforce the warrant, the ICC can also attempt to convince state authorities that a well-functioning criminal law system counts among the crucial standards to improve their legitimacy *qua* state authorities. More than expressing the dignity of the victims, therefore, international courts can persuade states of their crucial

[67] I refer here primarily to Anthony Duff's accountability model. See Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2003).

[68] Antony Duff, 'Authority and Responsibility in International Criminal Law,' in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010), p. 598.

[69] Massimo Renzo, 'Crimes Against Humanity and the Limits of International Criminal Law,' *Law and Philosophy* 31, no. 4 (2012): p. 448.

role of providing their subjects with the guarantees of the criminal procedure, that is, that state authorities will use coercion (public prosecution, adjudication and enforcement) *if and only if* their subjects' right to freedom and equality is seriously endangered. The 'reasons for rights' in the domestic, constitutional context become the 'reasons for establishing a trial' in the international, criminal context. What both have in common is a set of reasons that appeal to the founding values of liberal states, namely their subjects' freedom and equality and the institutional arrangements that sustain them.

Now how exactly the criminal law sustains the liberal state's founding values need to be clarified in a further project. Malcolm Thorburn has recently defended the generic argument in the domestic context under a so-called 'public law' approach to the criminal law.[70] This approach contrasts with the predominant 'legal moralist' conception of the criminal law according to which the structure of the criminal law simply mirrors the moral relations that ordinarily take place in the private sphere. In Thorburn's 'public law' account, in contrast, the basic function of the criminal justice system is not to enforce a particular and/or substantive moral view but to secure the individuals' basic sphere of freedom and equality owed to individuals *qua* citizens; it is therefore 'concerned with ensuring the institutional conditions within which it is possible to make moral choices without thereby undermining our own status as the equal of those around us.'[71] In other words, the criminal justice system promises to enforce those conditions in the name of our basic moral equality: 'the law focuses on each person's jurisdiction—the set of issues that it is

[70] Malcolm Thorburn, 'Criminal Law as Public Law,' in *The Philosophical Foundations of Criminal Law*, ed. Antony Duff and Stuart Green (New York: Oxford University Press, 2010).
[71] *Ibid*., p. 42.

up to them to decide—and the state promises to enforce the limits of jurisdiction in the name of us all.'[72] Translated onto the international level, international criminal courts can make use of their expressive capacities and aim either to incite states to establish a well-functioning criminal justice system or persuade them that establishing international trials on behalf of an unwilling or/and unable state amounts to re-installing the role of the criminal justice system in the name of the founding value of equal citizenship.

V

Conclusion

The expressive and persuasive role of courts a central requirement of Brettschneider's model of value democracy. This article was an attempt to show the potential application(s) and challenge(s) of value democracy at the supra- and international level. The first part of was dedicated to the potential deployment of value democracy in the case law of the Strasbourg Court. My starting point was double: first, the applicability the duty of democratic persuasion is premised upon the founding role of democracy to the very establishment of this supranational court. Second, the Court has spilled a lot of ink specifying the role of liberal rights in a 'democratic society'—an effort that reveals a significant expressive and explanatory dimension rather unique in international law. In my view, the teleological approach applied to 'democratic society' amounts to expressing and explaining the 'reasons for rights' in the vein of Brettschneider's duty of democratic persuasion, which requires that state actors and the citizenry criticize but not prohibit viewpoints that are at odds

[72] *Ibid.*

with the values that justify protecting the rights in the first place. I illustrated how this core principle can illuminate the Court's reasoning on freedom of expression and concentrated on extremist political and religious groups in order to test the limits of Strasbourg's viewpoint neutrality. Moreover, I also showed how the Court in my view has failed to meet the duty of democratic persuasion on freedom of religion where the Court's restraint (by way of allocating the margin of appreciation) remains salient. The critical potential of value democracy in this domain is therefore significant—and to my knowledge not accounted for in the theoretical literature on the Court.

But if there is room to fruitfully exploit value democracy in Strasbourg, there is also room to identify potential challenges when it comes to extend the scope of value democracy within and beyond European boundaries. In the second part of my article, I aimed to help preparing the terrain for what looks like one of Brettschneider's future projects. As it stands, the project seems to rely on an asymmetry between the function of international courts and the content of international norms. The first question I identified is whether the current quasi-judicial UN framework – namely Treaty bodies – ought to play the same expressive role as supreme domestic courts. The factual distinction lies in the absence of a global sovereign. Whether this distinction should impact on the function of international courts seems to be an important question for the extension of value democracy across international law. But the question of function is irremediably related to the question of content. On this point, Brettschneider pleads for a clear identity between the domestic and international levels in expressing the values of equal citizenship and human rights. While this connection is implicit in Brettschneider's account, I offered a suggestion to make this connection clearer. Finally, I sketched how the core attachment to the courts' persuasion could potentially develop in

international criminal law. I relied on the same 'reasons for rights' argument, that is, how to persuade states to conform to values to which they owe their legitimate existence *qua* states. The institution of the criminal law is a necessary condition for the exercise of liberal rights. Therefore, the same reasons for rights can be reasons for having a well-functional criminal justice system. In that sense, value democracy cannot only fruitfully apply beyond human rights law but point to a more comprehensive account of the 'expressive' role of international courts.

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If you need to cite this article, please use the following format:

Zysset, Alain, "When the European Court of Human Rights speaks, What Should It Say? Testing Brettschneider's Value Democracy at the Supranational Level," *Philosophy and Public Issues (New Series)*, Vol. 6, No. 1 (2016), 159-193, edited by S. Maffettone, G. Pellegrino and M. Bocchiola