AMINTAPHIL:
The Philosophical Foundations of Law and Justice

Freedom of Expression in a Diverse World

Edited by
Deirdre Golash

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Introduction

The essays in this volume consider issues at the intersection of freedom of expression and racial, cultural, and gender diversity. The claims of those whose cultures and beliefs differ from our own are no longer the exclusive province of diplomats, as the Danish newspaper that published cartoons ridiculing Mohammed quickly learned. Negotiating the claims of freedom of expression as they come into open conflict with a wide diversity of viewpoints, both domestically and internationally, has become an increasingly complex task. The present volume seeks both to provide fresh insight into the philosophical grounds for limiting government restriction of expression and to address current tensions between freedom of expression and pluralism.

The suppression of ideas by government is no doubt as old as government itself. Ideas help to keep governments in power, and opposing ideas can help them to lose it. As well, through most of the history of the world, the belief that some know better than others what is true, what is right, and what is valuable has been sufficiently widespread to make it seem natural for those betters to dictate for the rest what they should believe. Just as clerics did not hesitate to dictate to their congregations, Christians did not hesitate to impose their beliefs on non-Christians in order to save their souls. The arrogance of kings, no less than the fear of losing their kingdoms, permitted them to believe – and to require their subjects to believe – that ideas inimical to their continued rule were not just undesirable but also morally wrong.

Today, it is more difficult to believe that we – or our governments – have privileged access to the truth. In the disenchanted modern world, every organizing principle of society is subject to question. Revolutions have displaced hierarchies; broader literacy and education and better nutrition have undermined the easy assumption that the wealthy are automatically superior. The demands of colonized peoples for emancipation – their successful assertions of equality – have undermined western ethnocentrism in a way that the preceding centuries of exposure to other cultures could not. Similarly, the civil rights and liberties that were long understood as the privileges of propertied white males have gradually been extended to minorities and women in the wake of their struggles for equality. To those who have witnessed these transitions, the world appears more diverse than before. But the world, in fact, has become less, not more, diverse as cultures have

intermingled. The increases in transmigration, international trade, and especially international broadcasting and the internet have led to increased blurring of cultural boundaries at the same time as they have made it more difficult for anyone in the world to ignore the existence of other cultures. We see the world as more diverse than formerly because more of it is salient to us.

The idea of freedom of speech, though inscribed in no uncertain terms in the First Amendment to the US constitution, offered scant protection to critics of government from colonial times until mid-twentieth century. Colonial assemblies routinely punished any expression critical of the sitting government.[1] And, less than ten years after the adoption of the First Amendment by the First Congress, the Federalist government passed the Sedition Act, prohibiting combining or conspiracy to oppose any act of the government as well as "stir[ring] up sedition." [2] Vigorous selective enforcement of this Act against Republicans, but not Federalists, was followed, after the end of the French and Indian Wars, by the shamefaced extending of pardons to those convicted during the war.[3] The Supreme Court did not rule on the limits of First Amendment protections until more than a hundred years later, in the context of fears aroused by World War II and the Russian Revolution.

In *Schenck v. United States* (1919), Oliver Wendell Holmes's majority opinion quickly rejected the idea that Congress literally could not limit speech: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic," and went on to hold that Schenck's distribution to draftees of leaflets opposing conscription created a "clear and present danger… [of] bring[ing] about the substantive evils that Congress [had] a right to prevent."[4] Later the same year, Holmes found himself in the minority in *Abrams v. United States*, where Russian immigrants had been convicted under the Espionage Act for circulating leaflets critical of sending Marines to Russia.[5] Though the primary basis of Holmes's dissent was that the US was at war with Germany, not Russia, so that the defendants could not be said to have intent to hinder the war effort, his opinion is remembered for its appeal to the marketplace of ideas:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. . . . [W]e should be eternally vigilant against attempts to check the expression of the opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

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[1] Geoffrey Stone et al., eds., *Cases and Materials on Constitutional Law*, 5th ed. 2005, 1051–1052.

[2] Sedition Act of 1798, 5th Congress, Sess. II, ch. 74. The Act expired by its own terms in 1801.

[3] *Cases and Materials on Constitutional Law*, 1052.

[4] *Schenck v. United States*, 249 U.S. 47 (1919).

[5] *Abrams v. United States,* 250 U.S. 616 (1919).

The idea was not new: in 1859, John Stuart Mill had argued in *On Liberty* that the free exchange of ideas would result both in our coming more quickly to the truth of any disputed matter and in our more fully understanding the grounds of true opinion. Mill argued that we are not justified in suppressing the views of any person, even if no one else shares them. The value of the opinion, for Mill, is not primarily for the person who holds it, but rather for its potential audience. A seemingly outrageous opinion should still be allowed expression, because it may turn out to be true, or more likely, to have some truth. Even if it is completely false, Mill argues, we can still learn from it by being forced to defend our own views, and thus becoming more conversant with the underlying basis of our opinions.

Holmes's dissent in *Gitlow v. New York*, in which Gitlow was convicted of criminal anarchy for his role in publishing a "Left Wing Manifesto" advocating revolution was even more strongly worded:

> Every idea is an incitement . . . . If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[6]

But the majority deferred to the state legislature's assessment that advocacy of the overthrow of the government by unlawful means constituted sufficient danger to deny protection to such speech. In 1927, the Court upheld the conviction of Anita Whitney under the California Criminal Syndicalism Act, which prohibited knowing membership in any organization advocating political change through force and violence.[7] Whitney, a member of the Communist Labor Party, had advocated a nonviolent approach at the Party's California organizing convention, but had remained a member after her proposed approach was defeated in favor of a revolutionary platform. The Court upheld the Criminal Syndicalism Act, holding that the behavior it prohibited was similar to conspiracy to commit a crime. Justice Brandeis, though concurring in the judgment, emphasized the distance between advocacy and incitement, arguing that if danger is not imminent "the remedy to be applied is more speech, not enforced silence." In 1951, the Supreme Court upheld the conviction of Eugene Dennis under the Smith Act for conspiracy to advocate the overthrow of the government (by organizing study groups around the works of Marx and Engels, Lenin, and Stalin) over the dissents of Justice Hugo Black and William Douglas. Black wrote:

> The opinions for affirmance indicate that the chief reason for jettisoning the [clear and present danger] rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. . . . Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times . . . this or some later Court will restore the First Amendment liberties to the high preferred place where they belong.[8]

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[6] *Gitlow v. United States*, 268 U.S. 652 (1925)

[7] *Whitney v. California*, 274 U.S. 357 (1927)

[8] *Dennis v. United States*, 341 US 494 (1951), Black, J., dissenting.

More than a hundred other convictions under the Smith Act followed, as Senator Joe McCarthy led the relentless pursuit of communists, sympathizers, and suspected sympathizers through the House Un-American Activities Committee, and Congress followed up with legislation banning communists from union leadership, requiring registration of communists, and ultimately outlawing the Communist Party in 1954.[9] Loyalty oaths became routine; suspected communist sympathizers were blacklisted in Hollywood, and intimidation was such that the Cincinnati Reds renamed themselves the Redlegs.[10] McCarthy's influence burned itself out by 1955;[11] the last conviction under the Smith Act occurred that year.[12] In 1957, the Warren Court struck down the convictions of fourteen leaders of the Communist Party under the Smith Act, concluding that the Act did not encompass mere urging to belief without urging to action.[13]

Over the next decade, the civil rights movement won significant victories and opposition to the war in Viet Nam began to gather steam. Campus restrictions on speech and other forms of expression came under attack as they hampered activism. The association of legal restrictions on political speech with McCarthyism and attacks on civil rights demonstrators detracted significantly from their perceived legitimacy. In 1966 the Supreme Court held that, under the First Amendment, the Georgia House of Representatives could not refuse to seat Julian Bond because of his statements opposing the draft.

In this radically different political climate, eight years after it upheld the last Smith Act conviction, the Supreme Court was called upon to decide another political speech case, *Brandenburg v. Ohio*.[14] The case concerned the conviction under an Ohio criminal syndicalism statute of participants in a Ku Klux Klan rally. A speaker at the rally had made vague threats of future "revengence" against government officials if they continued to "suppress the white, Caucasian race." In a per curiam opinion, the Court struck down the statute, despite its similarity to the one upheld in *Whitney*, holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." With this change in the test for First Amendment protection, political speech came to enjoy more legal protection than at any time since the founding of the US government.

As advances in the rights of minorities were made, and especially as it became clear that affirmative action would be needed to bring about racial equality in employment and college admissions, many argued for "color-blind" policies on the ground that favoring minorities at the expense of whites was on a moral par with

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[9] *Cases and Materials on Constitutional Law*, 1090–1091.

[10] Richard M. Fried, *Nightmare in Red* (New York: Oxford 1990), 34.

[11] Ibid., 142.

[12] The Supreme Court upheld that conviction in *Scales v. United States*, 367 U.S. 203 (1961).

[13] *Yates v. United States*, 354 U.S. 298 (1957).

[14] *Brandenburg v. Ohio*, 395 U. S. 444 (1969).

previous policies discriminating blacks and other minorities. Similarly, colleges and universities faced pressure not to accommodate organizations limited to members of minority groups. Proponents of affirmative action and support for minority student groups responded that racial discrimination must be taken in historical context. There is a fundamental difference between racial discrimination against historically despised groups, which tends to perpetuate the discredited policies of the past, and racial discrimination in favor of such groups, which tends to overcome the lingering effects of such policies. In the speech context, Charles Lawrence and others argued that there is a literal difference in the effects of harsh epithets and hate speech directed toward racial minorities and gays, as opposed to comparable epithets directed toward whites: the former evokes both the history and the present threat of violent oppression, while the latter is no more hurtful than any ordinary insult. Moreover, Lawrence pointed out, the effect of such speech on minorities is not to promote dialogue, but rather to silence debate through fear.[15] The First Amendment, in his view, should be construed to exclude such speech under the "fighting words" exception made in *Chaplinsky v. New Hampshire*, a 1947 case.

Some indirect support for Lawrence's position is found in *Beauharnais v. Illinois*, decided in 1952. This case upheld in a 5–4 decision an Illinois statute prohibiting publications portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed, or religion."[16] Justice Frankfurter, writing for the majority, reasoned that defamation of groups could be proscribed on the same grounds as defamation of individuals, and appealed to the history of racist violence in Illinois as sufficient justification for the statute. Justices Black's dissent argued that the crime of libel had always been restricted to false statements about individuals. But later decisions in libel cases have strictly restricted the definition of libel to false statements of fact, significantly weakening the precedential value of *Beauharnais*.[17]

It also seems unlikely that the fighting words exception will in fact be extended to the kinds of cases Lawrence has in mind. *Chaplinsky* defined "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." [18] If Chaplinsky's use of the insults "damned fascist" and "racketeer" fell into this category, it may have seemed to the many Holocaust survivors residing in Skokie, Illinois, that the same must surely apply to the display of swastikas by Nazis, who had chosen their neighborhood to march through precisely because of its Jewish population.[19] But in rejecting this argument, the Illinois Supreme Court cited a 1971 Supreme Court case, *Cohen v. California*, which had overturned Cohen's conviction for disturbing the peace resulting from his wearing

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[15] 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. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw (Boulder: Westview Press, 1993).

[16] *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

[17] *Cases and Materials on Constitutional Law*, 1260.

[18] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[19] *Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (1978).

of a jacket bearing the words "Fuck the Draft" in a California courthouse. In that case, Justice Harlan, writing for the majority, argued:

> How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.[20]

Cohen protected the emotional tone of speech, as expressed in specific words, as well as its content. The *Skokie* court applied this reasoning to the use of a specific symbol to convey a message of hate. It thus seemed that, in the wake of *Cohen,* not much was left of the "fighting words" exception to First Amendment protection.

This impression was enhanced by *RAV v. St. Paul* (1992), in which students who had burned a cross on the lawn of a black family were convicted under a St. Paul ordinance prohibiting the burning of crosses or other conduct "that one knows or has reason to know 'arouses anger, alarm or resentment in others' on the basis of race, color, creed, religion or gender." The Minnesota Supreme Court had held that the ordinance reached only "fighting words." The US Supreme Court held that the ordinance impermissibly discriminated on the basis of the communicative content of cross-burning. Justice Scalia, writing for the majority, reasoned that such discrimination was impermissible even within areas (such as fighting words) excepted from First Amendment protection. Because the city could have banned all fighting words, but chose to ban only a subset, the ordinance was not necessary to the arguably compelling state interest of "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination."[21] The Court effectively announced that it would not countenance legislation directed specifically to the suppression of hate speech.

The Court again raised barriers to statutes targeting cross-burning in *Virginia v. Black* (2003). The state of Virginia had prohibited the burning of crosses on the property of others, or on a highway or other public place with intent to intimidate. The statute specified that the burning of a cross was prima facie evidence of intent to intimidate. The plurality held that it was permissible to ban cross-burning with intent to intimidate, but struck down the prima facie evidence provision, arguing that the provision created an unacceptable risk of the suppression of ideas. Justice Thomas dissented, noting that "even segregationists distinguished between speech and conduct." He argued that the connection between cross-burning and intimidation was obvious, and that the possibility that someone would burn a cross without intent to intimidate was negligible.[22]

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[20] *Cohen v. California*, 403 U.S. 15 (1971).

[21] *RAV v. St. Paul*, 505 U.S. 377 (1992).

[22] *Virginia v. Black*, 538 U.S. 343 (2003).

As is evident from the Supreme Court's treatment of political speech, as well as arguments such as those of Lawrence, the essentially consequentialist marketplace argument is vulnerable to claims that certain types of speech have bad consequences that outweigh the postulated good ones, as well as to arguments questioning the efficacy of the free exchange of ideas in getting us to the truth. Another potential weakness in the marketplace argument is that it may prove too much: if it's important for us to get to the truth, and the airing of every idea is an important part of how we get there, then it seems to follow that some share of society's resources should be devoted to facilitating, or even promoting, the dissemination of the most bizarre and deluded of ideas. Any steps that we take in this direction would likely impinge upon the property rights of the media, as well as on the public purse, thus raising the further question of how important it is, relative to other social interests, to pursue this path to the truth.

The first three essays in Part I analyze the marketplace argument both in terms of the aptness of the analogy and in terms of probable consequences. In the first essay, Richard Barron Parker argues that freedom of speech is a practical necessity for the flourishing of nations in the modern world. Specifically, he argues that free speech is essential to the best functioning of the social practices or "technologies" of scientific inquiry, democracy, and the free market. These practices (and other social practices that fulfill the functions of government, distribution of goods, and the pursuit of knowledge) are not as readily transferrable to other societies as are physical inventions such as the steam engine, but they are much more readily transferrable than elements of culture such as religion or language. Parker argues that each of the three social technologies is a way of processing information: scientific inquiry processes information about the physical world; democracy processes information about citizens' preferences in the area of policy; and the free market processes information to determine what goods will be available and at what price. Moreover, each of these practices produces results superior to alternative practices because they allow broader participation, promote competition, and provide a decentralized mechanism for determining which theories, policies, and goods will survive. Government restrictions on the free flow of information in any of these processes undermines their usefulness; to take maximum advantage of their benefits, we must accept that we cannot and should not try to control their outcomes. Parker concedes that these practices have a darker side, in that they in some respects may make human interaction less humane by undermining longstanding traditions and social cohesiveness, but contends that, in the balance, the three practices – and the freedom of speech necessary to support them – should prevail.

The next two essays consider the aptness of the "marketplace of ideas" and its role in the argument for free expression.

In the second essay, Steven Lee examines the analogy between the marketplace of ideas and the market for goods. He finds some similarities between the two in that, just as the market for goods can promote efficient distribution, the marketplace of ideas makes attainment of the truth more likely. It does not follow, however, that the marketplace of ideas must be left unregulated. The market for goods doesn't promote efficiency when entirely unregulated; government intervention is required,

not just to prevent force and fraud, but also to prevent various types of market failure, such as the generation of negative externalities. Similarly, the marketplace of ideas can generate the negative externality of speech that reinforces hierarchy. In the marketplace for political speech, all members of the community must be regarded as equal participants. Hate speech, if it explicitly treats other participants in the political speech community as less than equal, undermines deliberative democracy. It may be justified for government to intervene to prevent this harm; but we should be cautious in light of the tendency of governments to mishandle power.

Jonathan Schonsheck goes further in criticizing the usefulness of the "marketplace" argument. He points out that even given current regulations the marketplace for goods fails to produce efficient results, instead often providing incentives for large companies to suppress more efficient, but less profitable, products. Moreover, he argues, the exchange of ideas is fundamentally different from exchange of goods. When we "exchange" ideas, we don't give up one idea and get another in its place, as we would with goods. When we trade in goods, we trade exclusive possession; but when we trade in ideas, we expand possession. In addition, competition among ideas is unlike competition among goods because it is very difficult to be sure that the ideas that succeed in gaining acceptance are objectively superior to those that do not. Exchange, possession, and competition have very different meanings in the two markets. Thus, Schonsheck concludes, the analogy with the marketplace for goods is inapt.

Despite Kant's unparalleled influence in other areas of ethics, his writings are not much consulted on the issue of freedom of expression. Because his argument that untrammeled freedom of speech is a condition for the legitimacy of the state is better known, the nuances of his arguments concerning speech in other contexts have been neglected. In the fourth essay in Part I, Helga Varden takes a fresh look at Kant's writings on the issue, concluding that Kant would support limits on hate speech and harassment, as well as blackmail.

For Kant, speech between private parties is normally outside the domain of proper state regulation and is governed only by moral principles. Speech typically cannot give rise to private wrongdoing punishable by the state, because it is not coercive, even if false. Nevertheless, for Kant, when our lies do have impermissible effects on others, as they may in contractual misrepresentation or defamation, we can be held responsible. Defamation deprives its object of reputation or "rightful honor" and thus uses that person as a mere means rather than as an end in herself. Consequently, defamation is a civil wrong cognizable by the state.

The public use of reason must always be free, on Kant's view, because the state's ability to represent the common perspective of all citizens depends upon the availability of information about everyone's views on public affairs, including views critical of the public authority. Because hate speech and speech amounting to harassment achieve their aims largely as a result of the state's inability to provide some citizens with rightful conditions of interaction, Varden argues, Kant would support state regulation of such speech under public law to remedy the state's past failures. Kant also explicitly supports the banning of seditious speech. As over-

throwing the state would return us to the state of nature, where we cannot have reciprocal freedom under law, the state must ban seditious speech.

Present-day supporters of deliberative democracy draw extensively on the Kantian conception of the state in arguing that the state can have legitimacy only if all those affected by laws and policies are given a genuine opportunity to participate in the making of those laws and policies.[23] Alistair Macleod takes up the deliberative democracy view, arguing that the reasons for valuing freedom of speech obtain only for certain purposes and in certain contexts. In many contexts, free speech does not have even prima facie value. Arguments for a moral right to free speech cannot be generalized from one context to another; instead, those arguments must draw upon the reasons why free speech is valuable in a particular context and for a particular purpose. Thus, for example, the value of free speech in the context of arguing for political policy should not be taken to provide any support to the value of free speech in the context of hurling racist epithets. Where there is a moral right to free speech, it is as important to provide real opportunities for its exercise as to ensure that it is not legally prohibited. He concludes that the private sector should share with the state the burden of providing these opportunities.

The essays in Part II take up the specific issues of freedom of expression in tension with other values, specifically, the prevention of sex discrimination, hate speech, and religious discrimination.

Sex discrimination in employment is prohibited by Title VII of the Civil Rights Act of 1964. When the Act was passed, what is now known as sexual harassment was considered normal male behavior, and a woman who objected to it would be ridiculed or subjected to increased harassment. Women were rare in the ranks of professionals or management, and the acceptability of treating women as sex objects made it difficult for those who did achieve such positions to have their contributions taken seriously by their peers. Feminists took on the task of breaking this cultural barrier by redefining this "normal" conduct as harassment that could constitute sex discrimination in employment. A series of court decisions established that requiring sexual favors as a condition of hiring or promotion, or tolerating an atmosphere in which women are repeatedly subject to sexual comments, jokes, or unwelcome advances is impermissible sexual harassment. In 1980, the Equal Employment Opportunity Commission issued guidelines specifying the types of behavior that count as sexual harassment. These guidelines are applicable to education under Title IX. Some have criticized the concept of sexual harassment, and particularly the idea of the "hostile environment," as impinging upon freedom of expression. Others have defended the outlawing of sexual harassment as necessary to the dignity of women as well as to their career advancement.

In the first essay in Part II, Thomas Peard considers the moral permissibility of such restrictions in the classroom. Using Joel Feinberg's harm and offense principles, Peard argues that sexually harassing speech in the classroom is of low social and personal value and causes both harm and offense to vulnerable hearers. It may

[23] See Jürgen Habermas, *Between Facts and Norms* (1996).

impede rather than advance discussion of controversial views on sex and gender. Students should not be required to stop attending or drop a class they may need for credit in order to avoid a hostile environment. Thus, legal regulation of sexually harassing speech does not in itself wrongly interfere with the liberty of the speaker. Peard also considers whether some specific types of speech regulation may be morally wrong, even if restricting sexual harassment is not wrong in itself. Perhaps such regulation is unfair because it gives the advantage to anti-sexists, or perhaps it has an undue chilling effect on permissible speech. Peard draws upon the Supreme Court's argument in *RAV* to show that, because these regulations limit speech only when accompanied by harassing conduct, Title IX does not impermissibly regulate speech because of its content.

The next essay turns to the morality of the informal use of offensive speech. In recent years, as interracial friendships have become unremarkable and as some aspects of African American culture have become more familiar to young whites through rap and hip-hop music as well as popular movies, some whites have adopted the practice, common among blacks, of referring to or addressing their black friends as "nigga." Some, if not most, blacks are offended by this practice; but then, these whites are often also offended by being taken to task for doing what is, in their view, exactly the same thing as those who chastise them for it. In the second essay in Part II, Rodney Roberts draws upon Charles Lawrence's asymmetry argument to show that these two practices are far from the same. Historically, the use of "nigger" by whites has been associated with oppression, racial injustice, and violence, and such use today tends to evoke that history with its implications of contempt and hatred. In contrast, its use among blacks has no such associations; instead, it evokes shared experience. Roberts considers the use of "nigger" (or "nigga") by blacks offensive, but argues that its use by whites is more than offensive; it is morally objectionable, even if the speaker has good intentions. Regardless of the speaker's intent, the use of the word is likely to evoke an immediate "fighting words" response. Moreover, even if it is evident that the word is used in a friendly way, that too can be offensive. For blacks to draw on kinship and solidarity with other blacks is one thing; for whites to assume such kinship and solidarity can be both condescending and subordinating, like the former practice of addressing blacks as "boy" or using only their first names.

Roberts's vivid portrayal of the viciousness of lynching reminds us of the extreme harm that can result from racial hatred. The 1994 genocide in Rwanda, in which Hutus mercilessly murdered 800,000 Tutsis over a three-month period, is another such reminder. Unbridled expression played a significant role in this massacre: the radio station RTLM and the newspaper *Kangura* routinely spewed hatred against Tutsis and identified specific individuals as "enemies." Two of the defendants in the Rwanda Media Case were prosecuted for their roles in the radio broadcasts and newspaper items; the third, Hassan Ngeze, also spoke through a megaphone in a truck and directly urged the killing of specific Tutsis.

While the horror of the genocide and the reprehensible nature of the actions of all three defendants are undeniable, the case raises in a particularly sharp way the question that is in the background of many of the political speech cases that have

come before the US Supreme Court: where is the boundary between the expression of the desirability of illegal action at some unspecified future date and actually inciting people to such action?

The Media Case Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) held that no direct causal connection between the incitement and the deaths of any specific persons need be proved. Rather, the court held that it was the potential for the communication to cause genocide that made it incitement. The Appeals Chamber, though, was concerned to specify that direct incitement to commit genocide had to go beyond hate speech to call directly for the commission of the crime. Moreover, although a person could be convicted of incitement to genocide even if no genocide occurred, incitement must be shown through specific speeches likely to have specific effects, rather than through the general nature of the broadcasts or publications, and incitement to genocide must be distinguished from incitement to ethnic hatred or anger against the Tutsis.

May argues that incitement is best understood as involving the intention to take actions that initiate a causal chain known to risk serious harm. The risk of harm need not be intended, so long as it is known, and the harm need not actually occur. Those who do intend the risk as well as knowing it are more culpable, and should be more severely punished, than those who merely know of it. The Trial Chamber of the ICTR gave all three defendants in the Media Case similar sentences, but should instead have distinguished the two defendants who were only shown to know the risk of genocide from the one who was shown actually to intend that risk. The latter two defendants should have received a lesser sentence under May's analysis.

The next two essays explore the tension between pluralism and assimilation in the context of France's ban on the wearing of religious garb, particularly the *hijab*, or headscarf, worn by Muslim women, in public schools. First, Anita Allen argues against the ban, citing individual rights and the innocuous nature of the *hijab*, while Christine Sistare argues that the ban is appropriate in the context of the French commitment to secularism and the central role of the schools in inculcating the primacy of French citizenship over ethnic or religious identity.

Anita Allen argues that western democracies should accept the wearing of the *hijab*. In the US, banning any article of religious dress in the public schools would violate the free exercise clause of the First Amendment. The Supreme Court has generally favored religious exceptions to school rules, as well as the rights of parents to educate children in their own religion and tradition. The Court has held that religious minorities must comply with certain laws contrary to their beliefs only where those laws are in furtherance of important public policies, such as the policy against polygamy. As the wearing of the *hijab* does not impinge on any important policy area, but rather is symbolic of the personal choice of religion, feminine modesty, and cultural difference, it should be protected.

In contrast, Sistare argues that French principle of *laïcité* and the resulting *hijab* ban must be understood in the context of French attitudes toward individual freedom and national identity. In this context, she argues, the *hijab* ban is defensible. Against the backdrop of the brutal and devastating Wars of Religion in the sixteenth

century, the French Revolution sought to displace the influence of the church as well as to overturn the monarchy. The new state was to protect the freedom of individuals against religious proselytism and, importantly, to educate every citizen to be rational (and to distrust the dictates of faith) through a new system of public schooling. The bitter history of religious factionalism was to be overcome; citizens were to be taught to think of themselves as French, rather than as defined by other aspects of their identity. Thus, the French reject any official recognition of distinct ethnic and cultural minorities, and refuse to record such differences in order to deny them any legal status. Religion and ethnicity ideally exist only in the private sphere. Sistare points out that the French approach also has the virtue of clarity and consistency, unlike the often uneasy balancing of freedom of conscience and expression against state neutrality in the US.

The essays in Part III take a step back from issues of discrimination to consider more general ways in which freedom of expression is contoured by the social context. In the first of these, Emily Gill highlights the tension between freedom of expression and freedom of association. Individuals may have to choose between participating in a particular group and expressing views that conflict with the group's policies. Equally, groups may have to choose between expression that reflects their identity and garnering the support of others. These tensions are illustrated in *Boy Scouts v. Dale*,[24] a case in which an assistant scoutmaster was barred from scouting after his homosexuality became public in violation of the "don't ask, don't tell" policy of his scouting group. After conflicting rulings on similar cases by the Supreme Courts of California and New Jersey, the US Supreme Court held that associations have a right to free expression and could not be forced to allow scout leaders to express views contrary to their wishes, although the Scouts had no explicit official position on homosexuality. Justice Stevens dissented, arguing that the admission of openly gay members did not impede the pursuit of scouting activities or its public message, given that the Scouts had no agenda on heterosexuality and did not discuss sexual matters at meetings.

Gill argues that Scouts should not be required to accept those who disagree with the message it has decided on, and that the message decided on by the membership should be protected regardless of whether it defines the association. But this holds true only where the excluded persons have other opportunities for association; a liberal polity may legitimately favor more inclusive organizations. In the case of the Scouts, a number of public and private organizations cut off funding after the Scouts' exclusionary policy became widely known. The loss of funding might make it more difficult for the Scouts to operate, but the refusal to fund is itself a form of expression by the former funders. As such, it is permissible; the Scouts have a right to control the expression of their association, but not to have others facilitate that expression.

The right to freedom of expression is often taken as one of our most fundamental rights. The next two essays in Part III argue that, instead, it is predicated upon other, more basic rights.

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[24] *Boy Scouts v. Dale,* 530 U.S. 640 (2000).

In some contexts, there is a legal right *not* to express oneself – to refuse to follow prescribed forms such as an oath or pledge, or to refuse to answer questions posed. In the second essay in Part III, Kenneth Henley argues that this right is central to the right of freedom of expression. Although the formal oath of citizenship commonly required in colonial times has disappeared, the Pledge of Allegiance required in public school classrooms is a similar coerced expression of conviction. Henley argues that excusing specific students on the grounds of religion or personal belief does not much mitigate this form of coerced expression, given the conclusions that will be drawn concerning those who refuse to participate. Similarly, seekers of political office are no longer subject to formal religious tests, but their refusal to answer questions about their religious beliefs will be taken to establish their lack of an acceptable creed. Privacy of religious or political belief cannot survive these intrusions. Expressions of faith or loyalty also become meaningless when they are coerced. It may be reasonable to require certain public officials to take an oath to uphold the constitution, but such oaths should not be required of those performing minor public functions or having duties far removed from the legal realm. Individual liberty can only be preserved where the state is not permitted to intrude. For Henley, the right to freedom of expression is founded on the intrinsic value of individuality as an element of human flourishing. He rejects the idea that freedom of expression is valuable primarily because it promotes the search for truth: if we all subscribed to a comprehensive set of true beliefs, individuality would be lost. For us to maintain our individuality, we must have the right to silence on matters of conscience. This, according to Henley, is a right that can and should be considered absolute in the private sphere, and respected to the extent consistent with legitimate matters of public interest in the public sphere.

Where Henley sees privacy in the sense of keeping our beliefs to ourselves as mediating the interaction between the right to silence and the right to free expression, Wade Robison argues that privacy in the sense of being able to choose our audience is necessary for our freedom of speech to have any value. For that reason, he argues, privacy is not the kind of shadowy second-order right implied in the Supreme Court's privacy jurisprudence; rather, it is a key right that must be protected. In some situations, such as where we face an undesired audience, or when we are required to provide information against our will, the right to freedom of speech (though we still have it) has no value because we are unable to speak freely. The loss of privacy, even where the right to freedom of speech still holds, can harm the interests of the intended and unintended audiences as well as those of the speaker. Even where there is only a risk that a conversation, for example, may be overheard, the speaker is similarly constrained. In the contemporary context, the potential for governmental intrusion into our private conversations through rapidly improving technological means significantly impinges on our capacity to speak freely, and thus on the value of our freedom of speech.

In the concluding essay, Richard Nunan widens the scope of the inquiry into freedom of expression to the effects of social institutions on freedom of expression. As Nunan points out, social institutions often have broad ideological impact by establishing a particular way of thinking as the unquestioned norm. Institutions that

promote social stability may be necessary, but at least for some of them it is worth questioning whether their contribution to the smooth functioning of society is worth the price in ideological obfuscation. Federal and state Defense of Marriage Acts passed in recent years have sought to rescue the institution of marriage from encroachments on its traditional function of promoting the ideological position that only monogamous heterosexual couples were fit to be parents. Although adherence to this ideology is weakening as more states allow homosexual couples to marry, the perception of gender as binary – also key to the traditional institution – remains pervasive. For transgender individuals, who do not fit neatly into the gender binary because the sex of the bodies they were born into is not consonant with their self-perceived gender, the result is at best uncertainty over their marital rights and at worst denial by the courts of eligibility to marry anyone, male or female. Recent decisions have gone far beyond requiring informed consent for the validity of marriage to a transgendered individual, instead voiding fully consensual marriages well after the fact – or even after the death of the spouse – on the ground that the transgendered person is not really a person of the purported gender. Nunan suggests that legal incapacity to express one's true gender identity through marriage is an unparalleled denial of freedom of expression. Moreover, he argues, although it might seem that the courts are not in a position to address the broad ideological effects of any social institution, they have done so in establishment clause cases, which seek to preclude state sponsorship of a particular religion in part because of the effect such sponsorship may have on the ability of others to practice a different religion.

The essays in this volume advance the debate over freedom of expression both by deepening the theoretical inquiry and by addressing issues of vital concern in a shifting global landscape. They promise to enhance our understanding of the stakes in this debate, as well as our ability to respect the legitimate claims of free expression without sacrificing other values.

Part I
Why Free Speech?

Free Speech and the Social Technologies of Democracy, Scientific Inquiry and the Free Market

Richard Barron Parker

Abstract This essay points out the historical importance of freedom of speech in the rise and fall of nations. My major point is that over the past two centuries, nations have flourished or failed to flourish to the degree that they have adopted the social practices of scientific inquiry, democracy, and the free market, each of which requires freedom of speech. Those societies that did not embrace the freedom of speech necessary for the operation of the three practices were handicapped in competition with societies that did. In sum, the amount of free speech in any society has been central to the ability of that society to avoid disaster and to flourish.

Keywords Freedom of expression • Democratic government • Scientific method • Free market • Successful societies

1 Introduction

This essay points out the historical importance of freedom of speech in the rise and fall of nations. My major point is that over the past two centuries, nations have flourished or failed to flourish to the degree that they have adopted the social practices of scientific inquiry, democracy, and the free market, each of which requires freedom of speech. My point of view is a distant high-altitude aerial picture of world history over the past two centuries. Events such as the current world economic downturn or the election of Barack Obama as President of the United States can barely been seen from this altitude. Examples of events that can be seen, and which illustrate my major point, are the failure of most of the world's societies to avoid colonization by the nations of Western Europe, or the fall of Nazi Germany and Imperial Japan in the Second World War, or the defeat of the

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Soviet Union in the Cold War. In all of these cases, a major cause of failure was less use of democracy, scientific inquiry, and the free market compared to competitors who made greater use of these three practices. Free speech is the heart of each of these practices. A resistance to free speech is usually the way that societies have resisted the adoption of the three practices. Those societies that did not embrace the freedom of speech necessary for the operation of the three practices were handicapped in competition with societies that did. In sum, the amount of free speech in any society has been central to the ability of that society to avoid disaster and to flourish.

2 Social Technologies

It is useful to think of the social practices of scientific inquiry, democracy, and the free market as similar to technologies that can be transferred from one society to another.

Imagine a spectrum. On the left end (the blue end) are things that human beings discover in the natural world – the properties of iron, electricity, atomic energy. A bit closer to the center of the spectrum from the blue end are things that human beings invent – iron weapons, the electric light bulb, the atomic bomb. At the opposite end of the spectrum (the right red end) are the constituent elements of cultures – religions, languages, kinship patterns, festivals, costumes, domestic architecture, etc. We generally do not say that these constitutive elements are discovered or invented, we say that these constitutive elements of culture arose or developed.

Discoveries or inventions – things toward the left end of the spectrum – are thought of as transferable from one society to another. Gunpowder, the steam engine, electricity and the electric light, atomic energy and the atomic bomb may be discovered or invented by a given society and then adopted by other societies. Discoveries and inventions have often given the society that first made the discovery or invention a large military or economic advantage over rival societies. Societies often adopt the new discovery or invention in self-defense. The spread of discoveries and inventions may work large changes in the societies that adopt them, but we do not usually speak of the spread of discoveries and inventions as the imposition of one culture on another.

Discoveries or inventions are not just physical. New forms of social organization can also be discovered or invented. Military organizations such as the Roman army or economic arrangements such as the Dutch joint-stock company are inventions that gave the inventing societies a competitive advantage over their rivals until those rivals adopted the new invention or discovered or invented something that could neutralize the advantage.

I use the term “social technologies” for the social arrangements and practices and processes in the middle of the spectrum described above. They have some of the transferability and independence of culture that is true of physical technologies. They often confer competitive advantage over rivals on the societies that discover

or develop them, but they are social arrangements and practices, not physical discoveries or inventions.

The three "social technologies" I wish to discuss in more detail in this essay are the social practices of democracy, scientific inquiry, and the free market. They are near the middle of the spectrum described above. We can say that the ancient Greeks invented democracy, but it is also natural to say that democracy arose as a form of government in the Greek city states in the sixth century BCE. Scientific inquiry and the free market are perhaps a bit to the right of democracy in that we are a little less likely to say that they were invented or discovered and more likely to see them as arising in a cultural context.

3 Common Characteristics of Democracy, Scientific Inquiry, and the Free Market

Democracy, scientific inquiry, and the free market can be seen as effective methods for organizing vast amounts of information. They differ only in the sort of information they process. Scientific inquiry handles information about the physical world which fosters the development of new technologies that often contribute to a society's economic or military advantage over societies lacking the new technologies. Democracy handles information about the interests of various groups in society, confers legitimacy on governments, and enables a society to make the necessary hard choices between competing domestic or foreign policies without endangering social stability. The free market handles economic information and determines what goods and services are needed at what prices.

These practices are so superior to the alternatives for dealing with the same sort of information that any society which uses them has a competitive advantage over one which does not. The generally perceived superiority of the three practices is why they are spreading so rapidly.

The practices produce superior results because they share three characteristics.

First, there is more widespread participation in these practices than in more bureaucratic or authoritarian alternatives. More information is taken in. Scientific inquiry, democracy, and the free market allow a wider range of people to offer a scientific theory, political leadership or a public policy, or a good or service.

Second, the three practices give a wide circulation to the various scientific theories, political leaders or public policies, and goods and services that are offered and force them to compete against one another.

Third, there is a decentralized yet clear and peaceful decision procedure for determining which theories, political leaders or public policies, or goods or services survive and which are rejected. The consensus of opinion in a worldwide scientific community rejects or accepts a scientific theory. The electorate, or their representatives in government, accept or reject various leaders and their domestic and foreign policies. The marketplace accepts or rejects the provision of a particular good or service at a particular price.

4 Unpredictability and Trust

The results of each of the three practices are unpredictable and cannot be controlled by any single group or person. One never knows in advance what goods or services will be provided by a free market, or what political leaders or domestic or foreign policies will be chosen by a democratic society, or what new knowledge and consequent technology will be discovered in the course of scientific inquiry.

This unpredictability allows maximum adaptability by a society to changing circumstances. The practices of democracy, the free market, and scientific inquiry begin forcing necessary changes on a society even before the elite members of the society realize what is happening. To enjoy the benefits of this unpredictability leading to adaptability, there needs to be trust in the practices to produce over time better results than the conscious planning of any individual or small group could accomplish.

In the case of democracy, trust in the practice means that the commitment to democratic practice outweighs any commitment to any particular policy, political leader, or political party. Individuals may work hard to advance a policy, leader, or party, but those committed to democracy do not subvert democratic practice to achieve a desired substantive result. Using private violence or governmental power to intimidate voters or suppress speech are examples of a lack of trust in democratic practice and a failure to use it fully. Trust in democratic practice requires trust in freedom of speech. Speech is sometimes banned because it is false, or unsound, or seditious, or prejudicial to good order, or hateful or offensive. There may be good reasons in local contexts to ban speech but if those reasons are often considered dispositive and speech is often banned, democracy as a practice for the processing of information is undermined.

In the case of the free market, regulations which limit participation in the market, foster public or private monopolies, prevent competition, or thwart consumer choice are all examples of a failure to use fully the market process. (The free market is not, of course, identical with *laissez-faire*. Some regulation of markets is necessary to prevent monopolies or excesses leading to market collapse.) Trust in the market means that the commitment to market freedom outweighs any commitment to the success or failure of any given service or product in the marketplace. Freedom of commercial speech is important to market freedom. Again, there may be good reasons in local contexts to regulate commercial speech but if those reasons are often considered dispositive, the free market as a processor of information is undermined.

In the case of scientific inquiry, examples of a lack of trust are limitations on scientific research or on the use of the technologies to which scientific knowledge gives rise. Religious objections to scientific inquiry or a suppression of scientific inquiry on the grounds that it is dangerous – that new evils will be released upon the world – reveal a lack of trust in scientific inquiry as a processor of information. A society which does not have the confidence in science to solve the problems science creates will not be able to use fully the process of scientific inquiry.

Scientific inquiry depends essentially on free speech. The suppression of scientific opinion as heretical or dangerous will cripple a society's ability to make use of the process of scientific inquiry.

In general, private or governmental actions that constrict the collection and circulation of information, prevent opposing views from competing, or limit decentralized decision-making show a lack of trust in the three practices. The more government and private actions open the flow of information, encourage competition, and encourage the decentralized but dispositive decision-making characteristic of the three practices, the more a society can make use of the three practices. In sum, the freer speech is in a given society, the more a society can make use of the three practices. Societies that do not make extensive use of the three practices will not be able to process enough information fast enough to keep up with societies that do.

The three practices reinforce one another. It is difficult for a society to embrace fully one practice while refusing to countenance the others. Attempts by authoritarian countries to embrace the free market or scientific inquiry while refusing democracy are likely to fail. The three practices require a commitment to free speech, the free flow of information, and decentralized decision making that authoritarian governments have usually lacked. The commitment to accepting the unplanned results of the three practices is especially difficult for authoritarian governments.

5 The Social Costs of the Three Practices

Even from the high-altitude distant point of view of this essay, it is clear that the three practices tend to undermine traditional social institutions and make social interactions less dependable and often less humane. Thus good arguments can sometimes be advanced for limiting free speech and limiting the operation of the three practices in various local contexts. Although my point of view in this essay is too distant to dictate answers to specific questions of exactly when free speech might be limited in cases of, for example, hate speech, campaign financing, pornography, invasion of privacy, or the regulation of scientific or commercial speech, the historical patterns seen from the high-altitude distant point of view of this essay do support a general presumption in favor of free speech.

The rapid spread of these three practices or "social technologies" has often been seen as some kind of Western (especially American) cultural imperialism. But the spread of these three social technologies is more akin to the spread of steam power in the early nineteenth century. The spread of steam power was not "Britification." The spread of the three processes is not "Americanization." It may seem that way at present because the United States over the past two hundred years has made the most use of the three practices and has thus enjoyed a competitive advantage over societies that have used them less, but the three practices themselves are forms of social organization available to any society. None of them originated in the United States.

Much of the objection to "American hegemony" in the world is in fact objection to the three practices. Resistance to the three practices is expressed as resistance to the country – the United States – that enjoys "hegemony" because of its more extensive use of the three processes over the past two centuries.

In the United States, no one person, or group, or social class, is in charge. There is no semi-permanent hierarchy that can be relied upon. There is only the legal and political system, an open civil society, ethnic sub-cultures, and the shifting fortunes of individuals.

The comparatively rootless and consensual character of human relations in America allows greater use of the processes of democracy, the free market, and scientific inquiry. Americans are very good at coming together to create temporary communities among people with no prior relation to one another for a given temporary project. The only criteria for membership in the project, whether that project is to make money in a computer software business, to advance some political goal, or to achieve some national goal such as sending a man to the moon or winning a war, is whether someone can contribute to the success of the task at hand.

In other countries, social roles, class lines, traditions, seniority, and the comparatively pre-determined character of individual social relationships slow down the combination and recombination of individuals and groups that characterize America society. Japanese and British, and most other peoples, enter into cooperative arrangements within a larger social context. Before they cooperate, they want to know where people went to school, how old they are, who their parents are, and their status in the social world they share together. They are much slower to commit but much more likely to be loyal once relations are established. This concern with the long term social consequences of cooperation inhibits free speech in all contexts and thus inhibits democracy, the free market, and scientific inquiry.

Elites in various societies often limit free speech not out of selfish, self-interested motives, but out of genuine concern for the welfare of the societies they rule. Extensive use of free speech and the three practices creates a society with more physical risk, more economic risk, and more emotional risk. The slower, less nimble, more attached, more humane person, and the more traditional elements of society are often crushed. As severe as these social costs of the three practices are in the United States, they are worse elsewhere.

For the rest of the world, especially the economically poorer societies, the three practices and the free speech they require constitute an assault on traditional family structures, religious hierarchies, and accepted structures of social and political authority. The three practices piggyback on one another. For example, the exponential growth of access to information through TV, cellular phones, and the Internet – products of scientific inquiry – produces an exponential growth in the expectations of ordinary citizens in poorer countries for government more responsive to their welfare. This in turn produces a society that can only be governed democratically. Democracy is the only political system that can produce governments with sufficient authority to have a chance of dealing effectively

with the exponential growth of access to information among the citizenry. Democracy is increasingly seen even by non-democratic elites as necessary to the legitimacy and authority of governments. Even authoritarian governments feel the need to allow more free speech and to conduct elections that they would much rather forbid.

The consequences are hard for non-democratic elites to swallow. The problem is not that elites are not necessary in democracies. They are. The problem for more traditional elites is that the more democracy there is, the more rapid the turnover in the membership of elites.

The United States has a remarkable record of using free speech and the three practices to turn over its elites several times in the last two hundred years. Picking up the story eighty years ago, the Depression and Second World War gave rise to new elites that displaced those descended from the families that made fortunes in America's industrialization in the late nineteenth century. The new elites in the 1950s were the professional CEOs of large manufacturing companies and the leaders of the unions representing the workers that these large companies employed. Lawyers such as John Foster Dulles from large law firms occupied the top government positions occupied in other countries by elite civil servants. Fifty years later, this post-war elite has been replaced by enormously wealthy information technology entrepreneurs such as Bill Gates and media magnates such as Rupert Murdoch. Career military officers and academic experts are increasingly occupying the top government positions themselves rather than just acting as advisors.

The pace of change is accelerating. The new entrepreneurial/technocratic elite of the past twenty years will be replaced in less than sixty years. By whom, we do not now know, but no elite in the United States has lasted more than three generations. The choice will be made by the open-ended uncontrolled practices of scientific inquiry, democracy, and the free market. It is likely that Bill Gates' children will be nothing more than very wealthy. They will not wield power and influence at the highest levels.

This rapid replacement of elites over its history has served America well. As conditions change, old leaders, old families, and old social sets were swept aside by the impersonal three practices. The new elites have been better able to deal with the new conditions.

If the United States was more like other societies, the Washingtons, the Astors, and the Vanderbilits would still hold power. The idea of a great family has always been thin in America when compared with Asia or Europe. In the twentieth century, the great families of America – the Rockefellers, the Roosevelts, the Kennedys – were able to stay at the top for no more than three generations.

This instability is upsetting enough in America. In most other human societies, it represents a revolution in how authority of all kinds is acquired and used. Yet when those other societies try to protect the position of the old elites by failing to adopt more fully the three practices of democracy, the free market, and scientific inquiry, and the freedom of speech they require, those societies fail to adapt to ever more rapidly changing conditions.

6 The Effect of the Worldwide Spread of the Three Practices on the United States

If the above description of the advantage given to the United States by extensive use of the three practices and the free speech they require is anywhere close to the truth, then it also shows how "American hegemony" will end. Other nations, or combinations of nations, will make more extensive use of the three practices than they do now and the United States will make relatively less compared to other nations.

To some degree this is already happening. Many European countries are more democratic than the United States. Several countries such as Singapore have freer markets. Many of the best European and Asian scientists participate in the worldwide network of laboratories that constitutes the world of scientific inquiry. The decline in the ability of American universities to attract foreign students, and American financial markets to attract investors, are indicators of relative decline. In the United States, the power of the Bush family and the Clinton family and their large groups of courtiers are a symptom of a more rigid less open political system. On the other hand, the rise of Obama and the growth of Internet financing of political campaigns are hopeful signs of an increase in the amount of democracy in the United States.

The only countries in the world with a population larger than the United States are China and India. They will be formidable competitors in the future if they continue to increase their use of the three practices. (I am sanguine about the danger China may present to the United States. If China continues to democratize, it will become more powerful but also less likely to be a threat if it is true, as I believe, that large democracies do not go to war with one another. If China backtracks and uses the three practices less, China will be less powerful and thus less of a threat. In either case, China will not be a serious threat to the United States.)

At some point in the near future, the United States will decline in relation to some of the rest of the world. The major cause of the relative decline of the United States will be the more extensive use of the three practices by other countries.

7 A Personal Postscript

I hope that it is clear from the above that I think that free speech and the three processes are a mixed blessing. Americans have embraced free speech and the three practices to a degree unmatched by any other large society over the past two centuries. While I do think that this embrace has given the United States a competitive edge, it also has exposed Americans to greater economic insecurity and greater personal anxiety than people in most other societies. In the United States, expectations of any sort are much less likely to be realized than in Japan or the United Kingdom. American society is riskier, rougher, more violent, and harder on the delicate and the subtle.

As an American, I have been raised to take care of myself in a cultural semi-vacuum, but the majority of the world's people see life in America as exciting and free but also as dangerous and lacking in community and compassion. As D. H. Lawrence wrote in 1923, "The essential American soul is hard, isolate, stoic, and a killer."[1] Perhaps we Americans should collectively decide to abandon our lead in free speech and the three practices. (Our extraordinary democratic political system enables us to make collective decisions to change the fundamental premises of our society. More traditional societies have more difficulty making such basic changes.) Should we decide to be less free? Such a decision would make us more comfortable. People would do more what was expected. Our lives would be safer and more stable. We would provide more for one another's welfare and be more considerate of one another. We would be more like the rest of the world. Having lived in Japan for the past eighteen years, I can testify to the attractiveness of a society with less free speech and less use of the three practices.

On the other hand, as a competitive, isolate, and stoic American, I am reluctant to surrender my freedom. I also do not wish to lose the advantages that freer speech and greater use of the three practices offer in the historical competition among societies. As other countries adopt freer speech and make more use of the three practices, the competition to adapt well to changing conditions will increase. As an American, I think it is probably better for our long term flourishing if we accept the pain and pleasures of living in a rougher but freer society. When in doubt in weighing the value of free speech versus other values in local contexts, the large historical patterns pointed out in this essay incline me to favor free speech.

[1]D.H. Lawrence, "Fenimore Cooper's Leatherstocking Novels," in *Studies in Classic American Literature*, 68 (London: Penguin Classics, 1977).

Hate Speech in the Marketplace of Ideas*

Steven P. Lee

Abstract In this paper, I consider the issue of restrictions on hate speech in the context of the argument for free expression based on the idea that the realm of public communication is a "marketplace of ideas." What is the nature of the analogy with the economic marketplace implied by this phrase? Can maximizing the prospects for attaining truth in the realm of public communication (if this is its proper goal) be fruitfully compared with maximizing preference satisfaction in the economic market? And, does the analogy prove too much, in that arguments for government interference in economic markets based on the existence of "market imperfections" might be taken to justify analogous interference in the case of speech? Can hate speech be understood as analogous to a market imperfection?

Keywords Marketplace of ideas • Hate speech • Market imperfections • Government regulation of speech

Freedom of speech or expression is a highly valued right in democratic political systems, but the extent to which it is recognized or valued varies among Western democracies. "The American approach is *exceptional*," Frederick Schauer notes: "the American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails."[1]

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[1]Frederick Schauer, "The Exceptional First Amendment," Harvard University Kennedy School of Government, Faculty Research Working Papers Series No. RWP05-021, 2004: 2, http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-021/$File/rwp_05_021_schauer_SSRN.pdf. An opposing position is taken by C. Edwin Baker, "Hate Speech," Penn Law Public Law and Legal Theory Research Paper Series, 2-4, http://papers.ssrn.com/abstratc=1105043. Baker claims that the exceptionalism is at the level of academic theory rather than legal practice.

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The American legal right to free speech is exceptional, for example, in its treatment of hate speech. "There appears to be a strong international consensus that the principles of freedom of expression are either overridden or irrelevant when what is being expressed is racial, ethnic, or religious hatred," while "the United States remains steadfastly committed to the opposite view."[2] American free speech ideas have traditionally been highly influential on other democracies, but the current American exceptionalism shows that that influence has declined.[3] In this paper, I explore part of the theoretical basis of this aspect of American free-speech exceptionalism.

It has been over 15 years since the issue of hate speech was hotly debated at the height of the "culture wars." But the issue remains salient, for democratic nations are becoming more heterogeneous and, in the face of this increasing diversity, ethnic, racial, and religious tensions have remained a serious problem. Does a person have a moral right (against the government) not to be restricted in the use of hate speech, or is it morally acceptable for the government to restrict hate speech, and, if so, on what basis?

The basic feature of a legal right to free speech or expression is protection from government interference with acts that would otherwise be open to legal restriction due to their harmfulness.[4] Such a right exempts from legal restriction a group of acts that violate the harm principle, which, for some liberals, is the basic principle justifying legal restriction in general. From this perspective, the most obvious moral justification for such a right would be deontological, for example, in terms of a requirement of liberty based on respect for individual autonomy. But a free-speech right has also often been justified on consequentialist grounds, as in John Stuart Mill's discussion in *On Liberty*. Given the *prima facie* harmfulness of some acts protected by the right, a consequentialist defense must find a broader consequentialist advantage in the legal right, a justification for a second-order constraint on government interference in speech.[5] Such a defense is often expressed by pointing to the consequentialist advantage of the "marketplace of ideas" that that right supports.[6] My focus will be on this sort of consequentialist justification.[7]

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[2] Schauer, 6, 8. See also, Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs*, Vol. 22, No. 3 (Summer, 1993): 208. But the Danish cartoon controversy suggests that some Western democracies are willing to permit at least some forms of hate speech.

[3] Schauer, 30–32.

[4] Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs*, Vol. 1, No. 2 (Winter, 1972): 204–226. It is important to note that the legal right of free speech is a right against the government, that is, as Scanlon observes, it is a matter of legitimate legal authority.

[5] Schauer, 28.

[6] There are also other bases for a consequentialist argument for a legal right to free speech, such as claims that this right would allow individuals to better achieve self-realization, provide a necessary condition for a successful democracy, or provide a way to keep the government honest.

[7] But it should be recognized that an argument against hate speech restrictions based on a principle of liberty or autonomy would not settle the matter from a deontological perspective. Other principles may shift the conclusion in favor of restrictions. The principle of equality, for example, has figured in debates about hate speech when it is argued that allowing certain cases of hate speech to go unrestricted amounts to the law's treating members of groups who are the target of the speech as less than equal citizens.

It is a familiar trope to refer to the public arena as a "marketplace of ideas" in order to justify a legal right to free speech. A number of important Supreme Court opinions have made use of it.[8] Justice Oliver Wendell Holmes formally introduced the idea in his dissent in *Abrams vs U.S.*: "the ultimate good desired is better reached by free trade in ideas … the best test of truth is the power of the thought to get itself accepted in the competition of the market."[9] The "ultimate good desired" is the discovery of truth and the avoidance of falsehood, and allowing freedom of speech in the marketplace of ideas will maximize our chances of achieving this goal. "The truth can be expected to emerge only when all ideas are free to compete for rational acceptance."[10] The implicit analogy is, of course, with the economic marketplace, where free competition is said to be the best means to achieve the goal of economic efficiency. Freedom of speech may be likened to the freedom of economic exchange; each creates a marketplace whose operations have outcomes that most increase social value. The marketplace of ideas increases social value by allowing the truth to be more readily attained.

Ronald Coase defends this analogy.[11] Writing (in 1974) when Keynesian regulatory ideas were still most influential on economic policy, he uses the analogy between the two marketplaces to call implicitly into question the extent of economic regulation. He takes issue with the view that "in the market for goods, government regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly limited."[12] There is a "paradox" in this view: "government intervention which is so harmful in the one sphere becomes beneficial in the other."[13] He asserts: "There is, no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take that into account."[14] He concludes that we should be consistent, by either increasing regulation in the marketplace of ideas or lessening it in economic markets. It seems clear that he prefers the latter, though this is suggested rather than asserted.[15] I will adopt Coase's terms for the two spheres, the *market for goods* (MG) and the *market for ideas* (MI).

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[8]One commentator notes that the marketplace analogy was used explicitly or implicitly in at least 125 opinions in 97 Supreme Court cases between 1919 and 1995. W. Wat Hopkins, "The Supreme Court Defines the Marketplace of Ideas," *Journalism and Mass Communications Quarterly*, Vol. 73, No. 1 (Spring, 1996): 41.

[9]*Abrams v. United States*, 250 U.S. 616, 630 (1919).

[10]David Kelley and Roger Donway, "Liberalism and Free Speech," in *Democracy and Mass Media*, ed. Judith Lichtenberg (New York: Cambridge University Press, 1990), 83.

[11]Ronald Coase, "The Market for Goods and the Market for Ideas," *The American Economic Review*, Vol. 64, No. 2 (May, 1974): 384.

[12]Ibid., 384.

[13]Ibid., 386. In a bit of *ad hominem*, Coase claims that intellectuals and members of the press support this paradoxical view because ideas are their stock and trade, Ibid., 388.

[14]Ibid., 389. Coase is careful to say that he claims only that each market should be approached in the same way in regard to regulation, not that regulatory policy should necessarily be the same in each.

[15]Ironically, my conclusion will be that we resolve the paradox by following the former path.

But what is the nature of the analogy to which Coase refers between the MG and the MI? The analogy may have surface plausibility, but its details are unclear. Wat Hopkins complains that despite all the references to the analogy in Supreme Court decisions, the "opinions are virtually devoid of definitions of the term [marketplace of ideas] or explanations as to how the model works."[16] What is the analogical argument? Consider another famous analogical argument, the teleological argument for the existence of God, also called the Design Argument. In one version, a watch and the universe are said to share the property of possessing regularity and mechanism. In the case of the watch, this property entails that it has an intelligent designer. The conclusion is that the universe also has an intelligent designer. A brief reflection on this argument can tell us something about the nature and value of analogical arguments in general. This argument has historically been very controversial, and it may not have convinced many to believe in God's existence. But it has been fruitful in suggesting factors that need to be addressed. In themselves, analogical arguments are generally weak, but they can be valuable in calling our attention to features of a subject we might otherwise overlook or the import of which we might not otherwise appreciate.

On this model, the analogical argument for freedom in MI may be presented as follows. First, the primary subject (MI) is *relevantly* like the analogue (MG). Second, both MI and MG have a certain characteristic *y*. Third, as a result of its having characteristic *y*, MG has an additional characteristic *x*. The conclusion is that the MI has characteristic *x* as well. What are *x* and *y*? The conclusion of the argument is that the government should not interfere in MI, so we could take *x* to be: "functions best without government interference." But what is *y*? Both MG and MI involve a kind of *competition*. One way to formulate *y* is: "the characteristic of involving a competition for choice by individuals among a set of alternatives offered by other individuals, with positive or negative aggregate social consequences depending on which choices are made." The general idea is that MG involves a competition for individuals' choices among goods and services, as MI involves a competition for individuals' choices among ideas, and that there will be positive or negative overall consequences for society depending on how the aggregate choices come out, which ones "win" the competition. So, the argument is:

(P1) MI is relevantly like MG.
(P2) MI and MG both involve a competition for choice by individuals (consumers, recipients) who are offered items (goods and services, ideas) among a set of alternatives offered by other individuals (producers, originators[17]), with positive or negative aggregate social consequences depending on which choices are made.
(P3) Because it involves such a competition, MG functions best (maximizes positive aggregate social consequences) without government interference.
(C) Therefore, MI also functions best without government interference.

[16]Hopkins, 42.

[17]I will understand the category of producer or originator to include "middlepersons," that is, those who convey the goods or ideas from the producer or originator to the consumer or recipient.

What is supposed to count, for MI, as *best functioning*? If maximizing preference satisfaction is the goal of MG, what is the goal of MI? The classic answer, as elaborated by Mill, is that the goal of allowing unhindered freedom of speech is to attain the truth or, we might say, to maximize the likelihood of attaining the truth (as no process can guarantee its attainment). Allowing unhindered freedom of speech is most efficient at achieving this goal. MI functions best when it does this. So, the conclusion is that MI maximizes the likelihood of attaining the truth when the government does not interfere, as MG maximizes preference satisfaction when left alone by the government. Despite some doubts about whether this should be seen as the goal of MI, I will, with Mill, assume for the moment that it is.[18]

It is important to note that the labels "originator" and "recipient" of ideas in MI, analogous to "producer" and "consumer" of goods and services in MG, are misleading in at least two respects. First, as with producers and consumers, there is not one group of people who originate ideas and another group who receives them. Everyone does both – we all both originate and receive ideas, as we all both produce and consume goods and services. Second, the terms "originator" and "recipient" mask the dialogical nature of the exchange in ideas. Ideas are developed in exchange; they do not burst forth fully formed from the forehead of one individual. So, for example, in passing on an idea, a recipient will often also be an originator, altering the idea and often making it better.

To evaluate the soundness of this argument, we need to consider the acceptability of the premises. (The inclusion of "relevantly" in (P1) is meant to guarantee the argument's validity.) (1) Is the first premise, which claims that the analogy is appropriate, given what the argument from it attempts to establish, acceptable? (2) In (P2), do MI and MG have the characteristic attributed to them? (3) Does MG function in the way that (P3) asserts?

1. To determine whether MI is relevantly like MG, we must ask what (P2) means regarding MI. What is a "competition" of ideas, and how is it connected with the search for truth? What is the nature of the "choice" involved in the competition, and what is the role of originators and recipients of ideas? Here is one answer. Ideas get communicated by originators to recipients through speech, broadly understood. Recipients encounter different ideas competing for their acceptance or allegiance. Recipients choose among the ideas they encounter some over others by deciding which better represent the truth, and, in doing so, come to believe them. They then communicate the chosen ideas to others in their speech. One could say, then, that some ideas "win" the competition by being spread more widely among members of the community through speech (and coming to be believed by greater numbers of those members) than competing ideas. If the ideas that "win" are more likely to be true, this will have positive aggregate social consequences, presumably because true ideas lead to more successful action in the world.

[18]Mill was sensitive to the need to avoid interference in speech not just from government, but also from public opinion. In addition to free speech's being the surest path to truth, Mill also thought that it promoted individual development.

So, what (P1) asserts is that this competition among ideas in MI is sufficiently similar to the competition among goods and services in MG that a claim about the implications of the competition in MG applies to MI. I will consider two arguments denying that competition in the two cases is sufficiently similar.

The first argument against (P1) claims that being a participant in the competition among goods and services is very different from being a participant in the competition among ideas. Jill Gordon denies that Mill would accept the analogy. She claims that the analogy reflects the view "that market behavior represents paradigmatically the kind of freedom to which we aspire, so speech and action must be free … in the same manner." In her view, "the market metaphor connotes a dog-eat-dog world in which the public good can scarcely find a place among competing self-interested beings," and she finds Mill to be more interested in cooperation than in competition.[19] This is related to a point of Mark Sagoff's, that there is an important distinction between *preferences* and *values*.[20] The MG is for maximizing the preference satisfaction of consumers, and the MI, especially the realm of political discourse, is for advancing the values of citizens. A similar idea is offered by Cass Sunstein, who warns of the dangers of taking political sovereignty for consumer sovereignty.[21]

As a point of logic, dissimilarity between MG and MI does not by itself show the analogy to be faulty. (After all, the universe is much larger than a watch.) If competition plays the same role in MI as it does in MG, in the way the argument asserts, the fact that the participants in each are (or should be) operating under different capacities (satisfying preferences for MG participants and advancing social values for MI participants) does not, without more, show the analogy inapplicable. There is legitimate concern about the sad state of MI in contemporary society, where, due in part to the role of media in conflating the public sphere and the economic market, the MI seems increasingly driven by manipulated preferences.[22] But this historical contingency does not by itself show the analogy to be faulty.

The second argument against (P1) points to certain problematic assumptions that seem required to support the claim that MI has the features the analogy requires. Edwin Baker sets out three assumptions he claims are necessary for MI to promote the attaining of the truth.[23] First, truth is objective and discoverable. Second, people are basically rational, in that the contingency of their individual histories does not control how they perceive the world and they are able to sort through the clutter of messages to perceive the truth claims therein. Third, the discovery of the truth is desirable, in that it is the strongest basis for action, and it resolves value conflicts.

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[19]Jill Gordon, "John Stuart Mill and the 'Marketplace of Ideas,'" *Social Theory and Practice*, Vol. 23, No. 2 (Summer, 1997): 235, 246.

[20]Mark Sagoff, "Values and Preferences," *Ethics*, Vol. 96, No. 2 (Jan., 1986): 301.

[21]Cass Sunstein, "The Future of Free Speech," *The Little Magazine*, Vol. 2, No. 2 (March–April 2001): 4.

[22]For a discussion of the harmful role of the media in the public sphere, see Owen Fiss, "Why the State," in *Democracy and Mass Media*, 136. Some see in the internet a counter-trend.

[23]C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1992), 6–7.

Baker argues these assumptions fail.[24] First, what passes for truth in public discussion is not objective, because it tends to favor the interests of some over others. Second, people are often not rational in that their feelings and ideological tendencies determine their choice of ideas, and they are susceptible to rhetoric and manipulation. Third, there is no truth available through public discussion that can resolve all value conflicts, since their resolution falsely presupposes that people's real interests do not conflict. This contrasts with the plausibility of the analogous assumptions in the case of MG. First, that people have certain preferences is objective and discoverable, which is why preference-satisfaction forms of utilitarianism replaced hedonistic forms.[25] Second, people may not be rational about the preferences they hold, but they are generally rational about satisfying the preferences they in fact have.[26] Third, individual and group conflicts insure that some preferences will be left unsatisfied, but this fact does not cast into doubt the idea of maximizing preference satisfaction. It seems then that the two markets are not relevantly alike.

But this argument is too quick. Baker's criticism of the first assumption depends largely on the significant role that values play in discussions in MI, and normative claims are where the greatest question arises regarding objectivity. This is close to his position in criticism of the third assumption, so I will respond to these together. The MI can work in the face of irresolvable value conflicts because the truth it can yield may be simply how most effectively to get along in the face of those conflicts. In regard to Baker's criticism of the second assumption, the analogy does not require that participants in MI are rational all of the time, only some of the time, for MI does not guarantee attainment of the truth, but only that the likelihood of its attainment will be greater. So far at least, (P1) seems to be acceptable.

2. What about (P2), which asserts that both MG and MI are forms of competition? Both involve individuals (consumers, recipients) choosing among a set of alternatives, itself a result of choices by the other individuals (producers, originators), resulting in some of these alternatives being more frequently chosen than others and so "winning" the competition. Further, there are aggregate social consequences, positive or negative, depending on which of the alternatives are the winners. In the case of MG, goods and services are the alternatives, and *being chosen* amounts to changing hands from producers to consumers. In the case of MI, ideas are the alternatives, but what *being chosen* means may be more complicated. Roughly, we may say that for ideas to be chosen in MI means their being accepted as true or valuable by more of the choosers than competing ideas. Under this, or similar, explication, (P2) seems to be acceptable.

3. The third premise claims that, because MG involves the sort of competition indicated in (P2), MG functions best without government interference.

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[24] Ibid., 12–16.

[25] The preferences themselves are, of course, subjective rather than objective.

[26] There are however doubts based on historical evidence about whether free market choices do maximize preference satisfaction. One example is the market victory of the VHS format over the Betamax format for videotaping, where the latter seems to clearly have been the superior system.

Here, "functioning best" means resulting in choices that maximize aggregate preference satisfaction. This is the familiar point about the economic efficiency of the market. When producers and consumers freely choose what to produce and consume, the resulting competition among goods and services leads to choices that maximize preference satisfaction. The market could, of course, be understood as having other goals, with the resulting different forms of "best functioning." For example, the goal might be understood to be the satisfaction of needs rather than wants or preferences, but I will set this possibility aside.

Is (P3) acceptable? Does the MG function best without government interference? Even on a *laissez-faire* model, some government involvement is required to create the conditions for a free market. The market itself is a form of legal constraint. The government must, for example, sanction force and fraud through the criminal law to insure that economic choices are free, and it must provide mechanisms in civil law to determine and enforce judgments when individuals are harmed by others through market activity. Though this sort of *involvement*, which is constitutive of the market, should perhaps not be seen as *interference* of the sort that *laissez-faire* proponents proscribe, this bare-bones government involvement is not sufficient. Regulative as well as constitutive rules are needed. There are, in the market, sources of friction, market failures, inevitable *imperfections* or impediments to efficiency. There are, for example, negative externalities, cases where market transactions impose unwanted harm on individuals not consenting to or directly participating in the transactions that the tort law is insufficient to deal with. Such harm undercuts aggregate preference satisfaction.[27]

So, the government must interfere (or interfere further) in the market to insure higher levels of preference satisfaction. For example, the government may take action against producer monopolies in some areas and allow regulated producer monopolies in others; it may subsidize the growth of small businesses or certain industries; it may enact tariffs to protect producers; it may monitor certain industries for worker safety and quality of production; it may engage in consumer education; and so forth. Many of these involvements are understood as efforts to "mimic the market," to produce outcomes it is thought that the market would have produced in the absence of the imperfections, and so will both interfere with the choices of producers and consumers *and* help to maximize preference satisfaction. So (P3) must be recast.

> (P3') As a result of its involving a competition for choices by individuals among a set of alternatives offered by other individuals, with positive or negative aggregate social consequences depending on which choices are made, MG functions best (meaning, maximizes preference satisfaction) only through some specific forms of government interference.

Laissez-faire simply does not cut the mustard. As a result of these changes in (P3), the conclusion needs to be reformulated if the argument is to remain valid.

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[27] There are other problems as well, such as imperfections revealed by the public goods problem, the problem of imperfect information (beyond that caused by fraud), high transaction costs, producer monopolies, and high barriers to entering the market.

(C') Therefore, MI also functions best only through some specific forms of government interference.

So, the analogy between MI and MG turns out to support some government interference in MI.

But this seems to be a trivial result. We all know that some government interference in MI is justified, if only to include the restriction of shouting "fire" in a crowded theatre. In particular, the new argument says nothing so far about the legitimacy of hate-speech restrictions. But let us see if there is anything more interesting and more to the point to be wrung from this analogy.

In a discussion of the internal conflicts faced today by many ethnically diverse newly-democratizing states, Jack Snyder and Karen Ballentine argue that the recommendation of "unconditional freedom of speech is a dubious remedy."

> Just as economic competition produces socially beneficial results only in a well-institutionalized marketplace, where monopolies and false advertising are counteracted, so too increased debate in the political marketplace leads to better outcomes only when there are mechanisms to correct market imperfections.[28]

This is instructive because it suggests a rationale for restrictions on hate speech. Hate speech is a kind of speech likely to inflame the ethnic conflicts, undermining democracy, so that complete liberalization may be counterproductive.

Returning to the analogy, can the comparison between MG and MI tell us something about the specific government interferences in MI that might be acceptable? In comparing MG and MI, Coase asserts that "the case for government intervention in the market for ideas is much stronger than it is, in general, in the market for goods," and he suggests that one of the bases of interference in MI is the same as in MG, namely, "when there exist what are commonly referred to as neighborhood or spillover effects, or … 'externalities'."[29] Perhaps the idea of hate speech restrictions can be tied to a form of negative externality in the MI. To make the case for this, however, it is important to reflect further on the goals of speech in MI.

It may be better to think of there being not a single MI, but a number of MIs. In adjudicating free speech cases, Hopkins notes, "The [Supreme] Court, certainly, has identified a conglomerate of marketplaces, each of which possesses its own parameters, dynamics, and audience."[30] The distinction among the MIs is partially defined by the differing goals each of them has. To appropriate an insight of Wittgenstein's, we do different things with language, so the goals of language use will vary from one area to another. For example, one might say that the goal of *commercial speech* is persuasion, rather than the attainment of truth, and this, as some commentators suggest, would open up commercial speech to a higher level of permissible restrictions than other MIs.[31] On the other hand, *scientific speech* is

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[28] Jack Snyder and Karen Ballentine, "Nationalism and the Marketplace of Ideas," *International Security*, Vol. 21, No. 2 (Autumn, 1996): 6.

[29] Coase, 389.

[30] Hopkins, 45.

[31] See, for example, Baker, *Human Liberty and Freedom of Speech*, 197–206.

probably the clearest case where the goal of the enterprise is the attainment of truth, and where restrictions on speech would be counterproductive.[32] So, generally, different regulatory regimes would be permissible in the case of different MIs. The goals, directly or indirectly, help to provide an answer to the question of what interferences are acceptable.

The goal of the MI defines what counts as a negative externality, and thus what may count as a permissible interference. A particular outcome of an activity is a negative externality only in relation to the goal of the activity in which it occurs. In MG, indirect harm caused by economic transactions is a negative externality, and thus a possible opening to legitimate interference, because such harm undermines the goal of maximizing preference satisfaction. There may be value in the government stepping it to attempt to mimic the market. So, the questions are: (1) what is hate speech and what is the MI in which it occurs; (2) what is the goal proper to that particular MI; and (3) would consequences of hate speech count as negative externalities in that area?

1. Hate speech, as the term is normally understood, may refer to four different kinds of language use: (a) racial, ethnic, or religious epithets; (b) demonstrably false empirical claims about racial, ethnic, or religious groups (such as Holocaust denial); (c) promotion of or incitement to racial, ethnic, or religious hatred or violence; and (d) the creation of a hostile social environment in regard to gender, racial, ethnic, or religious categories.[33] These uses seem to have in common a tendency to create or reinforce social hierarchies, especially, to keep members of groups low on such hierarchies "in their place." Characterizing hate speech as speech that tends to create or reinforce social hierarchies has two virtues. First, it takes away some of the problematic vagueness of the term and, second, it sets aside as extraneous issues such as concern with the psychological harm it is said to cause. Understood in this way, the MI in which hate speech occurs is *political speech*, public speech designed to influence opinions and sway decisions in regard to matters of social or public policy, broadly understood.[34] The idea is that hate speech is used, explicitly or implicitly, to promote an agenda in public or social policy as this involves the hierarchical positioning of one such group over another. This could include, for example, efforts to bully members of some groups into submission or silence, thereby limiting their influence in the public debate. In any case, this form of speech expressing hatred of or directing hatred at social groups seems to be the most serious candidate for legal restriction.

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[32] The chief goal of the enterprise need not be that of its individual participants, which may often be career advancement, for example. Moreover, there are clearly restrictions on scientific speech seen as necessary for achieving the goal of the enterprise (though mostly imposed professionally and not by government), but these restrictions are probably constitutive rather than regulative, as discussed earlier in regard to MG.

[33] Schauer, 5–6.

[34] Some commentators, such as Alexander Meiklejohn, argue that political speech is the only form of expression protected by the first amendment, but this is not the only area where the moral acceptability of speech restrictions arises. See Meiklejohn, *Free Speech and Its Relation to Self Government* (New York: Harper Brothers, 1948).

2. What is the goal proper to political speech? It is not, I believe, the attainment of truth in the same sense that this is the goal of scientific speech. The prominent role of values in political speech precludes the attainment of a truth acceptable to all. The point is not that value claims are merely subjective, but rather that, under some idea of "reasonable pluralism," there may be little prospect of resolving differences in values among participants in the community.[35] As a result, as suggested earlier, the truth that political speech seeks is the truth about the best way to get along in the face of the value conflicts. But, to borrow a distinction from Rawls, this is not a truth simply about a *modus vivendi*, that is, a way of proceeding that manages for a time to satisfy all of the participants' self-interest. Rather, it is a truth with a minimal moral content, specifically, that all members of the community are to be regarded as equal participants in political speech exchanges. The source of this moral content is the democratic idea of all the members of a society being equal participants in the process of self-governance.[36] As a result, the goal of political speech, borrowing a phrase from Sunstein, is that of "producing a deliberative democracy among political equals."[37]

3. It seems clear that some of the consequences of hate speech count as negative externalities under the goal proper to political speech, so understood. If hate speech were carefully defined as speech that explicitly treats other participants in the political speech community as less than equal, it would undermine the goal of political speech, and so count as a negative externality. For example, as many have pointed out, racial, ethnic, or religious epithets used in public communication normally express the view that members of the target group are in some sense inferior to members of other groups, less than full and equal participants in public life.[38] Such an effect, counting against the goal of political speech, would be a negative externality, the avoidance of which might justify government interference in political speech. This argument does not focus on all the harm hate speech does, which includes a variety of forms of suffering of those discriminated against. Instead its focus is on a particular sort of harm, that defined in terms of its undermining the goal of political speech.[39]

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[35] "Reasonable pluralism" is a Rawlsian idea. See also Cohen, 223–224.

[36] There is, of course, a large issue involved in justifying this moralized departure, however minimal, from a *modus vivendi*.

[37] Cass Sunstein, "Free Speech Now." *The University of Chicago Law Review*, Vol. 59, No. 1 (Winter, 1992): 255–315.

[38] For a discussion of this, based on the theory of speech acts, see Andrew Altman, "Liberalism and Campus Hate Speech: A Philosophical Examination," *Ethics*, Vol. 103, No. 2 (Jan., 1993): 302. Note that this analysis would not apply to all insults because the idea of a social hierarchy of groups is not relevant to many of them, and it may not apply equally to the four types of hate speech mentioned earlier. It may, for example, apply differently to epithets than to reasoned empirical claims about group inferiority.

[39] Thus, this argument departs from a purely utilitarian accounting of hate speech, since not all harms are relevant; in contrast, in the MG, all harms are relevant because the goal of MG is identical with the end sought by the utilitarian, the maximization of preference satisfaction.

Jeremy Waldron points out that historically in the United States, despite the First Amendment, free speech was not recognized as an important value (think of the Alien and Sedition Acts) until it became clear that free speech did not threaten the state, that the state was not so fragile as to shrivel in the face of open criticism. What is now fragile, he suggests, is the recent achievement of "the position of minority groups as equal members of a multiracial, multiethnic, or religiously pluralistic society," and this may justify restriction of hate speech, which threatens that achievement.[40] This achievement is part of the goal of political speech, as I have characterized it.

This conclusion is only *prima facie*. Even assuming the soundness of the above argument, there are other morally relevant factors to be considered, which may limit the acceptability of government restriction of hate speech. These include the tendency of government to mishandle power ceded to it. Even democratic governments prove often incompetent and occasionally maleficent in its exercise of power, or simply unwilling or unable to challenge an unequal status quo. In this regard, Scanlon discusses the role of "linking empirical beliefs" in a theory of freedom of expression. One of these beliefs is that "governments, whether elected or not, have a settled tendency to try to silence their critics."[41]

An account of hate speech restriction must include a discussion of the risk of government's misusing or abusing its power, were it permitted to be restrictive. There are some ways to limit this risk, for example, by careful drafting of the relevant legislation.[42] In addition, there are alternative means by which a government may seek to reduce imperfections in MI, and some may be less risky than others in terms of the dangers they pose. For example, as often noted, the government's having the power to regulate speech *content* is more dangerous than its having the power to regulate speech *form*, especially in the realm of political speech.[43] Indeed, some forms of formal, content-neutral regulation of political speech (such as requiring permits for political demonstrations or facilitating the distribution of information on public issues) are generally thought unproblematic from a free-speech perspective. But it may be that more than formal regulation is required.[44] As with any area of public policy that involves power given to the government, we must consider the harm to be avoided through exercise of the power against reasonable (nonparanoid) expectations about the risk of government misuse or abuse of that power. What I hope

[40] Jeremy Waldron, "Free Speech and the Menace of Hysteria," *New York Review of Books*, Vol. 55, No. 9 (May 29, 2008): 44.

[41] Thomas Scanlon, "Content Regulation Reconsidered," in *Democracy and the Mass Media*, 337.

[42] See on this Waldron's response to a letter by Perry Link, who criticized the above-referenced article on the grounds, "What to do About Hate Speech," *New York Review of Books*, Vol. 55, No. 12 (July 17, 2008): 52.

[43] For a discussion of these points, see Cohen, 213–216.

[44] The attempt to provide a content-neutral basis for hate speech regulation is part of what is behind the attempt to justify hate speech restrictions by putting them under the Court's categories of "fighting words" or "harassment," which are presumed to be content-neutral and through which some speech restrictions may be allowed.

to have shown is that there is some important harm, defined in terms of the goal of political speech, to be avoided.[45]

Thus, even though my argument does not establish the all-things-considered justifiability of restrictions on hate speech, the conclusion that there is some good reason in favor of such restriction is important. The issue is morally complex, however, and this complexity may be represented by an observation similar to one made by Mill in the first chapter of *On Liberty*. Mill observed a sort of equivocation historically revealed in the term "liberty." In the conflict of liberty and authority, liberty originally entailed self-government, freedom from authoritarian rule, but then, with the achievement of self-government, it came to entail restrictions on that government itself, as in the avoidance of the tyranny of the majority. Similarly, we might say that "tolerance" or "diversity" originally entailed freedom of speech, as this was understood as tolerance for a diversity of ideas. But with the substantial achievement of free speech, we may now come to realize that free speech can undermine or interfere with the tolerance and diversity of society itself, which may then entail acceptable restrictions on free speech itself.

[45] On this point, see Waldron, "Free Speech and the Menace of Hysteria."

The "Marketplace of Ideas:" A Siren Song for Freedom of Speech Theorists

Jonathan Schonsheck

Abstract The concept of a "marketplace of ideas" has had a nearly irresistible appeal to those working on various issues of the right to freedom of speech. And yet, I argue, it must be resisted – for three compelling clusters of reasons. First, the analogy is based upon the presupposition that the "marketplace of commodities" is both *transparent* and *efficient*. Citing an array of historical examples, I argue that it is neither. Second, there is nothing in the world of ideas that corresponds to a Consumer Reports "best buy" in the world of commodities – the very *point* of having a marketplace. Third, the "exchange" of "ideas" is fundamentally different, in a variety of ways, from an "exchange" of "commodities" – the fallacy of equivocation is imbedded in the very concept of a "marketplace of ideas." Thus, the concept does not illuminate, but obfuscates.

Keywords Marketplace of ideas • Exchange of ideas • Freedom of speech • Market failure

1 Introduction to the Issues

There's no denying the fact that the concept of a "marketplace of ideas" is powerfully seductive. If not precisely omnipresent, this analogy is ubiquitous: for example, it has appeared in nearly a hundred Supreme Court cases over the last century.[1] My main goal in writing this paper is to bolster the weak wills of freedom-of-speech theorists, helping them to resist the temptations of this seductress.[2]

[1] Steven P. Lee, "Hate Speech in the Marketplace of Ideas," note 9, this volume.

[2] I apologize for the inherent sexism here. The lure of the Sirens' song is precisely the metaphor I wanted; I could devise no non-sexist revision of the myth that didn't seem badly contrived.

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For the "marketplace of ideas" is not the loving embrace of Circe,[3] but the jagged cliffs of the isle of the Sirens.[4] The essence of this concept itself is a fantasy, an imaginary "marketplace of commodities" that is perfectly transparent and perfectly efficient. And the analogy is sustained by a logical fallacy, equivocation as regards the term "exchange." In consequence, attempts to make philosophical progress on freedom of speech issues – whether arguing *for* state interference (analogous to market interventions), or *against* state interference (analogous to free-market restraint), are doomed from the start. Quite inevitably, they will become mired down in the quagmire of disanalogies between commodities and ideas, and conflicting conceptions about the internal workings of marketplaces.

In Section 2, I construct the analogical argument concerning the "marketplace of commodities," and the "marketplace of ideas." I argue that the idealized concept of the marketplace of commodities is indeed fantastic: destroyed by enormous *categories* of counterexamples to transparency and efficiency. I expose the equivocation on "exchange" in Section 4, abrading its admittedly brilliant patina of plausibility. Finally, in Section 5, I urge freedom of speech theorists to ignore the song of the Sirens, in order to avoid this philosophical shipwreck.

2 The Analogical Argument

1. There is a Marketplace of Commodities.[5]
2. The Marketplace of Commodities is *transparent* and *efficient:* superior commodities will become known, and will thrive; inferior commodities, once exposed, will wither away.
3. There is a Marketplace of Ideas.
4. The Marketplace of Ideas is *transparent* and *efficient*: superior ideas will become known, and thrive; inferior ideas will be exposed, and will wither away.

It is not (just) that I am skeptical about the prospects for the "marketplace of ideas" to function transparently and efficiently, like the marketplace of commodities. I am deeply skeptical about the alleged efficiency of the "marketplace of commodities" itself. More fundamentally, I am skeptical about the coherence of the very *concept* of a "marketplace of ideas."

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[3] Odysseus received a potion from Hermes that enabled him to resist her spells. "...she so marveled at the man who could resist her enchantment that she loved him. She was ready to do whatever he asked and she turned his companions at once back into men again. She treated them all with such kindness, feasting them sumptuously in her house, that for a whole year they stayed happily with her." Edith Hamilton, *Mythology: Timeless tales of Gods and Heroes* (New York: The New American Library, 1942), 212.

[4] "The Sirens ... had enchanting voices and their singing lured sailors to their death. It was not known what they looked like, for no one who saw them ever returned," Hamilton, 43.

[5] Lee uses the more narrow term "goods;" I use the broader term "commodities," referencing both goods and services.

3 Anti-Competitive Forces and Agents in the Marketplace of Commodities

My skepticism about the lack of transparency and efficiency in the marketplace of commodities does not arise from my incarnation as an unreconstructed hippie Marxian philosopher,[6] but from my incarnation as a philosopher jointly appointed to the Division of Arts and Sciences, and the Division of Management – a philosopher who has taught in an MBA program for more than 15 years. As a result of team-teaching with colleagues in the Management Division (and especially teaching by the case study method), and also research and publication in business ethics, I have become familiar with a vast array of anti-competitive agents and practices in the marketplace of commodities.

Each of the following should be understood as exemplars, representing entire *classes* of practices and examples.

3.1 False Consciousness Due to Extraordinary Events of Low Probability

Alternative fuels researchers are investigating, with renewed seriousness, the prospects of hydrogen as a fuel – for either internal-combustion engines, or fuel cells that produce power for electric motors. Hydrogen is the most abundant element in the universe, and it is not the case that the world's greatest reserves of hydrogen are to be found in politically unstable regions, controlled by deeply illiberal fundamentalists. Yet it has been neglected for some 70 years. Why? In a word: Hindenburg. In a sentence: the audio and video and stills of the Hindenburg's incineration. The words of radio announcer Herb Morrison – "Oh the humanity!" – are etched into our collective consciousness.

Some relevant facts need to be brought to the fore. Nearly half of the passengers of the Hindenburg disaster actually survived – 33 of 70. Of the 37 who died, 35 were killed by jumping or falling; only two died of burns. And those two victims died from the burning skin of the zeppelin, or its diesel fuel, *not* the hydrogen. Indeed, hydrogen is less flammable than gasoline. And since it is so light and disperses so quickly, hydrogen fires are far less lethal than petroleum fuel fires.[7]

Imagine that Herb Morrison and his videographer had been killed en route to the landing. Or less dramatically, had simply taken a wrong turn, ending up in Pinehurst rather than Lakehurst. Or imagine that the "remote feed" had not been recorded for rebroadcast at a different time.[8] The destruction of the Hindenburg would have been

[6] Well, at least not *merely*…

[7] For more information, and contrasts between the safety of hydrogen and the safety of gasoline, see hydrogennow.org.

[8] On this, see www.columbia.edu/itc/psychology/rmk/T5/Hindenberg.html.

a very short story, one small paragraph in the history of commercial aviation. Instead, the visuals, and the voice, are known to us all – and have unjustly stigmatized hydrogen. The use of helium in dirigibles is a good idea; the idea that hydrogen is too dangerous for any commercial application whatsoever is false consciousness that has not been corrected by market forces.[9]

3.2 Objectively Superior Commodities that Lose to Objectively Inferior Competitors

By most accounts (and I am no expert), Sony's Betamax format for videotape was superior to the VHS format. Indeed, in the Professional Market (as distinct from the home market), Betacam *SP* became "the most successful general-purpose professional video format of the 20th Century."[10] But in the home market, only one format could survive, and the resources promoting VHS overwhelmed those promoting Betamax. Arguably, it was the inferior product, and not the superior product, that survived. (Sony is getting its revenge, however, as its BluRay has bested HD DVD, which was backed by some of the companies that backed VHS. I do not know whether it is the superior format for High Definition Digital Video.)

3.3 Predatory Takeovers and Suppressions

Imagine that you are a small but innovative manufacturer of widgits; imagine that you have made an R & D breakthrough in widgit technology. The dominant force in the market, U.S. Widgit Works, takes notice of your innovation, and expresses keen interest. It points out its vastly greater manufacturing capacity, its advertising budget, etc., and makes an irresistible offer. (It dangles an enormous sum of money in front of the owners of your privately held firm, or it successfully engineers a hostile takeover of your publicly held corporation.)

Only after the sale has been consummated do you discover that U.S. Widgit has a huge inventory of the old, inferior widgits. It took ownership of your innovative technology *not* to (efficiently) take it to the market, but to *prevent its appearance* on the market. At a minimum, U.S. Widgit will suppress the innovative widgits until it sells off its inventory. And it may suppress the superior widgits even longer – e.g., if it had just made a substantial capital investment in its widgit-manufacturing capacity, and that machinery cannot be adapted to the new technology. If the new technology has

[9] One could argue – since we are *now* investigating commercial applications of hydrogen – that the marketplace has indeed worked. But this is just not credible; the delay of 7 decades completely undermines any claim of market efficiency.

[10] See www.mediacollege.com/video/format/beta/betacam-sp.html.

not been patented, U.S. Widgit may well proceed with the patent application – again, not necessarily to protect its interests in producing and marketing your innovative widgits, but to prevent yet other competitors from making obsolete its inventory or manufacturing capacity.[11]

(No, I do not believe that there is an inexpensive device, made of household materials, that will enable SUVs to get 300 mpg – and that the combined forces of General Motors and Exxon-Mobil have suppressed it. But: Are we to believe that there are *no* innovative technologies that have been "purchased" and then suppressed by multinational corporations, in order to protect inventories or investments? I am skeptical…).

3.4 Anti-Social Anti-Competitiveness

Let us continue speaking of General Motors. There is another iconic image, not as well known as that of the Hindenburg, but symbolizing something that has proved socially even more deleterious: stacks of perfectly functional, but junked, streetcars.[12]

Controversy continues to swirl about the role of GM in the demise of (electric) street cars, and the rise of internal-combustion busses – and then the shift in ridership from public mass transit to private automobiles. GM did indeed purchase controlling interests in some systems, perhaps with the intention of destroying them. (See the previous example.) And GM did engage in intense media campaigns, and the lobbying of government bodies at all levels.[13]

Urban sprawls, and the consequent Sasquatch-sized carbon footprints, are among the longer-term consequences – catastrophes – of that social transition.

3.5 The Anti-Competitive Initiatives of "Big Pharma"

The pharmaceutical industry – widely known as "Big Pharma" – makes big money on products with a high rate of return on investment. To a large extent, it focuses on that which it can *patent* – and of course patenting *itself* is fundamentally anti-competitive. Consider the following list, surely a fraction of the full list.[14]

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[11] For a very contemporary example of this, in the world of finance, see Lawrence G. McDonald, *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers* (New York: Crown Business, 2009), 55.

[12] A good image can be found at Culture Change, http://www.culturechange.org/issue10/taken-for-a-ride.htm.

[13] There is an enormous literature on this; for an introduction, see "The Fight to Save the Streetcars and Electric Trains," Modern Transit Society, http://www.trainweb.org/mts/ctc/ctc04.html.

[14] Our AMINTAPHIL colleague, Richard DeGeorge, has written extensively on these issues.

1. As the patent on a profitable drug is about to expire, the company makes a slight alternation of the patented molecule(s). According to legislation for which Big Pharma lobbied, this creates a "new" molecule, a new drug that can then be patented. It is essentially the same medicine, but the patent provides a new anti-competitive span of time. And while the original molecule moves into the public domain, it does so in the context of a marketing campaign denigrating it in comparison to the "new and improved" prescription medicine.
2. The disparagement of "generics," despite the FDA's scrutiny of manufacturing, and quality assurance programs, which are identical to that of Big Pharma's named drugs.
3. The avoidance of botanicals, and the disparagement of them, since plants cannot be patented. Without the anti-competitive "protection" of a patent, the risks of the market are declined – therapeutic plants are ignored.
4. The method of contraception known as the "cervical cap" is safe and effective and free of side-effects. It is, however, unprofitable – especially in comparison with birth control pills. Indeed, it is cheaper to use than a diaphragm (with contraceptive jelly), and single-use condoms. But its superiority cannot counteract its low cost of manufacture, and thus its low profit potential.[15]

3.6 The Utter Failures of "Market Discipline"

The "subprime mortgage crisis" was enabled by the proponents of the de-regulation of financial markets – in particular, of the private, secondary mortgage market – and the utter failure to regulate the so-called "derivatives" market.[16] Offered in the place of regulation was "market discipline:" those who made sound decisions would reap profits; those who chose poorly would suffer losses. However, when it came time to administer that discipline – to Smith Barney, to Fannie Mae and Freddy Mac – the unruly miscreants proved too big to be spanked. The discipline of the marketplace proved wholly ineffectual. The result is a financial obligation that will be a burden for future generations of "unborn debtors." This is a savage instance of the "internal contradiction of capitalism:" all the profits were individual, all the risks were social.

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[15] See Barbara Seaman and Gideon Seaman, M.D., "Gone but not forgotten: The cervical cap," in Barbara Seaman and Gideon Seaman, M.D., *Women and the Crisis in Sex Hormones* (New York: Rawson Associates, 1977).

[16] See Jonathan Schonsheck, "Tsunamis and Subprimes: Human Vices, not Natural Disasters," Mss. An excerpt was published as an Op Ed in the *Post-Standard*, Syracuse, NY, 20 July 202008, E-1, E-4. A portion of this was read to The Corinthian Club, Syracuse, NY, October 23, 2008. Another incarnation of it was read, as an invited address, to the American Society for Value Inquiry, meeting with the American Philosophical Association – Central Division, Chicago, IL, February 2009.

These are but a few exemplars of *sets* of anti-competitive forces and agents; there are indefinitely many other examples of inferior products that survive, of improbable events that pollute the intellectual environment, etc. Indeed, the success of the (objectively) superior product, together with the failure of the (objectively) inferior product, is a rarity worthy of marvel.[17]

All these considerations, taken together, render most implausible the claim that the "marketplace of commodities" functions transparently, and efficiently. In consequence, the claim the marketplace of ideas functions transparently and efficiently, "just like" the transparency and efficiency of the marketplace of commodities, is most implausible too. Indeed, the supposed analogy between the two markets is losing its power to illuminate.[18]

4 The Incoherence of the Very *Concept* of a Marketplace of Ideas

To this point, my focus has been on the marketplace of commodities; my thesis has been that the functioning of that marketplace is significantly less efficient, and significantly less transparent, than it is in the popular imagination. Or more bluntly: the analogical argument under scrutiny begins with a highly idealized – i.e., unrealistic – understanding of the marketplace of commodities.

In this Section, I want to re-direct our focus; let us look carefully at the hypothesized "marketplace of ideas." In two crucial dynamics, the marketplace of ideas *must* function in ways that are decidedly *different* from the marketplace of commodities. Taken together, they pose a challenge to the very *coherence* of the concept of a marketplace of ideas. While I (once again) acknowledge the *prima facie* attractiveness of that "concept," my claim is that it cannot withstand philosophical scrutiny.

4.1 At the Core of the Metaphor: The Fallacy of Equivocation

The constitutive activity of the marketplace of commodities is the *exchange* of commodities. Whether it is the simple bartering of primitive hominems, or trade in early civilizations mediated by money, or a system of credit and banking in the capitalist mode of production, or the buying and selling of financial derivatives like "credit default swaps" – the participants "enter" the marketplace with some commodity, seeking to "exit" the market with some *other* commodity. The very essence of the

[17] On this point, see Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House, 2007).

[18] For a more technical analysis of the fundamentals of the market, see Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (New York: Harper Business, 2009).

market, the point of one's participating, is to trade, or swap: you give up a commodity of less value to you (but of more value to your "counterparty"), in order to get a commodity that is of more value to you (but of less value to your counterparty). Indeed, to leave the marketplace possessing the self-same commodity with which one entered it, is to fail to consummate a bargain. Bluntly, your commercial venture has failed.

Now in contexts ranging from high-level diplomacy to the liberal arts classroom, we "exchange ideas." In this enterprise, we show respect and build trust. Indeed, the exchange of ideas is at the very core of civility, and thus of civilization itself.

The essential question – one that naturally arises, and must be answered – is this: *Is* the exchange of ideas closely analogous to the exchange of commodities? We must proceed with great caution here, as we reflect on the exchange of "ideas," and thereby the exchange of various cognates of ideas: views, or perspectives, or positions, etc.

Let us imagine two individuals – we can call them Scarlet and Gray – engaged in an exchange of ideas. If this activity is closely analogous to Scarlet and Gray's exchanging *commodities,* then Scarlet exits the conversation with Gray's idea, the idea Gray "held" when entering the conversation. And Gray exits the conversation with Scarlet's idea, the idea Scarlet "held" when entering the conversation.

This is not an impossible outcome – that each persuades the other to abandon one's *ab initio* position, and to adopt the other's position in its stead. But it is, I submit, relatively rare,[19] and not at all the premarket goal of either party. Such an outcome is ironic, and perhaps humorous.[20] But it is absolutely *not* the paradigm of an "exchange of ideas." Yet it *should* be the paradigm, if the analogy between the marketplace of commodities and the marketplace of ideas is a strong analogy.

Now consider various other possible outcomes of the exchange of ideas between Scarlet and Gray – all of which are commonplace occurrences.

- Scarlet could persuade Gray of Scarlet's position.
- Gray could persuade Scarlet of Gray's position.
- Scarlet could keep Scarlet's position; Gray could keep Gray's position.
- Scarlet's arguments persuade Gray to reconsider.
- Gray's arguments persuade Scarlet to reconsider.
- Scarlet's arguments leave Gray more deeply entrenched.
- Gray's arguments leave Scarlet more deeply entrenched.

Surely there are other variations, and gradations, of *all* of these possible outcomes.

The importance of this fact can hardly be overstated. In each and every case, the "exchange" of ideas is *quite* different from the "exchange" of commodities. Thus the proposed analogy between exchanges of commodities, and exchanges of ideas, is completely undermined.

Among the defining features of an "exchange of ideas," I submit, is that the participants are allowed to *retain* their ideas even as they exit the discussion. And

[19]Except, perhaps, early in marriages…

[20]Indeed, this seems most like a linguistic version of O. Henry's short story, "The Gift of the Magi."

this is true *even if* others have been persuaded by those ideas. Indeed, the other participants in the discussion can "take" your ideas away with them – that's the typical premarket intention. But their action does not require you to surrender your ideas. Quite to the contrary, the fact that others have been persuaded by your ideas may well result in your clinging to them even more tightly, their power to persuade having been thereby confirmed.

Can you exit a commodities bargaining session with the other's commodity, and yet retain your own commodity? That's not an "exchange," that's a *felony.*

In a similar way, it is not possible for all the parties to a commodities bargaining session to exit, with all those parties in possession of the same commodity. But it is perfectly possible, given a gifted orator, for all parties to exit a discussion in possession of the same *idea.*[21]

I submit that this is even more devastating than a disanalogy between an exchange of ideas, and an exchange of commodities. I submit that it undermines the very *concept* of a "marketplace" of ideas. Can it be a "marketplace" in *any* meaningful sense, if you can take another's, and keep your own? If another can take yours, but you can still keep it? Is thinking about philosophical dialog as a "market" of *any* sort at all actually *illuminating?* Isn't it, on the contrary, *obfuscating*?

4.2 Do Ideas "Compete" in a Marketplace?

Surely we can make some sense of a "competition" between ideas. Some ideas gain subscribers, some ideas lose subscribers – just like magazines. And we can speak (albeit loosely) of ideas, as well as periodicals, becoming "bankrupt."

Consumers Union purchases a vast array of products, carefully notes all of their features, and subjects them to an exhaustive battery of tests.[22] And even though some consumers may have idiosyncratic needs for particular features, we understand well the concept of a Consumer Reports "Best Buy" – the product at the nexus of reliability, functionality and price. We've got the notion of an "objectively superior" commodity, and thus of an "objectively inferior" commodity. (If you do not believe this, then you have never tried to drive a Yugo.[23])

But beyond casual expressions like those above – have we got the notion of an "objectively superior" *idea?*

I have an impulse to say that the theory of evolution – Charles Darwin, plus a century and a half of research, refinement and confirmation – is objectively superior to "creationism," including in its contemporary guise, "intelligent design." But some "ideas" – and surely this is one – are so thoroughly intertwined with deep

[21] This point highlights another equivocation in the analogical argument. To "possess" an idea is quite different from possessing a commodity.

[22] Consumers Union, http:// www.consumersunion.org.

[23] Often called, by its exasperated owners, "You DON'T Go!"

human emotions and aspirations and meanings that to speak of "objectively" superior or inferior is to understand very little, and *mis*understand very much. While endorsing the perspective of a research biologist, one can view the matter from the perspective of a fundamentalist preacher, looking to enlarge and energize his flock. Nothing, no idea, could be "superior" to the eternal salvation of a person's immortal soul. And that requires a commitment to biblical inerrancy, not Godless evolution.

So again, in a casual sense there is a "competition" between the ideas of creation and evolution. However, that "competition" is profoundly different than competitions between toaster ovens, or vacuum cleaners, or widescreen TVs, or automobiles – i.e., commodities. We must ask: Precisely what, of philosophical import, is illuminated by the assertion that the ideas compete?

5 Conclusions

An analogical argument is supposed to help us understand something obscure by bringing to mind something already well understood, and then identifying corresponding components and processes they share. To the extent that the initial phenomenon is not well understood, or seriously misunderstood, it cannot help us to understand the obscure. And if essential components or processes are *decidedly* different in the two — well, the analogical argument exacerbates the obscurity, rather than dispelling it.

The various attempts to "save" the analogy strike me as Procrustean. Every guest neatly fit Procrustes's iron bed. If, upon arrival, they did not fit – no problem. Those too short were stretched; those too tall were chopped down to size.[24] Similarly, the enterprise has shifted from illuminating a phenomenon, to (attempting to) salvage a metaphor.

Let us return to the original analogical argument, revised in the light of the foregoing critique.

1. There is a Marketplace of Commodities.
2. The Marketplace of Commodities is sometimes transparent (but very often opaque), and sometimes efficient (but most often not very inefficient, due to false beliefs held by various parties, and false consciousness, and an array of anti-competitive actions by various parties, and by regulatory failures).
3. There is a Marketplace of Ideas (but the central dynamic of that marketplace – "exchange" – is totally different, in every important respect, from the "exchanges" in the marketplace of commodities; "possession" of an idea is very different from "possession" of a commodity; "competition" among ideas is markedly different from competition among commodities). Therefore,
4. So: What *does* come next? Are we indeed on the path to enlightenment?

[24] Hamilton, 150.

The transparent and efficient marketplace of commodities exists only as a fantasy. But it is coherent; there is nothing self-contradictory in the concept. The same cannot be said of the supposed "marketplace of ideas," which does not function like a marketplace at all. If my arguments are essentially sound, there could be no such thing as a "marketplace" of ideas. So to proceed on this basis, when theorizing about freedom of speech issues, is to navigate unwaveringly into the cliffs of the Sirens' isle. Despite the overwhelming allure of the Siren's song, only (philosophical) death awaits those who succumb to the temptation.

A Kantian Conception of Free Speech*

Helga Varden

Abstract In this paper I provide an interpretation of Kant's conception of free speech. Free speech is understood as the kind of speech that is constitutive of interaction respectful of everybody's right to freedom, and it requires what we with John Rawls may call 'public reason.' Public reason so understood refers to how the public authority must reason in order to properly specify the political relation between citizens. My main aim is to give us some reasons for taking a renewed interest in Kant's conception of free speech, including his account of public reason. Kant's position provides resources for dealing with many of the legal and political problems we currently struggle to analyze under this heading, such as the proper distinction between the sphere of justice and the sphere of ethics, hate speech, freedom of speech, defamation, and the public guarantee of reliable media and universal education.

Keywords Freedom of speech • Kant on free speech • Public reason • Government regulation of speech

1 Introduction

Kant is a staunch defender of free speech. In fact, some see his defense of free speech as his sole objection to Hobbes's absolutism, even if these same interpreters find it puzzling why Kant chooses free speech as the sole condition on political

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legitimacy rather than, say, a right to life.[1] Given Kant's strong defense of free speech, it is also natural to think that he rejects any rightful limits on what private individuals can say to one another in public. Any such limitation, it seems, would be a limitation on free speech. At the same time, if Kant's view really is that people can communicate whatever they want – no matter how hateful, harassing or untruthful – then it doesn't have much to contribute to contemporary legal debates surrounding free speech. I will argue the contrary: a closer analysis of the texts in light of Kant's theoretical commitments reveals a powerful Kantian liberal critique of free speech.

The argument for this new Kantian critique of the scope of constitutional protection of free speech proceeds as follows. In the first part of the paper, I focus on Kant's discussion of private right – the rights private individuals hold against one another – as it pertains to speech. I start by exploring Kant's general distinction between right and virtue. The distinction between right and virtue is crucial to understanding why Kant claims that most speech does not involve private wrongdoing from the point of view of right, regardless of what virtue might have to say. Consequently, most speech does not give rise to legal claims between private persons in liberal courts of law. I then outline those aspects of private interaction involving speech that lie within liberal regulation. Here I pay special attention to the Kantian treatment of threats, honor (including defamation), contractual lies, legal responsibility for the bad consequences of lies, and noisy and startling uses of words. I argue that although there is private wrongdoing in each case, on Kant's account, private individuals do not have the right to punish the wrongdoers. Because private individuals cannot realize right any punishment of private wrongdoing must be exacted by the state.

In the second part of the paper, I argue with Kant that the state sets itself up as a public authority, understood as a liberal legal and political system, by accomplishing two main tasks. First, the state secures conditions in which its citizens can interact rightfully as private individuals by securing their rights through the establishment of corresponding private and public law. Private law regulates private disagreements while public law copes with violent private aggression (private crime). Since most speech cannot give rise to private wrongdoing, the constitution

[1] See, for example, Paul Guyer, *Kant* (New York: Routledge, 2006); Sarah Williams Holtman, "Revolution, Contradiction, and Kantian Citizenship," in *Kant's Metaphysics of Morals*, ed. M. Timmons (New York: Oxford University Press, 2002), 209; Otfried Höffe, *Immanuel Kant*, trans. Marshall Farrier (Albany: SUNY Press, 1994), 186f; Wolfgang Kersting, "Kant's Concept of the State," in *Essays on Kant's Political Philosophy*, ed. H.L Williams (Chicago: University of Chicago Press, 1992), 143, though contrast with his "Politics, freedom, and order: Kant's Political Philosophy," in *The Cambridge Companion to Kant*, ed. Paul Guyer (New York: Cambridge University Press: 1992), 342; Allen D. Rosen, *Kant's Theory of Justice* (New York: Cornell University Press: 1993); Howard L. Williams, *Kant's Political Philosophy* (New York: St. Martin's Press: 1983), 198. Though this absolutist reading of Kant is particularly encouraged by "On the Common Saying: That may be Correct In Theory, but It Is of No Use in Practice", especially pp. 8: 303ff, I argue against it in "Kant's Non-Absolutist Conception of Political Legitimacy" (*Kant-Studien*, forthcoming). All references refer to the Prussian Academy pagination of Kant's work. I have used Mary Gregor's translations of *The Metaphysics of Morals*, (New York: Cambridge University Press, 1996), and of his other texts in *Practical Philosophy*, (New York: Cambridge University Press, 2006).

both secures the citizens' rights to be so protected by private and public law and protects their right to free speech. Second, the state aims to ensure that it functions as a representative, tripartite system of liberal law and that it reconciles its monopoly on coercion with the rights of each of its citizens by securing domestic, systemic justice. Public law is the state's main tool for setting itself up with such an institutional structure. On Kant's view, I suggest, the way in which the state must establish itself as a public system of law yields a further, independent reason why liberal legal systems give such strong constitutional protection of free speech. Moreover, I argue that because of the aim to establish itself as a public system of law, the liberal state requires its public officials to distinguish between their official uses of speech and their engagement in public reason as private citizens as well as it regulates seditious speech. Finally, I argue that on the Kantian view, these systemic considerations inform the liberal state's approach to contemporary issues such as hate speech, speech amounting to harassment and blackmail.

2 Virtuous Versus Rightful Private Speech

In order to understand Kant's conception of free speech we need a good grasp of his conception of rightful relations in general. With this conception in hand, we can see how Kant conceives of rightful *private* speech. Then we can see how rightful private speech is distinguished from rightful public speech, namely that which is protected or outlawed by various public law measures, including free speech legislation.

Right, for Kant, is solely concerned with people's actions in space and time, or what he calls our "external use of choice" (6: 213f, 224ff). When we deem each other and ourselves capable of deeds, meaning that we see each other and ourselves as the authors of our actions, we "impute" these actions to each other and to ourselves. Such imputation, Kant argues, shows that we judge ourselves and each other as capable of freedom under laws with regard to external use of choice – or 'external freedom' (6: 227). Moreover, when we interact, we need to enable reciprocal external freedom, meaning that we must find a way of interacting that is consistent with everybody's external freedom. And this is where justice, or what Kant calls 'right' comes in. Right is the relation between interacting persons' external freedom such that reciprocal external freedom is realized (6: 230). This is what Kant means when he says that rightful interactions are interactions reconcilable with each person's innate right to freedom, namely the right to "independence from being constrained by another's choices… insofar as it can coexist with the freedom of every other in accordance with a universal law" (6: 237). For Kant, right requires that universal laws of freedom, rather than anyone's arbitrary choices, reciprocally regulate interacting individuals' external freedom.

The first upshot of this conception of right is that anything that concerns morality as such is beyond its proper grasp. Right concerns only external freedom, which is limited to what can be hindered in space and time (coerced), whereas morality also requires internal freedom. That is to say, morality encompasses both right and virtue, and virtue requires what Kant calls freedom with regard to "internal use of

choice". Internal freedom requires a person both to act on universalizable maxims and to do so from the motivation of duty (6: 220f) – and neither can be coercively enforced. This is why Kant argues that only freedom with regard to interacting persons' external use of choice (right) can be coercively enforced; freedom with regard to both internal (virtue) and external use of choice – morality – cannot be coercively enforced (ibid.). Because morality requires freedom with regard to both internal and external use of choice, it cannot be enforced.

This distinction between internal and external use of choice and freedom explains why Kant maintains that most ways in which a person uses words in his interactions with others cannot be seen as involving wrongdoing from the point of view of right: "such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere" do not constitute wrongdoing because "it is entirely up to them [the listeners] whether they want to believe him or not" (6: 238). The utterance of words in space and time does not have the power to hinder anyone else's external freedom, including depriving him of his means. Since words as such cannot exert physical power over people, it is impossible to use them as a means of coercion against another. For example, if you block my way, you coerce me by hindering my movements: you hinder my external freedom. If, however, you simply tell me not to move, you have done nothing coercive, nothing to hinder my external freedom, as I can simply walk passed you. So, even though by means of your words, you attempt to influence my internal use of choice by providing me with possible reasons for acting, you accomplish nothing coercive. That is, you may *wish* that I take on your proposal for action, but you do nothing to force me to do so. Whether or not I *choose to act* on your suggestion is still entirely up to me. Therefore, you cannot *choose* for me. My choice to act on your words is beyond the reach of your words, as is any other means I might have. Indeed, even if what you suggest is the virtuous thing to do, your words are powerless with regard to making me act virtuously. Virtuous action requires not only that I act on the right maxims, but that I also do so because it is the right thing to do, or from duty. Because the choice of maxims (internal use of choice) and duty (internal freedom) are beyond the grasp of coercion, Kant holds that most uses of words, including immoral ones such as lying, cannot be seen as involving wrongdoing from the point of view of right.

Three further clarifications are in order before we can see how this conception of virtue and right delineates the boundaries of free speech. First, even though lying is not a wrongdoing from the point of right, it is important to emphasize that if one lies, one is indeed responsible for the bad consequences of the lie. The reason is that by lying one voluntarily sets the framework within which another person acts. If the other person accepts an invitation to trust a false statement, then the bearer of the lie is responsible for the bad consequences of the lie. For example, say I ask you for directions to the library and you, due to your extraordinarily bad sense of humor, lie thereby sending me in the wrong direction. It happens that your lie directs me through the most dangerous part of town, where I become the victim of wrongdoing. Because your lie sets the framework within which I make my choices, namely the set of facts by which I make my choice, you become partly responsible

for what happens to me. Your words have set the framework within which I exercise my external freedom and consequently, even if unbeknownst to you, you send me into a dangerous neighborhood, you are still partly responsible for what happens to me there. Since the wrongdoing befell me as a result of your lie, you are responsible for the bad consequences resulting from it.

Second, it is important to distinguish threats of coercion from merely immoral speech. When you threaten me, you tell me that you do not intend to interact rightfully with me in the future. Simply saying so does not deprive me of anything that is mine, of course, but if you are serious and have the ability to make a strike against me, that is, if you really are threatening me, then you intend to back up your words with physical force. When you really threaten me, neither are you uttering 'empty words' nor are you taking yourself to be doing so. For example, assume that instead of yielding to your threat, I begin to walk away. You then move forward to block my retreat. This signals your intention to follow through with the threat. In fact, you might engage in other acts to signal that the threat is not empty. Perhaps you crush my hat under your foot or take a baseball bat to my car. In cases like these the words contained in the threat no longer function merely as speech but take on the role of communicating an intended future wrongdoing against me. Hence, threats are not considered mere speech on this view.

Third, speech must be distinguished from uses of words that debilitate others in virtue of their causal effect on their bodies. After all, words are communicated by means of sound waves, which exist in space and time and hence can have coercive power in relation to our bodies. For example, I believe that this account affirms the view that if your words debilitate another's physical functioning, whether intentionally or unintentionally, there is private wrongdoing. If you standing on the edge of a cliff, and I sneak up behind you and say 'Boo!', I am responsible for the consequences. In this case, it is the effect of the noise on your body, say the surprise or that you are startled, rather than the word ('boo') that hinders your external freedom, namely by hindering your choice to stay on the edge of the cliff. In the same vein, playing Herbjørg Kråkevik's latest album extremely loudly out the windows of my house night and day – say, to enlighten my ignorant neighbors as to the benefits of listening to contemporary Norwegian folk music – has the debilitating effect that those close by cannot concentrate on work, relax or sleep. Ultimately, the extremely loud music will result in their inability to function physically. Therefore, also in this case my speech clearly deprives others of what is theirs, namely the functioning of their bodies due to the stress created by being subject to constant high levels of noise. Nevertheless, it is not the words or their content that constitutes my wrongdoing, but the noise. The point is that when such acts significantly affect each other's physical ability to set and pursue ends with our respective means, they are coercive; such actions hinder others' external freedom.[2]

[2]The analysis therefore changes if the music is not extremely loud, but merely annoying or causing inconvenience. In these cases, the sound waves do not have the debilitating effect I'm describing above. The judgment of particular cases – whether they are merely annoying, debilitating, intentional or non-intentional – befalls, as we will see shortly, to the public authority.

And note that this is fully consistent with Kant's general claim that speech as such is not a private wrong since the wrongdoing involved in the three cases above arises from the fact that there is more than speech going on.

It is because people typically cannot deprive them of what is theirs by means of their speech alone that most immoral uses of words, including lies, do not involve private wrongdoing. Instead of tracking immorality in general and lies in particular, private wrongdoing merely tracks the few instances in which speech alone has coercive power. It should therefore not come as a surprise that these instances involve lying and that Kant argues that there are two cases in which the general rule does not protect the liar: first, lying as part of contractual negotiations, and second, defamation. In both cases the lies have coercive power and so constitute private wrongdoing.

The reason contractual lies have coercive power is that if I lie when I make a contract with you and you believe me, then my intention is to deprive you non-consensually of something that is yours. For example, assuming that were I honest about what you will receive for your hard-earned money, I strongly suspect you would not contract with me, say, to buy swampland in Florida. Therefore, I lie, since otherwise you would not consent to the exchange. Thus, by lying I non-consensually deprive you of something that is yours and lying as a part of contractual negotiations is a private wrong (6: 238, 238n).

What about defamation, how does it involve coercion? Attempts at defamation also constitute attempts non-consensually to deprive others of what is theirs, namely their good reputations as determined by their actions. Corresponding to a person's innate right to freedom, Kant argues, is that person's duty to "*Be an honourable human being… Rightful honour…* consists in asserting one's worth as a human being in relation to others" (6: 236). To defend one's rightful honor is to defend one's right to be recognized by others solely by the deeds one has performed. Indeed, one's reputation, Kant explains, "is an innate external belonging" (6: 295); it can originally belong only to the person whose deeds are in question. If others spread falsehoods about the life she has lived, then she has the right and duty to challenge their lies publicly, for her reputation belongs only to her and to no one else. A person's reputation is not a means subject to other people's choice; it is not a means others have a right to manipulate in order to pursue their own ends. To permit this, Kant argues, would be to permit others to use your person as their own means, or to "make yourself a mere means for others" rather than also being "at the same time an end for them" (6: 236).

Let me say briefly how this account of rightful honor analyzes cases like Holocaust-denial. Part of what makes denying the Holocaust different from other types of defamation is that it involves people who are no longer alive. On the Kantian approach I am advancing, one's reputation is seen as intimately connected with how one has interacted normatively with others (6: 291). To interact normatively is to be capable of normativity or capable of interacting qua 'noumena', as Kant says, and not merely 'qua phenomena' or as embodied beings governed by laws of nature. It is qua noumena that we are capable of deeds or of having actions imputed to us. And it is qua noumena that we can still be defamed long after

we are dead.[3] Because right tracks normative relations, that one is no longer alive is beside the point. What is more, anyone – "relatives or strangers" – can challenge the lies told by another on behalf of the dead. Indeed, the one challenging the defamation does so in virtue of her own duty to ensure the conditions under which we can have rightful honor (6: 295). The reason is that those who spread such lies do not only express an unwillingness to respect those they defame in particular, but also they display a general unwillingness to interact in a way compatible with the rightful honor of everyone. The absence of defamation is necessary for public opinion to be reconcilable with each person's right to freedom and the corresponding duty to be an honorable being. By defaming the dead, a person aims to falsify the public opinion, upon which everyone is dependent for rightful honor. Consequently, every member of the public has a right to challenge such lies on behalf of the dead.[4]

3 Public Regulation of Speech

The above account captures the main elements in Kant's conception of private right with regard to speech. Although we might expect that private law would track private right in liberal legal systems, we find that it doesn't. For example, if violations of rights are judged to be coercively aggressive, then they are considered crimes and hence are regulated by public law – not private law. To add to the puzzle, laws protecting citizens' rights to be protected by private rights against one another also concerns public law, namely constitutional law – not private law. To make matters even more confusing, notice that the previous analysis of rightful private speech contains no explicit mention of free speech legislation; indeed to find these laws we must look to public law. So how can we make sense of this from the Kantian

[3]One's good reputation should not to be understood as "a thing", Kant argues, but as "an innate external belonging, though an ideal one only, which clings to the subject as a person, a being of such a nature that I can and must abstract from whether he ceases to be entirely at his death or whether he survives as a person; for in the context of his rights in relation to others, I actually regard every person simply in terms of his humanity, hence as *homo noumenon*" 6: 295.

[4]In the Doctrine of Right Kant says that defamation is not punishable by "the criminal court", but only by "public opinion, which in accordance with the right of retribution, inflicts on him the same loss of the honor he diminishes in another", Ibid., 6: 296n. One might be tempted to conclude that Kant rejects the idea that defamation is a legal issue at all. But this would be mistaken, for in 6:295, Kant explicitly confirms that defamation after death can "take effect only in a public rightful condition, but… [it is] not *based* only on its constitution and the chosen statutes in it… [it is] also conceivable *a priori* in the state of nature and must be conceived as prior to such status, in order that laws in the civil constitution may afterwards be adapted to them." Reading defamation to be a legal issue also gains support from this passage in the Doctrine of Virtue: "*false* defamation… [is] to be taken before a court", Ibid., 6: 466. Consequently, when Kant argues in the Doctrine of Right that defamation cases should not be taken before a criminal court, he should be seen as identifying the proper venue for defamation cases, namely civil (rather than criminal) court. And when Kant says that the punishment should be loss of honor, he means that the proper punishment meted out by the civil court is loss of honor.

perspective? After all, if the above account of private wrongdoing with regard to speech is all the Kantian has to say about the regulation of speech, then it seems that she has little to contribute to many of the puzzles the free speech discussion gives rise to, such as public laws prohibiting seditious speech, hate speech, speech amounting to harassment, blackmail, and the way in which the speech of public officials is restricted by public law. I will argue that despite initial appearances, part of the strength of Kant's approach is its ability to critique the typical structure of right and the additional public law restrictions of speech. The core Kantian insight that gives its this ability to critique, I suggest, is its proposal that free speech legislation is not primarily about how private persons interact, but about citizens' claims on their public institutions, including their right to criticize these institutions. To see how this insight is justified and how it informs the Kantian critique of free speech, I start by emphasizing two features distinguishing Kant's approach to legal obligations from much contemporary liberal thought: first, Kant maintains that right is impossible in the state of nature and, second, that public right is different in nature from private right.

The first important distinction between Kant and much contemporary liberal thought issues from Kant's argument that it is not in principle possible for individuals to realize right in the state of nature. Kant explicitly rejects the common assumption in liberal theories of his time as well as today that virtuous private individuals can interact in ways reconcilable both with one another's right to freedom and their corresponding innate and acquired private rights. All the details of this argument are beyond the scope of this paper. It suffices to say that ideal problems of assurance and indeterminacy regarding the specification, application and enforcement of the principles of private right to actual interactions lead Kant to conclude that rightful interaction is in principle impossible in the state of nature.[5] Kant argues that only a public authority can solve these problems in a way reconcilable with everyone's right to freedom. This is why we find Kant starting his discussion of public right with this claim:

> however well disposed and right-loving men might be, it still lies *a priori* in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings… can never be secure against violence from one another, since each has her own right to do *what seems right and good to her* and not be dependent upon another's opinion about this (6: 312).[6]

There are no rightful obligations in the state of nature, since in this condition might ('violence', or arbitrary judgments and 'opinion' about 'what seems right and good') rather than right (freedom under law) ultimately governs interactions. According to

[5]I give an interpretation of this argument in my "Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature," *Kantian Review*, Vol. 13, No. 2 (2008): 1–45.

[6]To stay faithful to Kant's own text, I have replaced Mary Gregor's translation of "rechtliebend" ('law-abiding') with 'right-loving'. Moreover, Gregor uses 'it' instead of a 'him' or 'her' here, and since this is confusing, I have replaced it with 'her.'

Kant, therefore, only the establishment of a public authority can enable interaction in ways reconcilable with each person's innate right to freedom. Moreover, only a public authority can ensure interaction consistent with what Kant argues are our innate rights (to bodily integrity and honor) and our acquired rights (to private property, contract and status relations). The reason is that only the public authority can solve the problems of assurance and indeterminacy without violating anyone's right to freedom. The public authority can solve these problems because it represents the will of all and yet the will of no one in particular. Because the public authority is representative in this way – by being "united *a priori*" or by being an "*omnilateral*" will (6: 263) – it can regulate on behalf of everyone rather than on behalf of anyone in particular. For these reasons, civil society is seen as the only means through which our interactions can become subject to universal laws that restrict everyone's freedom reciprocally rather than as subject to anyone's arbitrary choices.

The second related distinction between Kant and much contemporary liberal thought concerns Kant's explicit challenge of the (typically implicit) liberal assumption that the reasoning and actions of the public authority should be thought of as analogous to the reasoning and actions of virtuous private individuals. This line of reasoning is typically assumed by both weak and strong voluntarist theories. On such views, 'public reason' is seen as referring to what *virtuous* individuals would or could hypothetically consent to. Instead, Kant proposes that the reasoning and actions of the public authority should be, exactly, *public*, meaning that any decisions or actions should be such that *all citizens* (whether virtuous or not) could hypothetically consent to them. To represent the citizens properly, then, the public authority must reason within a framework set by its citizens' rights. This is why Kant emphasizes that the citizens' hypothetical consent is understood as what citizens would consent to simply *as citizens* (6: 314).[7] And as citizens their aim is to enable a condition in which rightful interaction, or interaction consistent with everyone's right to freedom, is possible – exactly what is not possible in the state of nature. The perspective of the public authority is therefore not an idealized perspective of personal virtue or of private right, but rather a common public perspective constitutive of a rightful condition. Establishing such a public perspective to regulate citizens' interactions is necessary for rightful interaction on this view.

When the state comes into being, Kant therefore argues, "[t]he general will of the people has united itself into a society which is to maintain itself perpetually" (6: 326). The state must ensure that it sets up with an institutional structure that enables it to remain a public authority in perpetuity. Moreover, any liberal state, Kant argues, is a representative republic, in which the people is the sovereign by governing itself through public institutions. In the just state, therefore, "*law* itself rules and depends on no particular person… Any true republic is and can only be

[7]Ibid., 6: 314. Rawls seems to share this feature with Kant. It is especially prominent in his later writings (*Political Liberalism* onwards) since there he increasingly emphasizes both the *public* aspect of his theory as well as that the theory is based on the *citizens'* two moral capacities.

a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies)" (6: 341). The public authority comprises a liberal system of law aimed at enabling rightful interaction and whose officers are to be seen as the citizens' delegates or deputies. By the latter point Kant does not identify democracy as a minimal condition on a state's legitimacy.[8] Rather what is taken to be crucial is that the public authority is exercised within the parameters set by a firm commitment to act on behalf of the citizens. The aim, therefore, is not to construct an ideally virtuous, artificial person, but an artificial person who represents only its citizens, and yet no one of them in particular. To do this, the state must be established as a representative, liberal system of law. Therefore, the state does or must do something private individuals cannot in principle do, namely act *solely* as a representative of the people by establishing itself as the liberal rule of law.

How, then, does the public authority go about establishing itself as a representative authority in the right way? One condition is that the public authority cannot have any private interests: it cannot own land or private property (6: 323f). If it did, it would simply be a powerful private person, and so would reintroduce the problems of the state of nature in its most ghastly forms. Another condition is that the public authority as a sovereign power must be a tripartite authority whose powers are delineated by the social contract (the constitution) which legislates (posits laws); which judges (applies the posited laws), and which determines the execution of the law (upholds a monopoly on coercion) (6: 316–318). In addition, the public authority's monopoly on coercion must be reconcilable with each citizen's innate right to freedom as well as her corresponding innate rights (to honor and bodily integrity) and acquired rights (to private property, contract and status relations). Hence, because the public authority's primary aim is to overcome the problems of assurance and indeterminacy in the state of nature, and thus establish reciprocal freedom under law, Kant maintains that its authority must be thoroughly delineated by posited law that is also consistent with the "*a priori necessary*… laws… [that] follow of themselves from concepts of external right as such" (6: 313, cf. 6: 315). And as we have seen, this entails that posited law must be consistent with the a priori principles of private right. Otherwise, interaction cannot be reciprocal freedom subject to universal law. Making the principles of private right (bodily integrity, honor, property, contract and status) determinate by positing laws, which are applied by the courts and enforced by the executive power is therefore constitutive of establishing a public authority at all; its legitimacy requires that it enables reciprocal freedom under law in this way. In sum, then, constitutive of establishing a state is a legal, foundational or constitutional document that secures each citizen her right to freedom, which includes the right to bodily integrity, rightful honor, private property, contract right and status relations. Herein lies the reason why most communications of words as such as well as

[8] Kant considers there to be three forms of state, namely autocracy (rule by one), aristocracy (rule by nobility) and democracy (rule by the many), (6: 340).

virtue are beyond the proper boundaries of law: they fall outside the sphere of proper liberal legislation of private interaction constitutive of a legitimate public authority. Consequently private citizens do not have legal rights against one another regarding their speech, except insofar as their communications of thought are defamatory or are part of contractual relations, namely cases in which through speech we can deprive one another of rightful possessions. It is in part for this reason that the resulting Kantian position will defend citizens' constitutional right to free speech, understood as their right to discuss even the most controversial topics amongst themselves – through films, articles, the media, internet medium, and so on. And it is in part because citizens cannot have a right to take each other to court on these issues that legal protection of free speech is protected by public law rather than private law – it is a right the citizens hold against the state rather than against one another. Establishing a just state involves giving its citizens a constitutional right to be so protected.[9]

It would be tempting, but wrong, to conclude from the above that a full liberal critique of free of speech rights found in liberal states can be established by means of an account derived, ultimately, from private persons' rights against one another. For then Kant would be seen as arguing that constitutional protection of free speech is merely about ensuring that people are not punished when speech does not involve private wrongdoing. But Kant's defense of free speech is much stronger than this. On his view, crucially, the right to free speech also protects the possibility of criticism of the public authority, since the right to speak out against the state is necessary for the public authority to be representative in nature. Therefore, this right to free speech is constitutive of the legitimacy of the political authority, namely constitutive of the political relation itself – a relation that does not exist in the state of nature. The right to political speech therefore does not rely on the justification provided by the private right argument that words cannot coerce. This aspect of the right to free speech is rather seen as following from how the public authority must protect and facilitate its citizens' direct, critical engagement with public, normative standards and practices as they pertain to right. There are no a priori solutions or knowledge with regard to the actual formulation of the wisest laws and policies to enable rightful interaction. It is only through public discussion protected by free speech that the public authority can reach enlightenment about how and whether its

[9]In "A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage and Prostitution," *Social Philosophy Today*, Vol. 22 (2007): 199–218, I argue that it is because citizens have a right to access protection by private right that gays and lesbians have a right to marriage. This is why same-sex marriage is a constitutional right. In "A Kantian, Feminist Conception of Abortion and Homosexuality," in *Analytical Feminist Contributions to Traditional Philosophy*, eds. Anita M. Superson and Sharon Crasnow, I argue similarly that sodomy and abortion laws are constitutional issues; they involve rights to bodily integrity and hence are covered in US law under the term 'a right to privacy'. I employ a similar argument in "Kant's Non-Absolutist Conception of Political Legitimacy: How Public Right 'Concludes' Private Right in 'The Doctrine of Right'", *Kant Studien* (forthcoming), to justify the claim that the legitimacy of the German state dissolved once it introduced laws denying private property to Jews.

own laws and institutions really do enable reciprocal external freedom under law for all. That is to say, only by protecting the citizens' right freely to express their often controversial and critical responses to the public authority's operations can the public authority possibly take its decisions to represent the common, unified perspective of all its citizens. Without knowledge of how the decisions affect the citizens, it is simply impossible to function as a representative authority. Therefore, the state has the right and duty constitutionally to protect its citizens' right to free speech; the right to free speech is constitutive of the rightful relation between citizens and their state.

There is clear textual support that Kant provides the kind of twofold defense of free speech argued here, namely that communication of thought does not typically involve private wrongdoing and that the state must protect free speech in order to function as a representative authority. To outlaw free speech, Kant argues in the essay "What is Enlightenment?", is to "renounce enlightenment… [and] to violate the sacred right of humanity and trample it underfoot" (8: 39). Outlawing free speech is not only stupid, since it makes enlightenment or governance through reason impossible, but it involves denying people their right of humanity. Their right of humanity is denied by outlawing free speech, because such legislation involves using coercion against the citizens even when their speech does not deprive anyone of what is theirs. Moreover, outlawing free speech evidences a government "which misunderstands itself" (8: 41). Similarly, Kant argues both in this text and in "Theory and Practice" that such legislation expresses sheer irrational behavior on the part of a government. "*[F]reedom of the pen*", Kant writes in the latter essay,

> is the sole palladium of the people's rights. For to want to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter – whose will gives order to the subjects as citizens only by representing the general will of the people – all knowledge of matters that he himself would change if he knew about them and to put him in contradiction with himself…. (8: 304, cf. 8: 39f)

Free speech is seen as the ultimate safeguard or protection of the people's rights. Therefore, a public authority – an authority representing the will of the citizens and yet the will of no one in particular – cannot outlaw free speech, since citizens qua citizens cannot be seen as consenting to it. Such a decree would bring the sovereign 'in contradiction with himself' since it would involve denying the sovereign the vital information it needs in order to act as the representative of the people. In "What is Enlightenment?" Kant expands this point: "[t]he *public* use of one's reason must always be free… by the public use of one's own reason I understand that use which someone makes of it *as a scholar* before the entire public of the *world of readers*" (8: 37). Every citizen must have the right to engage truthfully, yet critically in public affairs – to be a scholar – and so to raise her voice and explain why she judges the current public system of laws to be unjust or unfair. If such voices are not raised, the public authority cannot possibly be able to govern wisely; without a public expression of the consequences for right of particular laws, the public authority does not have the information required to secure right for all and so to represent its citizens.

Above I mentioned that the aim of the state is to establish itself as a representative, liberal system of law, and I also pointed out how this entails that the state must ensure that it rules through liberal law, understood as encompassing both private right measures as well as certain public right measures that enable the sovereign to be representative in nature. This, however, does not constitute Kant's full discussion of what establishing a liberal system of law involves.[10] Additional public right principles are 'a priori' necessary or constitutive of a liberal system of law. These principles follow from the fact that the state must institutionally reconcile its monopoly on coercion with the rights of each of its citizens and thereby enable its own rightful existence in perpetuity. "*Public right*" refers not only to individuals' rights, says Kant, but to "[t]he sum of the laws which needs to be promulgated generally in order to bring about a rightful condition" (6: 311). These public law measures essentially concern issues of systemic justice, meaning that they are seen as required to secure systemic right for all citizens. The main principle guiding measures ensuring systemic justice is simply that the state cannot allow its citizens to become dependent upon its monopoly on coercion unless it makes sure that the system as a whole is consistent with their innate right to freedom, namely their right not to be subject to anyone's arbitrary choices but only be governed by universal law. The institutional systems upon which the citizens are dependent must respect the citizens as free, equal and independent in relation to one another (6: 313) – and public right is the main tool the state has to ensure that public institutions operate in this way.

Kant centers his discussion of systemic justice in "General Remark On the Effects with Regard to Rights that Follow from the Nature of the Civil Union" (6: 318). This section of the "Doctrine of Right" is dedicated to justifying public right principles as they pertain to systemic issues concerning revolution (6: 318–323); land ownership, the economy and the financial system (6: 323–325); poverty and religious institutions (6: 326–328); public offices (6: 328–330), and punishment (6: 331–337). Each of these principles of public right is seen as resulting from how the state must reconcile its monopoly on coercion with each citizens' innate right to freedom, by providing conditions or establishing a systemic institutional whole in which citizens can interact as free, equal and independent in relation to one another. Rather than engage each of these public right principles here,[11] I will concentrate on those more directly relevant to free speech, namely principles concerning seditious speech, punishment, public offices, and why all crimes are covered by public right rather than private right. Subsequently, I will treat contemporary issues surrounding hate speech, speech amounting to harassment, and blackmail.

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[10] Hence, even if the voluntarist would agree with Kant up to this point, I take it that the voluntarist position cannot make sense of the need for the additional provisions for systemic justice. Therefore, if the argument presented below succeeds, then voluntarism as it is typically understood fails as a liberal approach to analyze the state's coercive authority.

[11] See my "Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents", *Dialogue* XLV (2006): 257–284, and "Kant's Non-Absolutist Conception of Political Legitimacy" (*Kant-Studien*, forthcoming) for further discussion of these public right principles.

To understand Kant's condemnation of seditious speech, remember that Kant, as mentioned above, takes himself to have shown that justice is impossible in the state of nature or that there is no natural executive right. Since Kant considers himself to have successfully refuted any defense of the natural executive right, he takes himself also to have shown that no one has the right to stay in the state of nature. This, in turn, explains why Kant can and does consider seditious speech a public crime. The intention behind seditious speech is not merely to criticize the government or to discuss theories of government critically, say. In order to qualify as seditious, the speaker's intention must be to encourage and support efforts to subvert the government or to instigate its violent overthrow, namely revolution. To have such a right would be to have the right to destroy the state. Since the state is the means through which right is possible, such a right would involve having the right to annihilate right (6: 320). That is, since right is impossible in the state of nature, to have a right to subversion would be to have the right to replace right with might. Since the state is the only means through which right can replace might, the state outlaws it. And since it is a crime that "endanger[s] the commonwealth" rather than citizens qua private citizens, it is a public crime (6: 331).

The refutation of a natural executive right also explains why Kant holds that public right covers speech amounting to a private crime, such as a serious contractual lie. An act of aggression, or coercion, against another person is also an attempt to undermine the state's rightful monopoly on coercion. Hence all violent aggressions, including serious contractual lies, are crimes covered by public law – what we call 'private crime laws'. They are not regulated by private law (6: 331).

Public law also governs the public authority's administrative offices (6: 328). Only in this way can it subject its citizens to the authority of these offices without thereby subjecting them to other citizens' (the public officers') arbitrary choices. Public law regulation of public administrative offices creates the distinction between reasoning as a public officer and as a private citizen. Right, therefore, requires more than a properly functioning public reason. It also requires that public officers respect what Kant calls, somewhat misleadingly, the 'private' reasoning (8: 37f) constitutive of their office.[12] The distinction between 'scholarly' or public reasoning qua citizen and 'private' reasoning qua public officer is necessary to reconcile the public authority's power with each citizen's right to freedom. Thus can public offices function as representative of the citizens and ensure interaction subject to universal laws of freedom rather than to anyone's particular choices.

Kant's distinction between public and private right can also be used to make sense of controversial issues of hate speech, speech amounting to harassment, and blackmail. First, an explanation why all these kinds of speech will not only be regulated in relation to public spaces, but also private (non-governmental) workplaces. The reason why public spaces of interaction and private workplaces are equally

[12]For an excellent discussion of Kant's distinction between private and public reason, see Jonathan Peterson's "Enlightenment and Freedom," *Journal of the History of Philosophy,* Vol. 46, No. 2 (April 2008): 223–244.

important targets of public law issues from the fact that in capitalist economies, at least, the state has permitted its citizens to become dependent upon private employment to secure access to means and hence to exercise external freedom. Just as the state must ensure that all public spaces are spheres within which its citizens can interact as free, equal and independent bearers of rights, the state must also ensure that an economy on which its citizens are dependent for access to material means functions in the same way. That is to say, insofar as the state permits the capitalist system to become part of the public solution to enabling rightful private property for all, it must also govern that economic system by public law. The state cannot permit such systemic dependence without also ensuring that the systems are not under private control. To permit this would be to permit some private citizens to obtain coercive control over the freedom of other citizens, which is precisely not to ensure that universal law regulates all citizens' interactions.[13] Such private dependency relations are therefore necessarily in conflict with the state's function, namely to reconcile its monopoly on coercion with each citizen's innate right to freedom. The right to freedom, as we saw, is the right to *independence from* rather than dependence upon any private person's arbitrary choices, which is realized only by subjecting interacting persons' freedom reciprocally to universal laws of freedom as enabled by the public authority. By issuing public law to govern any systems, including private ones, upon which the citizens' exercise of their rights is dependent, the state secures rightful conditions for all.

Even if we accept that issues of systemic dependency explain why the state will regulate public spaces as well as some apparently private interactions, such as in the workplace, it is not immediately clear why the regulation of hate speech and speech amounting to harassment is necessary.[14] Why are these kinds of speech not protected by free speech legislation – and why do they fall under public rather than private law? The answer lies in the way in which these kinds of speech track severe and pervasive historical oppression. Hate speech and harassment are exemplified by personal insults on the basis of factors like race, ethnicity, gender, sexual orientation, disability and socioeconomic class. Moreover, it seems that achieving the insult is possible only because there has been a significant history of oppression of the insulted person. After all, blond jokes can't really rise to the status of insult, but sexist comments about my gender can.[15] Still, as we saw above, the fact that speech is offensive or annoying is not enough to make them proper objects of law, so what makes these cases different?

On the Kantian view I have been developing, hate speech and speech amounting to harassment are not outlawed because they track private wrongdoing as such, but

[13] I think this argument applies to any private system on which the state allows its citizens to be dependent for the exercise of their rights.

[14] Note that libertarian theories of justice have a hard time making sense of these kinds of regulation. Because they are committed to the view that the rights of the state are reducible to those of individuals, any restrictions must be understood in terms of private harms.

[15] See Ann E. Cudd, *Analyzing Oppression* (New York: Oxford University Press, 2006) for an excellent discussion of these features of oppression.

rather because they track the state's historical and current[16] inability to provide some group(s) of citizens with rightful conditions of interaction. This type of public law tries to remedy the fact that some citizens have been and still are 'more equal than others'. Hence, if the state finds that it is still unable successfully to provide conditions under which protection and empowerment of its historically oppressed, and thus vulnerable, are secured, then it is within its rightful powers to legally regulate speech and harassment to improve its ability to do so. By putting its weight behind historically oppressed and vulnerable citizens, the state seeks to overcome the problems caused by its lack of recognition in the past and its current failure to provide conditions in which its citizens interact with respect for one as free and equal. Therefore, whether or not any instance of speech actually achieves insult is inconsequential, for that is not the justification for the state's right to outlaw it. Rather, laws regulating speech and harassment track the state's systemic inability to provide rightful interaction for all of its citizens. Note that this argument does not, nor must it, determine which particular usages of hate speech and speech amounting to harassment should be banned. It only explains why certain kinds and circumstances of speech and harassment can and should be outlawed and why public law, rather than private law, is the proper means for doing so. Determining which types and how it should be banned is matter for public debate and reflection followed by public regulation on behalf of all citizens.

Finally, why is blackmail a matter of public right?[17] As we have seen above, private right protects each person's right to use his own means to pursue his ends. Moreover, we have seen that no one has a right to anyone else's silence. Insofar as I have obtained knowledge about something by rightful means, including another person's history, that knowledge belongs to me. And I can make available to others if I so choose.[18] So why can't I offer my silence with respect to another's history in exchange for some material means, such as money? The reason why I do not have a right to blackmail is that this kind of silence falls within the public sphere, and with regard to this sphere, as we have seen, all citizens must be provided conditions in which they can interact as free, equal and independent. Instances of blackmail subvert these conditions because they result in one citizen becoming dependent upon another for the exercise of rightful freedom. Providing conditions of rightful interaction precludes that one person can set ends that aim to subject another person's

[16] As is well known, criminal statistics affirm that ethnic and religious minorities, women, gays and lesbians, for example, are still frequent subjects of violence – whether by private individuals or by public officials – merely in virtue of their ethnic, religious or gender identity and their sexual orientation. Naturally, the fact that violence against citizens due to their sexual orientation is not covered in hate crime legislation in many U.S. states does nothing to mitigate this point. Rather, it signals one way the state currently fails to enable conditions of rightful interaction for all of its citizens.

[17] I am tremendously grateful to David Sussman and Arthur Ripstein for discussion on this point, which, of course, is not to say that they necessarily agree with my view.

[18] There are some exceptions to this general rule, such as, for example, we find in doctor-patient and attorney-client privilege, that I cannot consider here.

freedom to her choices in this way. Therefore, although I am permitted to make whatever truthful information I have about someone available to the public, perhaps by selling it to a newspaper or a magazine, I am not permitted to approach that person with an offer to exchange my silence (my means) for some of her means. To do so constitutes an attempt to force her into a private dependency relation with me, rather than to interact as free, equal and independent persons. Hence the state outlaws blackmail by means of public law. It is a public crime, since it endangers public right as such.

4 Conclusion

The aim of this paper has been to show that rather than being an outdated and peculiar account of free speech, Kant's position has something important and powerful to contribute to the current debate. I have argued that part of what makes Kant's account particularly interesting to contemporary discussions issues from the distinctions drawn between virtue and right and between private and public right. These help to clarify and justify the principled distinctions that liberal law is currently struggling with, including distinctions between free speech, seditious speech, hate speech, harassment, defamation and blackmail.

Free Speech, Equal Opportunity, and Justice*

Alistair M. Macleod

Abstract After distinguishing questions about (a) the reasons for the value we attach to various forms of freedom of speech, (b) the grounds of the moral right to freedom of speech, and (c) the role of the state as a guarantor of freedom of speech, I argue (1) that the reasons for valuing freedom of speech have force only in certain of the contexts in which (and only for certain of the purposes for which) freedom of speech can be exercised, (2) that the moral right to freedom of speech must be supported not only by reference to the reasons that give freedom of speech its value but also by appeal to principles of distributive justice, and (3) that while the state, as a guardian of freedom of speech, must adopt measures both to prevent interference with freedom of speech and to provide opportunities for the effective exercise of freedom of speech, responsibilities of both these kinds must also be discharged by individuals and agencies in the private sector.

Keywords Free speech • State facilitation of free speech • Value of free speech • Free speech and distributive justice

1 Freedom of Speech: Some Issues

A striking feature of much recent philosophical discussion of freedom of speech is its focus on the role of the state in protecting freedom of speech. It is often assumed that the question of the boundaries within which freedom of speech is to be protected

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is simply one aspect of the larger question of the limits of the authority of the state. For example, it may be argued that the state's authority to regulate freedom of speech, whether in this or that specific domain or (more generally) in any domain, is very limited because freedom of speech is a necessary condition of the enjoyment of individual autonomy and the state's legitimate authority is constrained by respect for the autonomy of the members of society.[1] It is also often assumed, when the normative basis of the right to freedom of speech is under discussion, that the fundamental question is one about what *legally protected right* to freedom of speech the members of a society ought to enjoy.

It is of course undeniable that importance attaches both to the question how far the state should be granted authority to regulate the freedom of speech of the members of society and to questions about the content and scope of the legal right to freedom of speech they should have when the law and the constitution are ideally contoured and interpreted. However, legal constraints aren't the only sorts of constraints to which a doctrine of freedom of speech may have to accord recognition. Even if it were a matter of agreement that there should be no *legal* prohibition of certain forms of hate speech (or, more generally, speech that gives serious offense) – and of course these are still controversial questions – it would remain to be determined whether these are forms of speech to which *other* kinds of protection ought to be given. The view that restrictions on freedom of speech ought not to be *legally enforceable* – provide the basis for legal action in the courts, for example – is perfectly compatible with the view that freedom of speech should nevertheless be subject to various *non-legal* constraints in contexts of certain sorts. For example, when the editor of a Canadian magazine decided to publish the Danish cartoons that had caused serious offence to members of the Islamic community across the world, a provincial human rights commission was asked to hand down a judgment censuring the decision, even though it was clear that the censure carried no legal consequences. While it is controversial both whether a human rights commission should have a mandate to issue judgments of censure that have no legal authority and whether the publication of the Danish cartoons merited this sort of non-legal censure, it is irrelevant to the settlement of these questions whether or not it should be legally impermissible to publish offensive materials of this kind. The relevant issue is whether a doctrine of freedom of speech should concern itself, in part, with more than the question of the role the state should play in the regulation of various forms of speech, and if so, whether the publication of materials that are seriously offensive to religious or ethnic groups or that incite hatred of such groups violates any of the non-legal norms governing freedom of speech to which, in these circumstances, recognition might be accorded.

A second striking feature of much recent philosophical discussion of freedom of speech is that it is often taken for granted that the only form that legal protection of

[1] A qualified version of this sort of argument is to be found, e.g., in Tim Scanlon's important early paper, "A Theory of Freedom of Expression," *Philosophy and Public Affairs*, Vol. 1. No. 2 (Winter 1972).

freedom of speech need take is the prohibition of attempts to *restrict or limit* the freedom of speech of the members of a society. The role of the state, on this view, is to draw a line between legally permissible and legally impermissible *interference* with freedom of speech and to use the enforcement machinery at its command to police this distinction by protecting freedom of speech against legally impermissible interference.

This way of characterizing the state's role is, however, too narrow. The state also has a substantial role to play in *facilitating* freedom of speech: it can arrange for the provision of the resources the members of a society may need in order to take advantage of the freedom of speech that, at least nominally, they are supposed to enjoy. For example, the freedom to express political views in ways that facilitate effective participation in a society's deliberative processes and thereby contribute to decisions about matters of common concern may require the state to ensure that all the members have adequate information about major political issues, or to guarantee easy access to appropriate "forums" for the discussion of these issues, or to create and maintain educational institutions to give them the skills they need in order to form their own views about matters of public concern.[2] In short, the state may have to "protect" the freedom of speech of society's members not only by the *prevention of legally impermissible interference* with freedom of speech but also by the *provision of opportunities for the effective exercise* of freedom of speech.

While I shall return later to questions about what the state must do for society's members if they are to enjoy freedom of speech, I want first to explore some of the values served by freedom of speech and then take up briefly questions about the underpinnings of the moral right to freedom of speech. Both of these questions can be distinguished quite sharply from questions about the limits of the authority of the state to regulate freedom of speech.

The first of these questions simply asks what it is about freedom of speech that serves to show why it is something we (should) value and consequently something we ought to be predisposed to protect and promote. This is clearly a question that leaves open (for later treatment) questions about how far, and in what ways, *the state* ought to play a role in "protecting and promoting" valued forms of freedom of speech.

The second question – the question about the basis for the *moral right* to freedom of speech in at least some of the forms it can take – goes beyond the first because not all the things we value (in some way, or to some degree) are things to which we have a moral right. An important part of the explanation is that even when there is agreement about the value that attaches to individuals having freedom of speech (in at least certain of its forms), it may not be possible for all the members of a society to have as much freedom of speech as they might like.[3] Allowing (or enabling) some members of society to enjoy as much freedom of speech of some valued sort as they might like may prove to be impossible if the other members

[2] Some of these matters are taken up in a later section of this paper.

[3] Indeed, it may not be possible for them to have as much freedom to say what they please as would be *in their own interest*.

are to enjoy at least a reasonable measure of freedom of this sort. For example, to permit wealthy members of society to give expression to their political views through the purchase of as much television or radio time as they can afford may in readily imaginable circumstances[4] be incompatible with the enjoyment by poorer members of anything even close to a comparable measure of freedom to give voice in effective ways to their political views. Before we can say of the members of a society that they have a moral right to freedom of speech of this or that sort, important issues about the fair distribution of effective opportunities for the expression of their views must be addressed. Principles of distributive justice have a crucial role to play in providing the normative underpinning for statements about the moral right individuals have to freedom of speech of this or that determinate sort.

The fact that distributive justice considerations must be invoked in support of the moral right to freedom of speech serves to underscore the sharpness of the distinction there is between questions about the grounds of this *right* and questions about the rationale for the *value* we attach to certain forms of freedom of speech. As will be argued in the second section of this paper, our reasons for valuing certain forms of freedom of speech can be identified without any appeal to principles of distributive justice.

2 The Values Served by Freedom of Speech

Questions about the value of freedom of speech cannot be treated as mere corollaries of questions about the value we attach to freedom itself. The main reason is that the view that freedom *as such* has value must be rejected. Since statements about freedom must be understood, in part, as statements about freedom *to X* – where X is typically some action or activity – value would attach to freedom as such only if it were true that we have reason to value freedom to X for *all* values of X. It is easy to show, however, that there are values of X for which the freedom to X is *not* a good thing even other things being equal. Freedom to torture people at will, freedom to kill people who are obstacles to the achievement of our ends, and freedom to blacken the reputation of others by spreading baseless rumors about their private life or business practices – all are examples of freedoms that we have no reason to value. Indeed, in at least all these cases rules or laws expressly prohibiting torture, murder, and libel under threat of severe penalty can be adopted without any attempt having to be made to balance the case for their adoption against the case for preserving the freedoms they restrict. The rules or laws that deprive the members of a society of these freedoms are defensible rules or laws *full-stop*, not rules or laws that are defensible *on balance*, because greater importance attaches to preventing the harm inflicted by acts of torture, killing or libel, than to safeguarding the freedom to commit

[4]Circumstances of this sort are familiar in democratic societies in which there is a great deal of economic inequality.

such acts. As such examples show it's simply false that there is any reason to value these freedoms – from which it follows that it's also false to suppose that there is any reason to value freedom *as such* (that is, freedom to X *for all values of X*).

Rejection of the view that there are reasons why we should value freedom as such has an interesting consequence. It means that claims about the value of freedom must be parsed as claims about the value of freedom to X *for certain values of X*. It then becomes necessary to distinguish the values of X for which freedom to X *is* from the values of X for which freedom to X *is not* a good thing.

The idea that there's an alternative way to draw the distinction – viz. to claim that, for certain values of X, it is *self-evident* that freedom has value – can be dismissed, for two reasons. One is that claims about the self-evidence of normative claims are epistemologically suspect, at least in part because, unlike (say) propositions in mathematics or logic, normative propositions cannot plausibly be represented as tautologies (or as "true by definition") and as *therefore* self-evident. The second is that reasons can typically be given for supposing that freedoms of this or that sort are prima facie a good thing, reasons it would be otiose to look for or offer if it were self-evident that the freedoms in question have value.

The obvious way to draw this distinction is to supply *reasons* for supposing that freedom to X, for this or that value of X, actually *has* value. Where good supporting reasons can be given, freedom to X, for the value of X in question, can be said to have value. Where such reasons can't be found for freedom to X, when X is assigned some other value, it can be concluded – at least pending the discovery of such reasons – that freedom to X, for this value of X, has no value. In this way, step by step, the distinction can be shored up between the values of X for which freedom to X has value and the values of X for which freedom to X is devoid of value.

Now if the value that attaches to freedom of speech can't be thought of as a mere corollary of the value that attaches to freedom as such – freedom to X for all values of X – then, where the "freedom to X" is freedom of speech, reasons have to be given for thinking that this is a freedom that does indeed have (at least prima facie) value.

When *this* question is taken on it's natural to wonder whether freedom of speech *as such* is something we (should) value, even other things being equal, or whether, alternatively, it's only under certain conditions that freedom of speech should be taken to have prima facie value. The first of these alternatives would be reasonable only if it could be claimed that value attaches to freedom of speech regardless of the context in which or the purpose for which it is exercised.

There are at least two lines of argument it's worth exploring for dismissal of this claim.

The first simply draws attention to the familiar fact that many of the things people actually say are devoid of value. Thus, they say things that, in the context in which they say them, are uncontroversially harmful in a number of familiar ways. People sometimes tell malicious, reputation-undermining lies about others; they issue death-threats; they offer bribes; they commit acts of perjury; they offer medical or legal advice when unlicensed to do so; they collude to fix prices; and they

resort to sexual and racial harassment.[5] What people say in all these contexts is crucial to – indeed constitutive of – the acts they are performing. It would consequently be bizarre to try to represent freedom of speech in such contexts as prima facie a good thing while dismissing the idea that value attaches to freedom to commit the associated acts.[6]

The second line of argument is this. The reasons normally given for attaching importance to freedom of speech in certain contexts and for certain purposes have force only in those contexts and for those purposes. Thus, if – in line with John Stuart Mill's celebrated argument in *On Liberty* – freedom of speech is represented as having a crucial role to play in extension of the frontiers of knowledge (because freedom to exchange ideas and disseminate information makes an indispensable contribution to the deepening and broadening of a society's cognitive resources), then, while members of the scientific community can invoke the value of freedom of speech (so understood) in the course of objecting to scientific contracts that place restrictions on the publication of research results, it is idle for freedom of speech considerations (of the kind cited in the Millian argument) to be appealed to in defense of freedom to make maliciously-motivated and false reputation-undermining statements about other people. Again, if freedom to express (and to engage in unconstrained discussion of) views about issues of political concern[7] is deemed to be crucial to the participation of the members of a society in all those collective decision-making processes that shape the social environment for the living of their lives, then it will be idle to appeal to the value of freedom of (political) expression in defense of freedom to make demeaning remarks about people's racial origins or their ethnic affiliations. The general point is that arguments for the value we attach to freedom of speech in this or that sort of context and for this or that broad purpose will be found to work, in so far as they work, *for the particular contexts and purposes in question*, but *not* for other contexts or other purposes – and certainly not

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[5] The list is an adapted version of one provided by Cass Sunstein. See "Democracy and the problem of free speech," *Publishing Research Quarterly*, Vol. 11, No. 4 (Winter, 95/96): 11. While Sunstein describes the items in his list as instances of "*low*-value speech" – noting that "all these can be regulated without meeting the ordinary highly speech-protective standards for demonstrating harm" – I cite them here as examples of "*no*-value" speech.

[6] While an attempt might be made to respond to the line of argument I have presented briefly here by distinguishing the question whether speech-acts of the sorts cited are unacceptable ways of exercising freedom of speech from the question whether (the presupposed form of) freedom of speech is nevertheless something we should value, I cannot here pursue the questions this response raises. Suffice it to say that a counter-argument can be constructed that builds on the closeness of the relationship there is between the value that attaches to freedom of choice (in standard situations in which this is a valued form of freedom) and the choice-worthiness of the options that make up the menu from which selections can be made. For example, the value of the freedom of choice I have in some area of my life is not enhanced when worthless options are added to those I already have, and the value of the freedom of choice I have is not diminished by the removal from the menu of options that are not even minimally choice-worthy.

[7] "Issues of political concern" can be taken, here, to be issues that bear, directly or indirectly, on the making of decisions, at various levels and in various contexts, about the shape of a society's institutions and practices, or its laws and procedures.

as arguments for freedom of speech *as such* (that is, freedom of speech in absolutely *any* context, for absolutely *any* purpose).

Trying out our own ideas about possible experiments in living as well as having the opportunity to benefit from – and to discuss – the ideas others have can contribute in obvious ways to the making of sensible life-enhancing and life-enriching decisions. As both T.M. Scanlon and Joshua Cohen bring out in their contributions to the recent philosophical literature on freedom of expression, freedom of expression – of certain kinds, and in certain contexts – has value not only because it provides a protected outlet for the views people want to communicate but also because it provides productive exposure to other people's views.

Arguments can readily be constructed for quite a large number of rather different kinds of contexts in which and purposes for which freedom of speech is something we (should) value. For example, it's plausible to argue that freedom of speech is something we (should) value because of the role it plays in facilitating the making of decisions that are conducive to the securing of personal well-being or to the development of latent capacities.[8] Again, freedom of speech is crucial to the exercise of the right to autonomy – the right to live one's own life in ways of one's own devising. It is a feature of all these arguments, however, that – like Millian arguments for freedom of speech in the search for truth and like arguments for the importance that attaches to freedom of speech in political contexts – they provide support for the value we attach to freedom of speech *in the contexts in which certain objectives are being pursued*. The presupposed contexts and objectives can and do overlap. Where they do, the arguments for freedom of speech with which they are associated will be mutually reinforcing. It is only to be expected, however, that – like the Millian arguments and like the arguments for freedom of political speech – there will be contexts in which and purposes for which people say things of various kinds that do *not* overlap with the contexts or purposes protected by any of these arguments. When we try to say why, in *these* (unprotected) contexts and for *these* (unprotected) purposes, freedom of speech should be valued, we may find ourselves unable to come up with any plausible supporting reasons. Yet unless reasons can be found that support these forms of free speech, it will be reasonable to conclude that no value attaches to them.

The reasons I have given for illustrative purposes of the value that attaches to freedom of speech in a variety of important and familiar contexts shouldn't be thought to be the only reasons to which we ordinarily do – or should – give recognition. Many of the things we say – to friends, family members, neighbors, colleagues, acquaintances, or strangers – may not serve any such grand objective as advancement of knowledge or promotion of public good or enhancement of personal well-being or preservation of individual autonomy. For example, in the course of myriad mundane interactions with people we associate with or meet, we refer in

[8] See T.M. Scanlon, "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review*, Vol. 40 (1978–1979): 519, and Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs*, Vol. 22 No. 3 (Summer 1993): 207.

conventional ways to the weather ("It's a nice day"), or we make casual use of hackneyed forms of greeting ("Hi, good to see you again"), or we exchange sundry pleasantries ("Hope you manage to get all your shopping done before rush hour"), or we trade humdrum stories about our everyday lives ("My appointment was for 1 o'clock and I didn't get taken till 4"). Routine utterances of these sorts are often so inconsequential that the search for reasons for thinking that the freedom to say such things "has value" may seem entirely misconceived: it may seem contrived and gratuitous to try to show that some valuable purpose is served by casual conversational exchanges.[9] It is worth noting, however, that the freedom to say intrinsically inconsequential things in the course of our interactions with other people does have a crucial role to play in the maintenance (or establishment, or strengthening) of a wide range of valued personal relationships. Friendly conversation over meals cements family relationships; casual exchanges at formal parties "break the ice" between guests who don't know each other; sincere expressions of interest in ordinary aspects of the lives of neighbors help to foster community solidarity; and so on. Freedom of speech in very ordinary situations of these familiar kinds can thus be seen – plausibly – to have value because of its role in the nourishment of relationships of various sorts to which we rightly attach importance. The value that attaches to freedom of speech in these mundane contexts can be confirmed by noting the disastrous effects on these relationships of speech that expresses hatred or contempt or hostility. Speech that vilifies members of the community through indulgence in falsely malicious forms of gossip or through use of racially or ethnically disparaging language or through demeaning public references to harmless cultural practices contributes to the destruction of valuable relationships by fostering distrust, suspicion, or enmity.

In summary, then, the claim that across-the-board recognition should be accorded freedom of speech as something to be valued can be shown to be false in three ways:

1. By citing counter-examples to the claim.
2. By rejecting the view that the value of freedom of speech as such is self-evident.
3. By showing that the arguments that can plausibly be constructed to show that, and why, we value freedom of speech – when and where we do value it – are all

[9] In a paper commenting on an earlier version of this paper Bruce Landesman raised the question whether freedom to engage in casual conversational exchanges – "idle chatter" is the expression he used – can be shown to "have value" by reference to the "purpose" it serves. While I agree that he is right to be skeptical of the view that this kind of freedom serves any such *grand* purpose as advancement of knowledge or protection and promotion of democratic decision-making processes, I argue above that its value consists in the indispensable contribution it makes to the establishment and maintenance of a wide range of the familiar relationships we stand in to other people. While not all such relationships, when examined, can be represented as valuable components of individual and social life, many of them play a crucial role in sustaining important social institutions and practices. Reasons *can* consequently be given for thinking that the freedom to engage even in "idle chatter" has value. See Landesman, "Confessions of a Free Speech Near Absolutist."

context- and purpose-relative arguments. These arguments provide support (sometimes in overlapping, and thus in mutually reinforcing ways) for freedom of speech in contexts, and for purposes, of *certain* kinds. However, even when they are taken together they don't substantiate the case for attaching value to freedom of speech in *all* the contexts in which, or for *all* the purposes for which, freedom of speech can be (and actually is) exercised. The conclusion that must be drawn is that freedom of speech in at least certain contexts and for certain purposes is devoid of value.[10]

3 Grounds of the Moral Right to Freedom of Speech

The account I offer here is only partial: the two sorts of "supporting considerations" I discuss briefly are only *among* the reasons that would have to be discussed in a fuller treatment. My aim here is limited to highlighting the importance of two points: first, that despite their importance claims about the *value* that attaches to freedom of speech (in certain of the forms it can assume) don't exhaust what needs to be said in support of the moral *right* to freedom of speech; and second, that a special place among the additional supporting considerations is occupied by principles of distributive justice. The question about the ground of the moral right to freedom of speech, then, requires at least two sorts of supporting considerations to be identified.

First, reasons have to be given in support of the contention that the individual members of a society have a stake (or interest) in the protection of freedom of speech. Several of these reasons have been at least mentioned in the last section of this paper. Thus, individuals have reason to value freedom of speech because (1) it is an indispensable condition of effective pursuit of knowledge in its various forms, (2) it is an essential ingredient in the freedom to participate effectively in the collective deliberative and decision-making processes of a democratically-organized society, (3) it plays a crucial role in the making of prudent decisions about strategies for the promotion of such fundamental long-term interests as the development of latent potentialities and the achievement of personal well-being, (4) it goes hand-in-hand with autonomy in the making of life-shaping choices, and (5) it contributes to the establishment and maintenance of a broad range of valued relationships. While the fundamental interests of all these kinds that underpin the value we attach to freedom of speech stand in need of further careful elaboration, it seems clear that, once elaborated in some defensible way, they serve to show, not that we have a stake in the protection and promotion of freedom of speech *as such* (that is, freedom of speech in absolutely all the contexts, and for absolutely all the purposes, for which it might be exercised), but that we

[10]The counter-examples cited in the first argument are illustrative of the kinds of contexts in which all the reasons we have for valuing freedom of speech simply have no force.

have reason to value freedom of speech in contexts of certain kinds and for purposes of certain kinds – viz. those that are related in some plausible way to the safeguarding of our fundamental interests.

The second point is this. Despite the fact that individuals all attach importance, defensibly, to the promotion of their fundamental interests, they cannot be said to have a moral *right* to the establishment and maintenance of conditions for up-to-the-hilt promotion of these interests. The most obvious reason is that even the fundamental interests of the members of a society come into conflict in a variety of constantly recurring situations. Providing *some* members with maximally hospitable conditions for the promotion of their fundamental interests is consequently incompatible with provision of comparably accommodating conditions for *other* members. Giving recognition to a moral *right* to freedom of expression presupposes that a morally acceptable solution has been found to the conflicting claims the members inevitably have to the promotion of their fundamental interests. Since all members have an equal stake in the promotion of their fundamental interests, a morally acceptable solution cannot assign systematic precedence to the claims of any sub-class of society's members. On the contrary, appeal must be made to principles of distributive justice that give equal weight, at least initially, to all of these claims. Only when this is done and when it has been determined how far the claims of the members to the promotion of their fundamental interests can in fairness be accommodated can they be said to have a moral *right* to the establishment of the conditions promotion of these fundamental interests will require.

4 Threats to Freedom of Speech and the Role of the State as a Guardian of Free Speech

I want now to ask whether, in all those contexts in which (and for all those purposes for which) reasons can be given for supposing freedom of speech to be something we (should) value,[11] the only threat to the enjoyment of freedom of speech takes the form of direct interference with freedom of speech, whether by the state or by individuals, groups, and agencies in the private sector. The general answer to this question is that important though it is to protect freedom of speech against threats of interference,[12] another often underemphasized threat has its source in the failure of a society, through governmental and other agencies, to implement adequately a suitably comprehensive version of the ideal of equality of opportunity. While I can't try in any systematic (let alone comprehensive) way to disentangle the many threats there are to the enjoyment of freedom of speech – or the measures that might be

[11] Consideration should also be given to all those (perhaps somewhat more restricted) contexts in which freedom of speech is something to which we have a moral right.

[12] Of course it's a mistake to think of the state as the only source of threats of this kind, massive though its power to interfere in systematic ways no doubt is, and great though its incentive to do so often is when its power is challenged.

adopted to deal with them – I hope that even a cursory discussion will lend support to two theses. The first is that protection of freedom of speech calls not only for interference with freedom of speech to be prevented but also for readily seizable opportunities for the exercise of freedom of speech to be made available.[13] The second is that, while the state has a role to play both in preventing interference with freedom of speech and in facilitating effective exercise of this freedom through the provision of opportunities for its exercise, protection of freedom of speech in these two ways isn't the *exclusive* responsibility of the state: individuals and private sector organizations of various sorts must be prepared to assume part of the burden, especially in contexts in which the state and its agencies may be unable to do so effectively.

I begin with a conceptual point about the relationship between claims about the *freedom* individuals might be said to have to perform actions of certain sorts or to engage in activities of certain sorts and the *opportunities* they have to perform these actions or to engage in these activities. Suppose A is a member of a democratically organized society, and we say, "A is *free* to participate in the collective decision-making processes of her society." This statement could not be true if it were not also true that A has the *opportunity* to participate in the collective decision-making processes of her society.[14] Thus, if being *free* to vote in an upcoming election is part of what it means to be free to participate in the collective decision-making processes of a society, then A's having the *opportunity* to vote in an upcoming election (where this is an opportunity A can take advantage of simply by deciding to vote in that election) is part and parcel of A's being free to participate in her society's collective decision-making processes. "Being free to" and "having the opportunity to" are thus, in this sort of context, necessarily connected aspects of a single complex state of affairs.

Applying this conceptual point to the question what it means to enjoy freedom of speech in some context, we can say that for it to be true of someone that she

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[13] My attention was drawn at the AMINTAPHIL Conference to an earlier article in which this sort of point is forcefully made by one of the Conference participants. See Virginia Held, "Access, Enablement, and the First Amendment", in *Philosophical Dimensions of the Constitution*, eds. Diana T. Meyers & Kenneth Kipnis (Boulder & London: Westview Press, 1988), 158.

[14] The term "opportunity" is ambiguous as between (a) the sense in which it implies that anyone who has the opportunity to X is in a position to X simply by deciding or choosing to X and (b) the sense in which it means that someone who has an opportunity to X (say, take up a long-sought-after position by participating in a competition for the position) has no more than a *chance* of X-ing (that is, a chance– a high probability chance, perhaps, or a low probability chance, depending on the perceived strength of the applications for the position – of actually taking up the sought-after position). In cases of the second sort, participants in a job-competition will have an opportunity to take up the sought-after position in the first sense of "opportunity" only if and when they win the competition and are actually offered the job on a take-it-or-leave it basis. It is in the first of these senses that A must have the opportunity to participate in her society's collective decision-making processes if it is to be true that she is "free" to participate in these processes. For discussion of this and other ambiguities in talk about "equality of opportunity," see Alistair M. Macleod, "Equality of Opportunity," in *Moral Issues*, ed. Jan Narveson (Oxford University Press, 1983), 378.

enjoys *freedom* of speech it must also be true that, in that context, she has the (readily seizable) *opportunity* to express her views (beliefs, opinions, attitudes, etc.). Thus, if in the context provided by a society's political arrangements, A has the *freedom* to express her political views and thereby participate in collective deliberative and decision-making processes, it must also be true that she has the *opportunity*, by expressing her views, to participate in these deliberative and decision-making processes.

Under what conditions, then, will it be true of the members of a democratically organized society that they enjoy freedom of political speech? That is, what conditions would have to be fulfilled, in recognition of the (perhaps numerous) ways in which freedom of speech might be threatened in political contexts, for the members of a society to be "free," and thus also to have the (readily seizable) "opportunity," to express their political views and thereby participate effectively in deliberative and decision-making processes?

1. It's uncontroversial that one crucial condition is that there must be *no interference* – whether by the state or by individuals and agencies in the private sector – with the attempts people make to express their political views and thereby participate effectively in deliberative and decision-making processes. While governments can interfere with freedom of speech in a number of familiar and distinctive ways – through the laws and administrative rules they enact and through the policies they seek to implement – it's important to notice that non-governmental agencies as well as individuals and groups can also interfere, in direct and indirect ways, with freedom to participate effectively in deliberative and decision-making processes. For example, those who own and operate private sector news media – newspapers, television networks, radio stations, etc. – may distribute employment-related "plums" (special assignments, say) to their reporters on the basis of their political views, or let them go because they have the "wrong" party affiliation.
2. A second important condition is *access to information* about the major issues of the day of the sort that is indispensable to the formation of political views about these issues. Here too the duty to provide such information in readily accessible forms falls not only on the state but also on a wide range of agencies in the private sector. While the state may of course have a role to play in requiring greater transparency in the private sector about matters that have even an indirect bearing on the formation of public policy, non-governmental agencies can also contribute to the effective operation of a democratic system by making generally available more information about their activities and objectives than the law requires.
3. A third condition is *the existence of a suitably comprehensive and universal system of education*. Absence of interference with freedom of speech (condition [1]) and ready access to adequate information about matters of public concern (condition [2]) will together not suffice to enable the members of a society to contribute freely to deliberative and decision-making processes if they lack the

skills and competencies needed to make use of the available information in the formation of political judgments about the issues of the day. Difficult though it is to identify and implement all the educational measures that a society should ideally adopt if its members are to develop the capacity to make the sorts of political judgments that facilitate effective participation in deliberative and decision-making processes, and considerable though the (distorting) impact often is of the efforts powerful groups make to blur the distinction between policies that promote their own private interest and policies that would serve the public interest, there is little reason to think that enough serious recognition is given, even in some of the most "advanced" democracies in the world, to the importance of the educational preconditions for the proper enjoyment of freedom of political speech.

4. A fourth condition is ready *access to the "forums" in which political debate takes place* and in which, consequently, it is important for the political views of a society's members to be communicated and discussed. Because of the role money often plays in giving people the opportunity to communicate their political views in effective ways to large numbers of their fellow-citizens, it's understandable that concern about the inadequate fulfillment of this fourth condition is particularly high in societies in which there are vast economic inequalities and in which no restrictions are imposed on the spending of money for political purposes. Curbs on private spending for political purposes are normally needed if there is to be any hope of promoting freedom of speech through the provision of fair access to the forums in which effective political communication takes place.

While these four conditions of enjoyment of freedom of political speech are not, of course, the only conditions to which attention ought to be given,[15] they serve to show not only that provision of (readily seizable) opportunities for freedom of speech is often as important[16] as prevention of direct interference with free speech, but also that fulfillment of these conditions, through adoption of "protective" measures of both these sorts, calls for combined efforts to be made to this end by the state and by individuals and agencies in the private sector.

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[15] Additional conditions would include, for example, (a) reform of the electoral system to ensure that the members of important law- and policy-making bodies are more fairly representative of the electorate, (b) abandonment of political campaign practices that are designed to exploit the vulnerabilities of less reflective voters by presenting skewed messages about the content or the importance of the issues on which elections are fought, and (c) adoption by the media of less simplistic criteria of "balance" in the selection and presentation of politically-sensitive news items. In the case of such conditions as these too, both state and non-state actors clearly have important roles to play in efforts to secure their fulfillment.

[16] It is necessary to underscore this point because its importance is often either overlooked or underemphasized.

5 A Concluding Observation about the Role of the State

Let me conclude by making an observation about one of the ways in which it would be a mistake to try to partition the responsibilities for protection of valued forms of freedom of speech that the *state* should seek to discharge from those that fall *on individuals and agencies in the private sector*. Just as it doesn't follow from the fact that freedom of speech of this or that sort is something we rightly *value* that it's something to which we have a *moral right*,[17] so too it doesn't follow from the fact that we have a moral right to certain forms of freedom of speech that the state ought to "swing into action" by giving legal recognition to this right. While it's certainly tempting to think, once a distinction is drawn between moral and legal rights, that no additional distinction need be drawn between *moral rights* and the *rights to which legal recognition ought to be given*, this temptation, I suggest, should be resisted. Not all moral rights would also be legal rights in a perfectly just society – a society in which, for example, the system of law gave fully adequate expression to principles of justice. Part of the reason is that recognition of moral rights as legal rights (by the enactment of suitable laws to this end) commits the state to using the resources of the state to enforce recognition of the rights in question. While this is to be welcomed for some (perhaps many) moral rights, it shouldn't be assumed, in the case of *all* such rights, that use of the law enforcement machinery of the state is the preferred means of promoting respect for them. It is rash to suppose that legal protections should always be in place when moral rights are violated. On the contrary, a distinction must be drawn between questions about the existence, content, and scope of people's moral rights and questions about the rights to which legal recognition and protection should be accorded. For example, it's uncontroversial that such a moral right as the right not to be physically assaulted should be given recognition and protection in the law. There is general agreement that it's not only appropriate for the enforcement machinery of the state to be used to protect this right but also that use of this machinery is an effective – indeed an indispensable – part of what the members of a society should authorize as a means of fostering respect for the right. However, in the case of such a moral right as the right to be told the truth – in all those contexts in which this can be shown to be a moral right – it's understandable (and entirely reasonable) for there to be great reluctance to make violation of the right a *legal* offense. Lying under oath in a court of law is a legal offense, of course – so it is sometimes appropriate for the right to be told the truth to be afforded legal protection. But in many other contexts lying is not illegal – and ought not to be made illegal either.

The general conclusion I should like to draw, consequently, is that while there are more contexts than may often be recognized in which freedom of speech lacks even prima facie *value*, and while it is only in a sub-class of the contexts in which

[17] It was an important part of the account of the ground of the moral right to freedom of speech in an earlier section to make this point.

freedom of speech has prima facie value that there is a *moral right* to freedom of speech, these claims are entirely compatible with the view that very few *legally enforceable* restrictions on freedom of speech should be accorded recognition. One of the most familiar – and often-cited – arguments for limiting the authority of the state to restrict the freedom of speech of the members of a society is that the state cannot be relied upon not to abuse its authority by restricting forms of speech that issue legitimate challenges to its authority. Granting to the state the authority to censor speech is dangerous, in part because it heightens the risk that this authority may be used to silence criticism of its policies and practices. The law should thus give a society's members the right to freedom of speech in many contexts in which it is neither the case that they have a moral right to freedom of speech nor that freedom of speech of the kind in question has even prima facie value.

Part II
Proscribed Speech: The Limits of Free Expression

Is It Immoral to Prohibit Sexually Harassing Speech in the Classroom?*

Thomas Peard

Abstract Courts have found college instructors liable for hostile environment sexual harassment in the classroom even where such conduct includes the instructor's speech. This paper focuses on the moral issue of whether prohibition under Title IX of sexually harassing speech by an instructor in a college classroom unduly interferes with the liberty of the instructor to engage in such speech. This liberty issue raises the classical philosophical question of the moral limits of social coercion. In addressing the liberty issue, I state and apply an analytical framework derived from Joel Feinberg's work *The Moral Limits of the Criminal Law.* On the basis of this analysis, I conclude that Title IX does not constitute an immoral restriction of the instructor's liberty in such cases. I also briefly consider two general objections pertaining to the form such regulations take.

Keywords Sexual harassment • Free speech in academia • Sexual harassment and free speech • Harm principle and free speech • Offense principle and free speech

Consider the following:

(a) In *Bonnell v. Lorenzo*,[1] an English professor at a community college frequently swore in the classroom (after announcing at the beginning of the term that he would do so), using such words as "s - - t," "damn" "f - - k," "ass," "pu - - y," and "c - - t. " He also referred to the act of necrophilia as a "serious b - - -f - - king," used the term "b - - w j - b" in discussing President Clinton's conduct,

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[1] *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001).

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and on three occasions made the same obscene remark about nuns. These actions were deemed not to be "germane to course content." [2]

(b) In *Silva v. University of New Hampshire*,[3] a tenured faculty member used the following metaphor in a technical writing class: "Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one." Two days later he said in class, "[b]elly dancing is like jello on a plate with a vibrator under the plate." He claimed that this example illustrated "how a good definition combines a general classification with a specific concrete concept in a metaphor." [4]

In each of these cases, the instructor was disciplined by the college or university,[5] and the instructor filed a lawsuit against his employer challenging the disciplinary actions taken. The chief penalty imposed by the college in *Bonnell* was suspension without pay for 4 months. The Sixth Circuit Court of Appeals reversed the district court's order granting Bonnell's motion for a preliminary injunction requiring reinstatement to his teaching position.[6] In arriving at its decision the court held that Bonnell's speech was not protected under the First Amendment of the United States Constitution. In *Silva*, the district court determined that the plaintiff teacher prevailed in an action against the university that had dismissed him for making comments in the classroom that allegedly violated the university's sexual harassment policy. The court held that Silva's speech was protected under the First Amendment.

The fact situations in *Bonnell* and *Silva* illustrate a tension between competing rights: the right of freedom of speech and the right to be free from hostile environment sexual harassment in the classroom. Each of these rights may be viewed as moral or legal. For our purposes the right of freedom of speech at issue is the *moral* right of free speech which clearly may have much in common with the legal right of freedom of speech under the First Amendment (or other similar laws in the United States or elsewhere), but the two rights are not identical since one is moral and the other legal. I will understand the right of a student to be free from sexual harassment to be the legal right under Title IX of the 1972 Educational Amendments ("Title IX").

This paper will focus on the moral issue of whether prohibition under Title IX of sexually harassing speech by an instructor in a university classroom

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[2] *Bonnell*, 241 F.3d at 805.

[3] *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994).

[4] *Silva,* 888 F. Supp. at 289-99. Quoted in Lisa M. Woodward, "Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?" *Capital University Law Review*, Vol. 27 (1998–1999): 683–84.

[5] Hereafter I will use "university" to mean "college or university" unless otherwise noted.

[6] *Bonnell*, 241 F.3d at 806–808, 826.

unduly interferes with the liberty of the instructor to engage in such speech. This liberty issue raises the classical philosophical question of the moral limits of social coercion. I first provide an account of the basic law prohibiting sexual harassment under Title VII[7] and Title IX. I then address the liberty issue. I conclude that Title IX does not constitute an immoral restriction of the instructor's liberty. I also briefly consider two general objections pertaining to the form such regulations take.

1 Title VII

Sexual harassment under Title IX is to be interpreted similarly to Title VII's prohibition of such conduct in the workplace. Title VII states in pertinent part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to [her or] his compensation, terms, conditions, or privileges of employment because of such individual's...sex....;or (2) to limit, segregate, or classify [her or] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her or] his status as an employee, because of such individual's...sex.[8]

To resolve residual confusion regarding sexual harassment under Title VII, the Equal Employment Opportunity Commission promulgated guidelines that include:

> Harassment on the basis of sex is a violation of section 703 of Title VII....Unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitute sexual harassment when …(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment....[9]

While federal courts initially failed to recognize a claim for sexual harassment under Title VII, they eventually did so by viewing sexual harassment as a form of sexual discrimination.[10] Hostile environment sexual harassment under Title VII "consists of conduct that rises to the level of a hostile or offensive working environment."[11]

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[7] See citation in note 8.

[8] Title VII of the 1964 Civil Rights Act, § 703(a), 42 U.S.C. § 2000e to 2000e-17. Quoted in Alba Conte, *Sexual Harassment in the Workplace: Law and Practice*, 3rd. ed., v. 1 (New York: Panel Publishers, 2001), 31.

[9] 29 Code of Federal Regulations § 1604.11 (a). Quoted in Laura W. Stein, *Sexual Harassment in America: A Documentary History* (West Port, Conn.: Greenwood Press, 1999), 33.

[10] Conte, 32–33.

[11] Conte, 35.

2 Title IX

Title VII does not provide a cause of action to a university student who is a victim of hostile environment sexual harassment, because students are not employees of the university. For such a claim, the victim must look to Title IX which provides in pertinent part:

> § 1681. Sex
>
> (a) Prohibition against discrimination; exceptions
>
> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....[12]

The reach of this statute is expansive since "the vast majority" of educational institutions in the United States receive some form of federal assistance. The statute has been broadly construed to protect students from harassment by both teachers and administrators.[13] In 1997, the Office of Civil Rights issued a document which provides that Title IX's prohibition of sexual harassment should be interpreted similarly to Title VII's prohibition of the same in the employment context and that Title IX prohibits hostile environment sexual harassment. [14]

3 Moral Analysis of the Regulation of Sexually Harassing Speech

3.1 The Liberty Issue

While sexual harassment is reprehensible, prohibiting such conduct may be viewed as impermissible censorship of speech in the classroom and possibly an infringement of the instructor's liberty or academic freedom. A difficult moral question then is whether regulation of sexually harassing speech by instructors in university classrooms may constitute *immoral* coercion of university members by virtue of impermissibly restricting the speaker's liberty. More precisely, does the regulation of sexually harassing speech of university instructors *in itself* impermissibly restrict the speaker's liberty? The expression "in itself" is intended to indicate that the specific form of the regulation is not at issue as might be the case if, say, the regulation is void for vagueness or if it has an undue chilling effect on protected speech because it is overly broad.

By *sexually harassing speech* in the classroom, I mean speech that constitutes or is a principal factor in actions that rise to the level of hostile environment

[12] 23 United States Code §1681 (a). Quoted in Stein, 192.

[13] Stein, 191.

[14] Ibid., 192.

sexual harassment under Title IX. Typically such speech: (a) is addressed directly to one or more members of the class (including the class as a whole), (b) is intended to vilify, stigmatize, insult, embarrass or harass such individuals on the basis of their gender or could reasonably be foreseen or interpreted to have such effects, and (c) is "sufficiently severe, persistent or pervasive...to create a hostile or abusive educational environment."[15] Thus the instructor's conduct in *Bonnell* could be plausibly viewed as an example of such speech. We should also note that sexually harassing speech must violate Title IX and that, as in *Silva*, speech that is protected under the Free Speech Clause legally could not constitute sexual harassment under Title IX.

3.2 The Analytical Framework

In addressing the liberty issue, I offer an analysis derived from Joel Feinberg's well-known work *The Moral Limits of the Criminal Law.*[16] Like criminal laws to which Feinberg applies his analysis, Title IX imposes sanctions aimed at punishing individuals or deterring them from engaging in sexually harassing speech. Feinberg argues for a moderate liberal position on the moral limits of criminal prohibitions. For him, the only good reasons for criminal prohibitions are those stated in the *harm* and *offense* principles. The *harm principle* states that "it is always a good reason in support [of penal legislation] that it is probably effective in preventing harm to persons other than the actor (the one prohibited from acting)."[17] The *offense principle* states that "it is always a good reason in support of [penal legislation] that it is probably necessary to prevent serious offense to persons other than the Actor."[18]

In applying the harm and offense principles, the actor's interests promoted by sexually harassing speech must be balanced against the harms and offense it causes. Thus, on one side of the balance, is the seriousness of the harm or offense caused by the speech. This is weighed against the reasonableness of the speaker's conduct.[19] The seriousness of the offense or harm is determined by (1) the *magnitude* of the risk of harm, if any (compounded out of *gravity* and *probability* of harm); (2) the *intensity* and *durability* of the offense, if any; (3) the ease with which the victim can avoid the offensive/harmful conduct; (4) whether the victim assumed the risk of harm/offense; and (5) whether and to what extent the harm/offense can be mitigated.

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[15] 20 Code of Federal Regulations 1604.11 (a). Quoted in Stein, 33.

[16] Joel Feinberg, *The Moral Limits of the Criminal Law*, 4 vols. (New York: Oxford University Press, 1985, Oxford University Press Paperback, 1987). For a statement and analysis of the liberty issue relating to regulation of racist hate speech, see my "Regulating Racist Speech on Campus," in *Civility and Its Discontents: Civic Virtue, Toleration, and Cultural Fragmentation*, ed. Christine T. Sistare (Lawrence, Kansas: University Press of Kansas, 2004), 140.

[17] Joel Feinberg, *Offense to Others*, vol. 2 of *The Moral Limits of the Criminal Law*, p. xiii. This formulation ignores refinements that we need not address.

[18] Ibid., xiii.

[19] Joel Feinberg, *Harm to Others*, vol. 1 of *The Moral Limits of the Criminal Law*, 25–26.

On the other side of the balance are the factors determining reasonableness of the conduct, which are (6) its personal importance to the actor and its social value generally; and (7) the extent to which the conduct is motivated by spite, malice or the intent to harm/offend the victim.[20]

Following Feinberg, we understand *harms* to be "wrongful setbacks" to significant interests, such as interests in mental and physical health etc.[21] *Offense* encompasses various disliked mental states caused by wrongful conduct.[22] The principal offended states of mind relevant here are shame, embarrassment, anxiety, fear, resentment, humiliation and anger.[23]

3.3 Applying the Analysis

Harms: "Twenty to thirty percent of female undergraduates and thirty to forty percent of female graduate students experience some form of sexual harassment during their college careers.....When definitions of sexual harassment also specifically include gender harassment, those figures jump to near seventy percent."[24] Woodward states, "[s]exual harassment….is about power."[25] Professors assign grades, write letters of recommendation and advise students as to matters relating to their careers and education.[26] Students are vulnerable and generally trust their professors to be the professionals they are supposed to be. Accordingly, they may be easily manipulated, controlled and coerced by their teachers. ¨When professors tell sexist jokes, pepper their lectures with sexual innuendos, and focus on topics of a sexual nature, they often create a hostile learning environment."[27]

As a result of such conduct, victims are less likely to participate fully in academic and extracurricular activities which may result in lower grades and poor academic performance generally.[28] Sexual harassment may also affect a student's mental and physical health. The physical manifestation of the mental stress can take the form of drug and alcohol addictions, sleeping disorders, eating disorders, headaches and ulcers.[29]

Offense: Sexually harassing speech and conduct in the classroom can obviously result in offense that is both intense and durable. It is varied as well and may include

[20] This test is derived from Feinberg's mediating maxims for application of the harm and offense principles. See Feinberg, *Offense*, ch. 8 and *Harm*, ch. 5.

[21] See Feinberg , *Harm*, ch. 1.

[22] Feinberg, *Offense*, 1–5.

[23] Ibid.

[24] Woodward, 672.

[25] Ibid., 673.

[26] Ibid.

[27] Ibid., 673–674.

[28] Ibid, 674.

[29] Ibid, 674–675.

shame, embarrassment, anxiety, fear, resentment, humiliation and anger. Accordingly, both harm and offense are caused by such speech, and the total disvalue of the harm and offense taken together could exceed the disvalue of the harm or offense alone.

Factors (3)–(5): Typically, victims of sexual harassment do not assume the risk of such conduct, at least not initially. Even if at some point they assume the risk, it may not be reasonable to require them to take such measures as walking out of class, refusing to attend class, or dropping the course. Of course it is possible that the instructor has legitimate interests in continuing to teach the class that may outweigh the harm or offense caused to the students, in which case students may have the choice of either discontinuing their attendance or assuming the risk of harm if they attend; this is especially so if the students are put on notice of the instructor's conduct. However, there is a point at which the instructor's behavior may be so harmful and offensive that no amount of notice will suffice to require students to be subjected to it in order to receive credits that they might need even if the course is an elective. Additionally, students who try to mitigate the harmful conduct by steeling themselves against it or perhaps using "more speech" to challenge the professor in class will often not be successful and may incur additional harm, as was apparently the case in *Bonnell*. Those who are critical of the instructor whether in or outside of class run the very real risk of being subjected to retaliation by h/her.

Factors (6)–(7): Sexually harassing speech has little to do with discovery of the truth; rather it may impede robust discussion and debate through embarrassment, degradation and harassment of students based on their gender. Undoubtedly, the speech may have propositional content – often indeterminate – but the essential cognitive content of the propositions can be communicated without using sexually harassing speech. For example, if relevant, the professor can in a civil way raise such issues as whether women are biologically less (or more) intelligent than men. Certainly, academic freedom would permit discussion of these issues under the right circumstances. Moreover, the professor should be permitted to state and defend h/her own view under such circumstances, but that clearly does not require the professor to engage in speech that constitutes sexual harassment. Indeed, sexually harassing speech is often counterproductive with respect to promoting classroom discussion.

Additionally, Title IX does not prohibit a professor from using strong or uncivil language to express h/herself, as long as the accompanying *conduct* is not "sufficiently severe, persistent or pervasive" to constitute hostile environment sexual harassment. For example, Bonnell's statement that necrophilia is a serious b--t f-----g, as crude as it is, may be uttered in contexts that do not constitute sexual harassment. The same is true for virtually all of the offensive language that Bonnell used including "f - - k," "ass," "pu - - y," and "c - - t." Accordingly the very same propositional content conveyed in harassment contexts often, if not typically, may be conveyed apart from such contexts. Thus, for example, had Bonnell used the offensive language without engaging in the accompanying conduct, it is likely his actions would not have risen to the level of sexual harassment. Indeed the complaints of female students were not based merely on the use of such language but also on the conduct that accompanied it. In class Bonnell's conduct was, among other things, confrontational, and he humiliated individual students. For instance, after attending just *one*

of Bonnell's classes, a female student complained about "the denigration of women" during the class. The court described her experience as follows:

> The student was so offended by Plaintiff's conduct that the only reason she stayed throughout the entire class was because she 'did not want to take the chance of being caught in the crossfire of someone's rage. A feeling of uneasy nervousness overcame me. I felt trapped in the room for fear of getting up and causing a scene where he might humiliate me all the more'....The student opined that 'if you continue to employ this perverted man, I suggest that you put warning labels on all of the classes that he will be teaching...which state 'extremely explicit language and sexual content'…[30]

Thus in Bonnell's case, the utterance of the offensive language contributed to and was an indicium of the sexual nature of the harassment, but the mere utterance of the language absent the undue repetition and other accompanying conduct may not have risen to the level of sexual harassment.

It may also be thought that sexually harassing speech has value to the extent it plays a role in *emotive* advocacy – persuasion, or coercion, through the *venting* or *expression* of emotions and attitudes. First, the value of such advocacy is low since it is usually intended to weaken the opposition through intimidation, embarrassment, harassment and similar means and perhaps to issue a rallying cry to others perversely motivated by verbal attacks on students because of their gender. Such advocacy risks multiple problems such as gender inequality and divisiveness and is inconsistent with according even minimal respect to others. Emotive advocacy in the form of sexually harassing speech also deters efforts to attain a sense of community among university members. Furthermore, advocacy involving such speech is likely to be malicious conduct intended to harm and offend others. Thus not only is the social value of the speech low, the *reasonableness* of the conduct must also be *further* reduced for its intentional maliciousness under factor (7) of our test.

Still, it may be argued that censoring sexually harassing language results in censorship of emotive content which, while harsh and even demeaning, cannot be expressed any other way. However, even if we assume that there is some unique emotive or propositional content associated with sexually harassing speech, it does not follow that such speech should be permitted. There may be unique propositional content in both verbal and non-verbal acts which are unlawful, for example, spitting on another to express contempt, making unlawful threats, or shooting someone in the knees to convey one's hatred. Perhaps the precise message expressed by these actions cannot be expressed in any other way, but that does not mean that the speech or conduct is permissible.[31]

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[30] *Bonnell*, 241 F.3d at 808.

[31] It may be thought that this statement is contrary to the United States Supreme Court's decision in *Cohen v. California,* 408 U.S. 15 (1971). Cohen was convicted of violating a California law that prohibited disturbing the peace. The conduct Cohen engaged in was wearing a jacket in the corridor of a courthouse with the language "Fuck the Draft" on the back. The U.S. Supreme Court reversed a California Court of Appeal's decision to affirm the conviction. In support of its holding the Supreme Court points out that (i) there is no principled way to distinguish the language at issue from other offensive language that is clearly protected under the Free Speech Clause, (ii) the

Not only is the *social* value of sexually harassing speech low, its *personal* value is low as well. The conduct hardly promotes the speaker's interests in acquiring information or making considerate judgments – interests sometimes associated with the value of free speech.[32] Certainly, the speaker's interests in communication are implicated. But base impulses to deprecate or harass others often play no significant role in the speaker's network of interests and may be self-defeating, as where the conduct results in debilitating guilt. There are extremists for whom such conduct plays a more integral role, but even this may be relatively minor.

One final consideration should be mentioned. There is unfairness in requiring an innocent party harmed or offended by the actor's conduct to pay the costs of promoting the actor's interests, especially where the harm/offense is intentional. In such cases greater weight should be given to the innocent party's interests. Call this the *fairness principle*. Its applicability to sexually harassing speech requires us to give additional weight to the victim's interests.

Assessing the balance: As stated above, the offense caused by sexually harassing speech may be extreme, and there is also a risk of serious harm, especially where the victim is particularly vulnerable to discriminatory treatment. On the other side of the balance, the personal and social value of sexually harassing speech is typically low and must be further reduced under factor (7). Additionally, the fairness principle applies, requiring more favorable treatment of the victim's interests. In the absence of significant evidence to the contrary, we may plausibly conclude that the regulation of sexually harassing speech under Title IX does not wrongly interfere with the liberty of the speaker.

4 Other Issues

So far I have focused on the issue of whether regulation of sexually harassing speech *in itself* constitutes immoral coercion of the speaker, independently of the form the regulation may take. Some types of speech regulation, however, may constitute immoral coercion due to factors other than the mere prohibition of speech. There are, at least, two such examples: (i) a regulation may constitute immoral coercion of the speaker because it *unfairly* restricts the use of harassing

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offensive language has "emotive and cognitive force" both of which are protected speech, and (iii) it is a mistake to think that one can prohibit particular words without "suppressing ideas in the process." Point (iii), and perhaps (ii), seem to suggest that there may be cases in which speech must be protected because it expresses emotive or cognitive content that cannot be expressed in any other way. However, it does not follow that all such speech is protected. So nothing in *Cohen* affects my point above that in *some* cases censorship of speech may be permitted even if the proposition expressed by the language cannot be otherwise conveyed, as where the "language" used to convey the proposition constitutes unduly harmful or offensive conduct.

[32] See Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs,* Vol. 22, No. 3 (Summer 1993): 224, 228–229.

speech by giving proponents of egalitarianism an unfair political advantage over those who believe (in the extreme case) that sexism is morally justifiable, and (ii) a regulation may have an undue chilling effect on permissible speech. My aim in considering these issues is the modest one of convincing the reader that these general objections are, without more, not decisive and thus do not render the liberty issue irrelevant.

Objection (i) is that Title IX is fundamentally unfair because it constitutes impermissible content discrimination. It prohibits speech that is sexually harassing, but does not prohibit other forms of harassing speech, say, speech directed to harassing extreme conservatives who believe, for instance, that women should not have the same rights as men. However, to borrow reasoning from the United States Supreme Court, under Title IX the *content* of sexually harassing speech is not being targeted principally on the basis of its subject matter, viewpoint, or propositional content, but rather because the *conduct* in question rises to the level of harassment. As the Court stated about Title VII in *R.A.V. v. City of St. Paul*:

> [S]exually derogatory 'fighting words' among other words may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.[33]

While this argument is a legal one, it is relevant to the *moral* concern that Title IX *unfairly* regulates *speech*. If Title IX's prohibition of sexually harassing speech is primarily regulation of conduct, as I have argued above, it does not impermissibly regulate speech based solely on its content. As pointed out above, Title IX may permit "sexually derogatory" speech such as the kind Bonnell engaged in if the accompanying conduct does not rise to the level of sexual harassment.

Objection (ii) is that effective regulation of sexually harassing speech cannot be accomplished without resulting in a chilling effect on protected speech. In response, it is not enough to assume that a law such as Title IX will *unduly* chill protected speech just because it regulates speech. And even if it has some chilling effect, that risk must be balanced against the necessity or desirability of curbing the conduct in question. Few would deny that we should have laws prohibiting slander and libel merely because of the risk of chilling protected speech. In such cases that risk may be outweighed by the benefits of the regulation. Further, there is a minimal chilling of protected speech under Title IX, if, as we noted above, Title IX does not regulate speech solely on the basis of its content but only when it is a component of conduct that rises to the level of sexual harassment. I conclude that, as they stand, general objections (i) and (ii) above are not decisive.

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[33] *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). Quoted in Andrea Meryl Kirshenbaum, "Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?" *Texas Journal of Women and the Law*, Vol. 12 (2002–2003):78.

5 Conclusion

I have offered an analysis of the liberty issue that is expressly grounded in principles of moderate liberalism. The analysis supports the view that regulation of sexually harassing speech under Title IX does not *in itself* impermissibly restrict the liberty of the speaker. However, so many issues relating to speech regulation are empirical that it is difficult to draw definite conclusions. In the case of sexually harassing speech, additional empirical evidence would be helpful for drawing with greater certainty conclusions about the harm/offense specifically attributable to such speech. Nevertheless, there is considerable evidence of the harms/offense caused by sexually harassing speech, and, as I have argued, the value of such speech to the speaker and society is typically low.

We have also considered two general objections to regulating sexually harassing speech which purport to show that any such regulation is problematic. We have seen that, as they stand, these arguments do not establish the general conclusions they are offered to support. Certainly, they do not establish that Title IX's regulation of sexually harassing speech is so infeasible or otherwise undesirable that we need not address the liberty issue.

The Morality of Using "Nigger"*

Rodney C. Roberts

Abstract The black experience in what is now the United States of America has been one of perpetual racial injustice from the arrival of the first enslaved Africans in the early seventeenth century to the present day. Significant among the phenomena that have contributed to this perpetual state are cross-burning, lynching, and using "nigger" to refer to black folk. Since the word has been an integral part of lynching, cross-burning and other anti-black violence, it is understandable that it has come to be characterized as both the ultimate American insult and the ultimate expression of racism and white superiority. Although black folk have historically used the word amongst themselves with a number of different meanings, some, mostly younger, white folk, have taken to using the word to address black folk with the belief that doing so is morally benign. In this chapter I argue for a negative answer to the question: Are there good reasons for thinking that the use of "nigger" by white folk to address black folk is not morally objectionable?

Keywords Racial epithets • Use of "nigger" by whites • History of racial violence • Racial violence and hate speech

Use of the word 'nigger' by white folk to address black folk has, at least since the Civil Rights Movement, generally been viewed as morally objectionable. Recently some, mostly younger, white folk, have taken to using the word to address black folk with the belief that doing so is morally benign. I aim to challenge this belief. Specifically, I want to suggest a negative answer to the following question: Are there good reasons for thinking that the use of "nigger" by white folk to address black folk is not morally objectionable?

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I shall not be concerned with the mere reading of the word aloud or with quoting its usage by others. Rather, I shall be concerned with expressions that directly or indirectly address black folk. Expressions such as: "You niggers keep quiet," "Hey nigger, what's up?" "Nigger you must be kidding" and "Joe, you my nigger." Unlike some writers I understand 'nigger' and 'nigga' to be the same word.[1] The difference is that with white folk the word is "usually pronounced 'nigger,' not *nigga*."[2] Since any argument claiming to provide good reasons for thinking that use of "nigger" by white folk to address black folk is not morally objectionable must stand in the wake of the word's history and under the weight of extant moral objections to its use, I begin my analysis by taking up the history of the word, including its usage since slavery and its link to anti-black violence and oppression. In Section 2 I draw a moral distinction between use of the word by black folk to address each other and its use by white folk to address black folk, arguing that the former is merely offensive while the latter is morally objectionable. I then propose three arguments that I take to be the best candidates for supporting usage of the word by white folk and attempt to show that none of these arguments succeed.

1 History

According to the *OED*, a *nigger* is a dark-skinned person of sub-Saharan African origin or descent.[3] The word may have its origin in the Latin *niger*, said to be the classical Latin adjective for black. However, the Latin word has been translated not only as black, but also as dark, dismal, ill-omened, and bad in character.[4] Indeed, HarperCollins tells us that negro (also nigro), believed to be in use before nigger, means *Aethiops*, another word for Ethiopian and (figuratively) stupid.[5] The word has been compounded to create a plethora of expressions (many of which can be found used with negro as well): nigger boy, nigger child, nigger culture, nigger dialect, nigger land, nigger lips, nigger mouth, and nigger music; nigger lover, nigger driver, nigger breaker, and nigger killer, to name only a few. It has been described as the "ultimate American insult" and the "ultimate expression of racism

[1] Cf., e.g., Kenneth Einar Himma, "On the Definition of Unconscionable Racial and Sexual Slurs," *Journal of Social Philosophy*, Vol.33, No. 3 (Fall 2002): 516.

[2] Geneva Smitherman, *Black Talk: Words and Phrases From the Hood to the Amen Corner* (New York: Houghton Mifflin, 1994), 168.

[3] *Oxford English Dictionary Online* (Oxford University Press, 2009) http://dictionary.oed.com (accessed July 27, 2009).

[4] *Latin Dictionary* (Glasgow: HarperCollins, 2003).

[5] Ibid. This is consistent with Kant's understanding of black folk, saying of a "Negro carpenter" that "this fellow was quite black from head to foot, a clear proof that what he said was stupid," in Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime*, trans. John T. Goldthwait (Berkeley: University of California Press, 1960), 113.

and white superiority."[6] It is said to have "evolve[ed] into the paradigmatic slur." This evolution has seen the word become "the epithet that generates epithets. That is why Arabs are called sand niggers, Irish the niggers of Europe, and Palestinians the niggers of the Middle East."[7]

The black experience in what is now the United States of America has been one of perpetual racial injustice from the arrival of the first enslaved Africans in the early seventeenth century to the present day. Significant among the phenomena that have contributed to this perpetual state are cross-burning and lynching. These phenomena are important to our understanding of the history of "nigger" because they, like many other acts of anti-black violence, are perpetrated upon "niggers." The link between "nigger" and the brutality of slavery and its progeny, including cross burning and lynching, is long-standing. Of course, it was only after the end of slavery, when black folk could no longer be valued as property by white folk, and when they threatened to become a legitimate part of society, that they became the objects of these practices.[8]

"Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan," the activities of which included "whipping, threatening, and murdering" black folk throughout the South.[9] "Although the Ku Klux Klan dates back to the nineteenth century, its well-known symbol of white resistance to racial equality, the burning cross, is a twentieth century invention." It has become "an integral part of the mass theater of the Ku Klux Klan," the membership of which "swelled into the millions by the mid-1920s."[10] The contemporary significance of cross burning is its function as a means of intimidation. Its history, including a significant increase in the number of them in the last decade of the twentieth century, supports the belief that the practice typically has the desired effect.[11] After one black woman's experience with a cross burning, "she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'Nothing good. Murder, hanging, rape, lynching. Just anything bad that

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[6]David Pilgrim and Phillip Middleton, "Nigger and Caricatures," (Ferris State University Jim Crow Museum of Racist Memorabilia, September 2001), http://www.ferris.edu/htmls/news/jimcrow/caricature/homepage.htm (accessed October 21, 2007).

[7]Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* (New York: Pantheon Books, 2002), 27.

[8]As former slave Sarah Fitzpatrick recalls of her years in bondage, "we didn't have many lyn'chings den," in John W. Blassingame, ed. *Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies*, (Baton Rouge: Louisiana State University Press, 1977), 648.

[9]*Virginia v. Black,* 538 U.S. 343, 343 (2003).

[10]Donald P. Green and Andrew Rich, "White Supremacist Activity and Crossburnings in North Carolina," *Journal of Quantitative Criminology*, Vol. 14, No. 3 (September 1998): 263.

[11]There was an upswing in cross burnings in the late 1990's, with 30 documented cases in 1995 and over 45 cases in 1996; see "Number of Cross Burnings on Increase," *Greensboro News Record*, 29 December 1996, A6.

you can name. It is the worst thing that could happen to a person.' "[12] Such accounts give credence to Justice Thomas's view of "violent and terroristic conduct" as "the Siamese twin of cross burning."[13]

Evidence of the link between "nigger" and cross burning can be found in my home state. Three white men, Alfred and Eugene Smith and Martin King, were convicted and imprisoned for cross burnings they perpetrated near Asheville, North Carolina. The men wanted their neighbors, Gordon Cullins a black man and Hazel Sutton a white woman, out of the neighborhood. In furtherance of this desire they burned crosses on the couple's lawn on New Year's Eve 1992. Cullins and Sutton returned home, not only to smoldering crosses, but also to their neighbors' shouts of "nigger" at them.[14] In 1999 near Charlotte, North Carolina two white men burned a cross near the home of another interracial couple. Having already taunted the black member of the couple with "nigger," both verbally and by way of a sign placed on a tree, the men were said to have sat in lawn chairs drinking beer as the cross burned.[15]

Fire has also played a role in lynching. Indeed, the public burning of black people came to be known as a "Negro Barbecue."[16]

> The story of lynching, then, is more than the simple fact of a black man or woman hanged by the neck. It is the story of slow, methodical, sadistic, often highly inventive forms of torture and mutilation. If executed by fire, it is the red-hot poker applied to the eyes and genitals and the stench of burning flesh, as the body slowly roasts over the flames and the blood sizzles in the heat. If executed by hanging, it is the convulsive movement of the limbs. Whether by fire or rope, it is the dismemberment and distribution of severed bodily parts as favors and souvenirs to participants and the crowd: teeth, ears, toes, fingers, nails, kneecaps, bits of charred shin and bones. Such human trophies might reappear as watch fobs or be displayed conspicuously for public viewing.[17]

"Between 1882 and 1968, an estimated 4,742 blacks met their deaths at the hands of lynch mobs. As many if not more blacks were victims of legal lynchings (speedy trials and executions), private white violence, and 'nigger hunts,' murdered by a variety of means in isolated rural sections and dumped into rivers and creeks."[18]

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[12] *Virginia v. Black,* 538 U.S. 343, 390 (2003) (Thomas, J., dissenting), quoting *United States v. Skillman*, 922 F. 2d 1370, 1378 (9th Cir. 1991).

[13] *Virginia v. Black* 538 U.S. 343, 394 (2003) (Thomas, J., dissenting).

[14] "Arson Charge Stands in N.C. Cross Burning," *Morning Star*, 2 March 1999, B5; "4 Face Charges in Cross-Burning Case," *Morning Star*, 1 November 1996, B4. Although both articles report that Cullins and Sutton "heard racial slurs yelled by the three men," it seems almost impossible that they did not use some version of "nigger."

[15] "Cross-Burning Penalty Appealed," *Washington Post*, 24 January 2004, A6. Again, while this article reports that the men used "a racial epithet that they also wrote on a sign tacked to a tree," it seems almost impossible that this epithet was not "nigger" or some version thereof.

[16] Leon F. Litwack, "Hellhounds," in *Without Sanctuary: Lynching Photography in America,* eds. James Allen, Hilton Als, John Lewis, and Leon F. Litwack (Santa Fe: Twin Palms Publishing, 2000), 10, emphasis deleted.

[17] Ibid., 14.

[18] Ibid., 12, emphasis deleted.

As one federal official in Wilkinson County, Mississippi put it: "When a nigger gets ideas, the best thing to do is to get him under ground as quick as possible."[19] Hence, niggers are "naturally" the ones who are to be hunted down and lynched.[20]

One of the most horrific lynchings in recent memory occurred when James Byrd Jr. was lynched by John King, Shawn Berry and Lawrence Russell in Jasper, Texas on June 7, 1998. Byrd's body was found decapitated and missing its right arm. His head and arm were discovered in a ditch about a mile away from his torso. After being beaten, chained by his ankles and dragged over several miles by a pickup truck, Byrd's facial features were so badly distorted that investigators were unable to positively identify him from the identification card they found in his wallet. King and Russell were purported to be members of a racist prison gang and had "tattoos of Black Men hanging from a tree with a duck in a Klan uniform nearby."[21] King also had a "triangular symbol" representing the Klu Klux Klan on his cigarette lighter. When Russell was asked about his bruised big toe, he replied: "I kicked the shit out of that fucking nigger."[22]

Fortunately, it appears that, at least for the most part, the hanging of a noose has replaced the actual lynching of black folk.[23] Nevertheless, other sorts of anti-black violence continue, as the recent case of 21 year old Megan Williams well illustrates. Although not much publicized in the main-stream media, Ms. Williams was rescued by the Logan County, West Virgina Sheriff from a broken down mobile home trailer where she had been held captive by six white people. She "told authorities how she was allegedly stabbed, strangled, raped, fed dog and rat feces, and threatened with death." Ms. Williams said her captors told her "This is what we do to niggers around here."[24]

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[19] Ibid., 26, emphasis deleted.

[20] As one self-described "colored man" sees it, people have used "nigger" as a "metaphorical lynching before the real one." See Hilton Als, "GWTW [Gone With The Wind]," in *Without Sanctuary*, 39.

[21] Roy Bragg, "Jasper trial defendant says Byrd's throat was cut," *San Antonio Express-News*, 17 September 1999, and Region VI NAACP Emergency Resolution to Support Jasper, Texas, http://www.texasnaacp.org/archive/jasper.htm (accessed July 6, 2009).

[22] James Gunter, Affidavit of Probable Cause, State of Texas, County of Jasper, June 9, 1998, http://www.texasnaacp.org/archive/jasper1.gif (accessed July 23, 2009).

[23] The most highly publicized noose hangings in recent memory occurred in Jena, Louisiana in the summer of 2006. See Mark Potok, et al., "The Geography of Hate," *New York Times*, 25 November 2007, Op-Ed, 11. In response to a surge in noose hangings, the state of New York made it a hate crime of felony first degree aggravated harassment. Cyril Josh Barker, "Hanging Nooses Now a Hate Crime," *New York Amsterdam News*, 22–28 May 2008, 3. Other states, like Louisiana and North Carolina, are considering similar legislation. Whitney Woodward, "Bill Would Make Noose Displays a Felony Crime," *Daily Reflector*, 24 June 2008, B1; "Outlawing the Noose," *Jet*, 7 July 2008, 22.

[24] Cash Michaels, "Rev. Al Sharpton Calls Megan Williams Case 'National Disgrace,'" *Chicago Defender*, 28–30 December 2007, 6.

1.1 Nigga Callin

Throughout this history many black folk have used nigga amongst themselves. This phenomenon, known as "nigga-callin" (hereafter NC), has always included other than strictly negative understandings of the word.[25] Indeed, the history of NC is a part of African American culture. Among the things that make African American English (AAE) or Black Talk unique, are "verbal rituals from the Oral Tradition and the continued importance of the Word, as in African cultures[.]" "The African American Oral Tradition is rooted in a belief in the power of the Word. The African concept of *Nommo*, the Word, is believed to be the force of life itself." Also unique to AAE is its "lexicon, or vocabulary, usually developed by giving special meanings to regular English words, a practice that goes back to enslavement and the need for a system of communication that only those in the enslaved community could understand."[26]

> The absorption of African American English into Eurocentric culture masks its true origin and reason for being. It is a language born from a culture of struggle, a way of talking that has taken surviving African language elements as the base for self-expression in an alien tongue. Through various processes such as 'Semantic Inversion' (taking words and turning them into their opposites), African Americans stake our claim to the English language, and at the same time, reflect distinct Black values that are often at odds with Eurocentric standards.[27]

"Words like nigga reinforce Blackness since, whether used positively, generically, or negatively, the term can refer only to people of African descent." Nigga is one of the "constant reminders of race and the Black Struggle."[28]

Of the meanings given to nigga at least two were in use during slavery. The first is the most generic or neutral and may refer to black folk generally or black men in particular. Expressions like "it was wall-to-wall niggas at the party last night," and "she got rid of his triflin ass, she got herself a new nigga now." Or, as former slave Sarah Fitzpatrick said of one man, "dat [nigga] wuz gone."[29] Also present during slavery was nigga as the rebellious and/or fearless black man, the "bad" nigga. According to Fitzpatrick, "Some [niggas] so mean dat white fo'ks didn't bodder'em much." As she recalls, a man named "Will Marks wuz a bad [nigga]." "Ma' Marster use'ta talk 'bout killin'im an' Miss Ann, tell'im 'You bedder not put your hands on dat [nigga], he kill 'ya' " (note that this meaning is negative for the enslaver but

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[25] While it has been clear to me for some time that there are black folk who use "nigga" in conversation with other black folk and those who do not, I first heard this expression when Michael Eric Dyson used it in the course of interviewing a black author on C-Span in 2008. In contrast to his interviewee, Dyson characterized himself as a "nigga-callin black man."

[26] Smitherman, 5, 7.

[27] Ibid., 17–18.

[28] Ibid., 20, small caps deleted.

[29] Blassingame, 641. It is important to note that Fitzpatrick's liberal use of "nigga" was almost certainly facilitated by her having been interviewed by a black interviewer, in this case Thomas Campbell, a co-worker of George Washington Carver (xliv–xlviii, 605). Quoted below is another former slave, Henry Baker, who was also interviewed by Campbell.

positive for the enslaved).[30] Another meaning is that of acting out the loud vulgar stereotype of a nigger, as in "Y'all be cool and stop acting like niggas up in here." Still another is no doubt due in large part to the African liberation struggles and the Black Power Movement in the second half of the last century. This meaning refers to someone rooted in blackness, especially black culture, black politics and the black social condition. But it is "nigga" as close friend, brother, or sister, that is perhaps most associated with white-to-black NC. When employed by black folk, expressions like "J. T. is my nigga" are a radical change from the original meaning when the expression was used by slaveowners. When a slave mistress moved to a new home it was not uncommon for her to have "brung all o' her [nigga] property wid her." As Fitzpatrick recalls, Miss Ann said regarding one slave: " 'You know he'se my [nigga] an' don'cha tech'im ag'in, less I say so.' "[31] Miss Ann was asserting her title to ownership of another human being.[32] NC black folk took a claim of chattel ownership and turned it into something familial.

2 Moral Considerations

The moral distinction between NC and white-to-black NC is that the former is merely offensive while the latter is morally objectionable.[33] Who says what often matters; indeed, it often matters a great deal. Whether it is a parent versus an acquaintance, or a head of state versus a college student, who the speaker is and the speaker's position in society can make a significant difference in the ways in which, and the extent to which, words impact the hearer. In NC, where the speaker and hearer share the black experience, they are likely to share the commonality of "Black Talk… that takes us across boundaries. Regardless of job or social position, most African Americans experience some degree of participation in the life of the community…. This creates in-group crossover lingo that is understood and shared by various social

[30] Ibid., 641–642.

[31] Ibid., 639, 640.

[32] If Bill Lawson is correct, "ownership was the defining feature of oppression for slaves." Howard McGary and Bill E. Lawson, *Between Slavery and Freedom: Philosophy and American Slavery* (Bloomington and Indianapolis: Indiana University Press, 1992), 2.

[33] This analysis responds to the concern expressed in Randall Kennedy's claim that "[t]here is no compelling justification for presuming that black usage of nigger is permissible while white usage is objectionable." See Randall L. Kennedy, "Who Can Say 'Nigger'? … and Other Considerations." *Journal of Blacks in Higher Education,* No. 26 (Winter 1999/2000): 92. As Geneva Smitherman sees the problem, "the frequent use of *nigga* in Rap Music… and throughout Black Culture generally, where the word takes on meanings other than the historical negative, has created a linguistic dilemma in the crossover world and in the African American community. Widespread controversy rages about the use of nigga among Blacks – especially the pervasive public use of the term – and about whether or not whites can have license to use [the word] with the many different meanings that Blacks give to it." See Smitherman167–168.

groups within the race" including "a ready understanding of the different meanings of [nigga]."[34] It would seem that at worst, non-NC black folk might take being addressed as "nigga" as a case in which the speaker "called them outa they name," that is, the speaker was insulting or characterized the hearer in a negative way. "[T] he direct and indirect harms of subordinating speech are only possible in the case of members of groups that are socially subordinated."[35] Since "[s]kin color, or to be more exact, skin shade, or lightness or darkness of skin color, has seemed to be the primary common sense criterion for racial membership and identification," thus making at least prima facie subordinate status readily determinable, only cases of white (superior)-to-black (subordinate) NC can produce morally objectionable injury.[36]

White-to-black NC can be injurious in a number of morally objectionable ways. Face-to-face it can have an immediate and injurious impact on the hearer. It does so by "remind[ing] the world that you are fair game for physical attack," by "evok[ing] in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed," and by "imprint[ing] upon you a badge of servitude and subservience for all the world to see."[37] "The experience of being called 'nigger'… is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. The harm to be avoided is both clear and present." For Charles Lawrence, "the visceral emotional response to personal attack precludes speech. Attack produces an instinctive, defensive psychological reaction. Fear, rage, shock, and flight all interfere with any reasoned response." "Nigger" produces physical symptoms that are temporarily disabling to the hearer.[38]

As a racial insult it relies on "the unalterable fact of the victim's race and on the history of slavery and race discrimination in this country." Indeed, it does so paradigmatically. As Richard Delgado reminds us, "a racial insult is always a dignitary affront, a direct violation of the victim's right to be treated respectfully." "Our moral and legal systems recognize the principle that individuals are entitled to treatment that does not denigrate their humanity through disrespect for their privacy or moral worth." Hence, "[t]he wrong of this dignitary affront consists of the expression of a judgment that the victim of the racial slur is entitled to less than that to which all other citizens are entitled." "Nigger" can also inflict psychological harm on the victim. Because it "draw[s] upon and intensif[ies] the effects of the stigmatization,

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[34]Ibid., 25, small caps deleted.

[35]Joan C. Callahan, "Speech That Harms: The Case of Lesbian Families," in *On Feminist Ethics and Politics*, ed. Claudia Card (Lawrence: University Press of Kansas, 1999), 250.

[36]Naomi Zack, *Philosophy of Science and Race* (New York and London: Routledge, 2002), 42.

[37]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. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw (Boulder: Westview Press, 1993), 74.

[38]Ibid., 67-68.

labeling, and disrespectful treatment that the victim has previously undergone," it may cause long-term emotional pain.[39]

Diana Meyers also thinks that being called "nigger" constitutes a violation of one's rights. For her, the effects are such that they threaten a person's self-esteem and introduce "an element of wariness or defensive belligerence into one's relations with other people, and ske[w] one's life choices."[40] On Meyers's view,

> [b]road empathic understanding of such harms discloses that they undermine people's agentic capacities. It would seem, then, that the negative impact of hate speech on subjectivity is a paradigm case of moral significance. Since agentic capacities are the very capacities that basic rights secure, it seems that empathic understanding of people who belong to historically despised and currently excluded social groups supports the claim that they have a right not to be subjected to verbal or pictorial abuse based on their membership in one or more of these groups.[41]

"Nigger" can be oppressive. "[I]t works in concert with other racist tools to keep victim groups in an inferior position."[42] Moreover, if Mary McGowan is correct, it "not only causes racial oppression, it often *is* racial oppression."[43]

It is in the wake of the word's history and under the weight of these moral objections that any argument claiming to give reasons for thinking that the use of "nigger" by white folk to address black folk is not morally objectionable must stand. As near as I can tell, the following three arguments are the best candidates.

2.1 The Depictions Argument

Although there have been a number of factors involved in accounting for white-to-black NC, gangster rap may have been the most influential. "From 1979, when 'Rapper's Delight' was released, until 1988, when 'Straight Outta Compton' went gold, [nigga] was seldom uttered on hip-hop recordings. All that changed when N.W.A. (short for Niggas Wit Attitude) became a national sensation with 'Straight Outta Compton.' "[44] When we add music-video and film depictions to those found in music, it presents an enormous potential for influencing white folk, the majority

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[39]Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," in *Words That Wound*, 94.

[40]Diana Tietjens Meyers, "Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech," *Law and Philosophy*, Vol.14, No. 2 (May, 1995): 215.

[41]Ibid., 215.

[42]Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," in *Words That Wound*, 39.

[43]Mary Kate McGowan, "Oppressive Speech." *Australasian Journal of Philosophy* Vol. 87, No. 3 (September, 2009): 406.

[44]Jabari Asim, *The N Word: Who Can Say It, Who Shouldn't, and Why* (New York: Houghton Mifflin, 2007), 220.

consumers of the hip-hop music industry. Given the proliferation of depictions of NC, many may be inclined to endorse the *Depictions Argument*: given the proliferation of depictions of NC in music, music-video, and film, white-to-black NC is not morally objectionable.

The first thing to notice about this argument is the sort of depictions upon which it relies. Depictions in the media are rarely depictions of white-to-black NC. Moreover, there are a host of depictions that undermine or contra-indicate white-to-black NC. White rap artist Eminem may be the quintessential example of this. Eminem rocketed to stardom after he was spotlighted by rapper Dr. Dre, who began his career as a member of N.W.A. Eminem does not, however, use the word in his lyrics. It is a word he does not feel comfortable using. "It wouldn't sound right coming out of my mouth" he says. While he is quite alright with a black man saying "Eminem is my nigga," "[i]f a white kid came up to [him] and said it, [he] probably would look at him funny. And if given the time to sit down with him [Eminem would] say, 'Look, just don't say the word. It's not meant to be used by us.' Specially if you want something to do with hip-hop."[45]

White-to-black NC is also contra-indicated in film. Take *Bulworth* for example.[46] In the movie, Jay Bulworth, a white U.S. Senator from California campaigning for reelection, follows the suggestion of some of his young black female volunteers and they all go to a night club in a predominately black neighborhood after a campaign stop. Bulworth has been attracted to one of his volunteers, a girl named Nina, since first seeing her at the campaign stop. Nina's brother Donelle objects to this attraction. While in the club Donelle asks Bulworth: "You lost massa?" He then says to Nina: "Its about homies and shit, the real niggas. He ain't no real nigga is he?" Bulworth interjects: "I ain't no what?" Donelle responds: "I said you ain't no real nigga, is you?" Bulworth then says: "Is *you* a real nigga?" Donelle immediately takes on a much more aggressive demeanor, the kind of response one has to fighting words. He says to Bulworth: "What, you callin me a nigga motherfucker? Don't be callin me a nigga motherfucker!" Of course, strictly speaking, Bulworth has not called Donelle anything, he has only asked a question. Be this as it may, the reaction is the same.

It may be right to say that hip-hop culture is largely the source of most of the depictions of NC. However, since these depictions are overwhelmingly of black folk engaging in NC, and since they include a host of depictions that contra-indicate white-to-black NC, the Depictions Argument fails – the recent proliferation of depictions of NC in music, music-video, and film fail to support the inference that white-to-black NC is not morally objectionable.

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[45] Toure, "The Serious Side of Eminem: The Rolling Stone Interview," *Rolling Stone,* November 25, 2004,http//www.rollingstone.com/news/coverstory/serious_side_of_eminem/page (accessed August 15, 2008). As Michael Eric Dyson observes, "Whites who possess intimate knowledge of black culture are the very people who know the tortured history of the term and thus refrain from using it, at least publicly." See Michael Eric Dyson, *Holler If You Hear Me: Searching for Tupac Shakur* (New York: Basic Civitas Books, 2001), 148.

[46] *Bulworth*, prod. Warren Beatty and Peter Jan Brugge, dir. Warren Beatty, 108 min., Twentieth Century Fox, 1998, videocassette.

2.2 The Endearment Argument

The next argument arises from the contemporary sense of the word in NC as a "term of endearment." According to the *Endearment Argument*: since "nigger" has been used in NC by black folk as a term of endearment, white-to-black NC is not morally obectionable.

The first difficulty with this argument is the assumed familiarity that it entails. Because the prima facie familial relation that often exists among black folk is absent in white-to-black NC, the argument assumes that something like a kinship relation exists between the white speaker and the black hearer. An example at the low end of the spectrum of assumed familiarity can be found in the media. One often heard Secretary of State Condoleezza Rice referred to as "Condi" Rice in the media. Not surprisingly, when Janet Reno was U. S. Attorney General I never heard her referred to as "Jan," nor did I ever hear Madeline Albright referred to as "Madie" when she was Secretary of State. A more serious expression is the centuries-old practice, fortunately not much in vogue today, of calling grown black men "boy." This is a relatively minor but effective way to negate African names, culture etc., and indeed the very personhood of black folk. The black experience in America provides the genesis for this white-on-black familiarity. It began with the sort of familiarity that enabled and made normal the inspection of naked Africans on the auction block before bidding on them as one would cattle at a livestock auction.[47] When spoken by someone of the dominant group, assumption can turn to assertion. In cases of NC there is often a prima facie sense of something like a sibling-to-sibling relation. The message in expressions like "Joe, you my nigga," is "You are my brother (sister);" at the very least "I think of you as a brother (sister)." In white-to-black NC, the message might be "*I am to be thought of* as your brother (sister)." A relationship is thus merely being asserted without any ground in a shared culture and shared social experience. This seems to suggest something closer to the ownership expressed by Miss Ann than the kinship relation expressed in NC. It also suggests another difficulty with the Endearment Argument – it relies on a co-opting of black culture.

Cultural co-opting can take many forms. For example, when white folk attend a revered Native American ceremony and take souvenir photographs, even after being asked not to do so. In such cases they are simply co-opting Native American culture for their own entertainment. In so doing they disrespect the culture and the people. Such practices are consistent with the Lockean idea that the "new world" (as well as in Africa, of course) exists for the use and benefit

[47]The treatment of a pregnant runaway slave in Missouri who bit the finger of a perspective purchaser after being captured and confined to a "nigger pen" is paradigmatic of the genesis of this sort of familiarity: "Martha received a kick that ended the life of her child and nearly her own. When she had sufficiently recovered to be salable another would be purchaser demanded that she strip for inspection, and upon her refusal to do so her clothing was torn from her and she was given thirty lashes, well laid on." See Blassingame, 507.

of white folk.[48] Another example of co-opting black culture occurs when, after failing to comb their hair for a considerable period of time, white folk declare that they have "dreadlocks." However, by appropriating the look of the Rastafari, they take for their own something with a meaning that is far more significant than a fashion statement.

The Jamaican Rastafari movement resonates with "the worldview of the Jamaican peasantry, the direct descendants of 'those who came' *after* Columbus, the Africans forced into slavery." "[T]he driving force in [the] formation [of their worldview] was their determination to make the best of this new situation *on their own terms*, which meant resistance to European slavery and colonialism, both physical and mental."[49] The dreadlock hairstyle was institutionalized by the Youth Black Faith, an organization of young male activists founded in Jamaica in 1949.[50] It emerged from an internal debate over the question of whether or not one ought to comb one's hair. The Dreadful won. Of course, "[t]he appearance to the people when you step out of the form is a outcast." But while the locks certainly had shock value, they were also "a way of witnessing to faith with the same kind of fanaticism for which the prophets and saints of old were famous, men gone mad with religion."[51] "One who earned that name inspired dread in other brethren by the forthrightness and frankness of his critical remarks and the defense of the principles essential to the Youth Black Faith. 'Dreadful' or 'Dread' was therefore synonymous with 'upright.' "[52] Dreadlocks are a positive symbol of religious faith, uprightness, and black resistance to white oppression.

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[48]Locke took it as a command of God that white men should "subdue the Earth" for their benefit. On his view, "the *Earth it self*" is "the *chief matter of Property*" and the "chief end" of civil society is "the preservation of Property." See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 290, 291 (bk. II chap. V), 323 (bk. II chap. VII). As Charles Mills puts it, "Locke's unenlightened Native Americans are not sufficiently 'industrious and rational' to appropriate and add value to the land God has given them, unlike hardworking day laborers in England." See Charles W. Mills, "Whose Fourth of July? Frederick Douglass and 'Original Intent,'" in *Frederick Douglass: A Critical Reader*, ed. Bill E. Lawson and Frank M. Kirkland (Malden: Blackwell, 1999), 122. According to Locke's theory of property, "a relatively small number of people have justly appropriated or acquired the world's wealth, leaving the majority with no property but only with their talents and persons." See Bernard R. Boxill, "Radical Implications of Locke's Moral Theory: The Views of Frederick Douglass," in *Subjugation and Bondage: Critical Essays on Slavery and Social Philosophy*, ed. Tommy L. Lott (Lanham: Rowman & Littlefield, 1998), 36.

[49]Barry Chevannes, *Rastafari: Roots and Ideology* (Syracuse: Syracuse University Press, 1994), ix.

[50]Ibid., x, 154, 157.

[51]Ibid., 158. "[T]he title 'Warrior' or 'Dreadful' was conferred on those who distinguished themselves with ascetic discipline." "In earning the name 'warrior,' members were motivated not by a sense of office, for warrior was not an office as such [,] but by a sense of deep religious conviction. In time, the designation gave way to a more appropriate biblical one, 'Bonogee' [Boanerges], or 'Sons of thunder,' the name Jesus gave to the brothers James and John," 156 (the third set of brackets are Chevannes's).

[52]Ibid., 156.

"By the 1950s and early 1960s, when the Dreadlocks became normative, many people were actually *afraid* of the Rastafari."[53] People are not afraid of white males, although given their history of enslavement, domination and colonization perhaps they should be. With control to a large extent of what the populous sees in the media, at most a white male with uncombed hair who sees himself as wearing "dreadlocks" will be perceived as "rebellious" or "anti-social." He will never be the object of fear in America that a black man is, even when the black man is wearing the most conservative of hair styles.[54] A white person's claim of wearing "dreadlocks" co-opts black culture by taking a positive symbol of religious faith, uprightness, and black resistance to white oppression and reducing it to a source of entertainment. As white journalist James Ledbetter observes:

> Whites have been riffing off – or ripping off – black cultural forms for more than a century and making a lot more money from them…. [Whites] cavalierly adopt… the black mantle without having to experience life-long racism, restricted economic opportunity, or any of the thousand insults that characterize black American life…. It's a curious spectacle[55]

Given the sense of assumed familiarity and the co-opting of black culture entailed in the Endearment Argument, it fails to be the case that the use of "nigger" as a term of endearment by black folk supports the inference that white-to-black NC is not morally objectionable. The Endearment Argument fails.

2.3 The Intent Argument

The final argument to be considered is grounded in the intent of the speaker. Intent is an important part of social life. In everything from gift giving ("it's the thought that counts") to answering questions in the law about appropriate punishments, what a person intends can carry a great deal of weight. Take for example the recent U.S. Supreme Court ruling in the cross burning case of *Virginia v. Black*. According to the Court, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Since "burning a cross is a particularly virulent form of intimidation," "cross burnings done with the intent to intimidate" may be outlawed.[56] Analogously, some think that when there is a lack of racist intent in white-to-black NC it is not morally objectionable. According to the *Intent Argument*: when white folk engage in white-to-black NC with good intentions, it is not morally objectionable.

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[53] Ibid., 132.

[54] On white fear see Rodney C. Roberts, "The American Value of Fear and the Indefinite Detention of Terrorist Suspects," *Public Affairs Quarterly,* Vol. 21, No. 4 (October, 2007): 412–414, and "Criminalization and Compensation," *Legal Theory,* Vol. 11, No. 2 (June, 2005): 156–158.

[55] James Ledbetter, "Imitation of Life," *VIBE*, Special Preview Issue, September 1992, quoted in Smitherman, 16.

[56] *Virginia v. Black* 538 U.S. 343, 344 (2003).

If J. Angelo Corlett and Robert Francescotti are correct, "[w]hether a sentence has hateful content ultimately depends on the typical intentions of those who use that sentence. It would be inappropriate (if not false) to say that a sentence has hateful content if speakers seldom have hateful intentions when uttering the sentence."[57] Analogs to this include congratulatory speech. One can offer congratulatory words without having any real desire to congratulate. Cases where speakers unknowingly utter hateful expressions in a language that is foreign to them is another example. For the hearer, a statement can express hatefulness whether or not the speaker actually holds any hateful feelings. Since hate speech only requires "intensely antipathetic content," it does not require… hateful emotions."[58] Consequently, when the speaker is a member of the dominant group, "use of the word by even 'hip' whites evokes an unspoken history of racial terror."[59]

The prevalence of this connotation is underscored by the provocative fighting words response that white-to-black NC can evoke in spite of the speaker's intent. Recall the scene in *Bulworth*. In spite of his intent and the fact that his sentence was only a question, use of the word evoked an immediate fighting words response. As one man put it: "What would happen if a white friend were to come up to me and say [as does my black brother], 'Hey Nigger! How are you doing?' Well, excuse my ebonics, but we be fightin.' "[60] Since the connotation of "nigger" as derogatory can reasonably be maintained in white-to-black NC regardless of the speaker's intent, the speaker's good intentions fail to support the view that the use of "nigger" by white folk to address black folk is not morally objectionable. The Intention Argument fails.

If my analysis holds, and if the arguments I proposed do indeed give the best reasons for thinking that white-to-black NC is not morally objectionable, then there are no good reasons for accepting this position. Michael Eric Dyson is right, "Nigger has never been cool when spit from white lips."[61]

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[57] J. Angelo Corlett and Robert Francescotti, "Foundations of a Theory of Hate Speech." *Wayne Law Review,* Vol. 48 (2002): 1086–1087.

[58] Ibid., 1087.

[59] Dyson, 145.

[60] Stan Simpson, "In Defining the N-word, Let Meaning Be Very Clear," *Hartford Courant*, 3 November 1997, quoted in Kennedy, *Nigger*, 201 n. 27.

[61] Michael Eric Dyson, "Nigger Gotta Stop," *The Source*, June 1999, quoted in Kennedy, *Nigger*, 51.

Incitement to Genocide and the Rwanda Media Case*

Larry May

Abstract In this paper I will examine in detail the case of the journalists and broadcasters in Rwanda, and I will do so as a vehicle for saying something about the idea of incitement, an often overlooked basis of individual liability. As an initial take on the idea of incitement, the ICTR urges that we think of it as it has been conceptualized in Common Law systems, namely, "as encouraging or persuading another to commit an offence" and not merely by "vague or indirect suggestion." Incitement is thus associated with provoking, which involves both causation and intent, namely, "the intent to directly prompt or provoke another to commit genocide." In Rwanda, the ICTR said that the actions of the Media Case defendants constituted the kind of "direct incitement" that is prosecutable under the crime of genocide.

Keywords Rwanda Media Case • Incitement • Elements of incitement • Incitement to genocide • ICTR

In this paper, I will look at the difficult case of a group of three media leaders who were convicted of genocide in Rwanda for their role in disseminating the message of hatred that seemed to incite the massacre of Tutsis by Hutus in 1994. This investigation will broaden our sense of how to understand and assess participation in such massacres. One scholar says that it is rare that there are prosecutions for incitement, but the Rwanda case was extreme because "grotesque caricatures in

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racist newspapers and broadcast appeals to participate in such killings marked the 1994 genocide."[1] Indeed, as the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) said: "RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy...The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach."[2]

In this so-called "Media Case," those who incited mass murder and mutilation against members of the Tutsi ethnic group were prosecuted. Barayagwiza and Ngeze founded the newspaper, *Kangura*, which editorialized in invective terms against the Tutsis.[3] Barayagwiza, along with Nahimana, also founded a radio station, RTLM, which routinely referred to Tutsis as "'enemies' or 'traitors' who deserve to die."[4] Both the newspaper and the radio station were used to incite hatred against the Tutsis by the Hutus and even to target specific Tutsis for attack. In addition, both media companies purchased weapons from 1992 through 1994 for the Hutu militias that eventually carried out the mass killings of Tutsis.[5] All three defendants were convicted, yet there was no evidence that any of the three committed any killings.

In this paper I will examine in detail the case of the journalists and broadcasters in Rwanda, and I will do so as a vehicle for saying something about the idea of incitement, an often overlooked basis of individual liability. As an initial take on the idea of incitement, the ICTR urges that we think of it as it has been conceptualized in Common Law systems, namely, "as encouraging or persuading another to commit an offence" and not merely by "vague or indirect suggestion." Incitement is thus associated with provoking, which involves both causation and intent, namely, "the intent to directly prompt or provoke another to commit genocide."[6] In Rwanda, the ICTR said that the actions of the Media Case defendants constituted the kind of "direct incitement" that is prosecutable under the crime of genocide.[7] Throughout, I am guided by a remark of the USSR's delegate to the 1948 Convention on Genocide that seems especially apt to Rwanda: "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so…"[8]

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[1] William Schabas, *The UN International Criminal Tribunals* (New York: Cambridge University Press, 2006), 181.

[2] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Trial Chamber, International Criminal Tribunal for Rwanda, Case No. ICTR-99-52-T, 3 December 2003, para. 1031 [hereinafter "Media Case Trial Chamber"].

[3] *Prosecutor v. Jean-Bosco Barayagwiza*, International Criminal Tribunal for Rwanda, Amended Indictment, April 4, 2000, para. 5.3.

[4] Ibid., para. 5.10.

[5] Ibid., para. 5.16 and 5.14.

[6] Ibid., para. 560.

[7] *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, paras. 555–557 [hereinafter "Akayesu Trial Chamber"].

[8] Quoted at Ibid., para., 551.

1 The Facts of the Media Case

The case against Nahimana, Barayagwiza, and Ngeze turned on the roles they played in running a newspaper *Kangura*, a radio station RTLM, and a political party, CDR. Through these sources, a steady stream of hate propaganda was produced preceding and during the Rwandan genocide. I begin by discussing three of the most graphic examples of the way that these media leaders are said to have played an important role in the Rwanda genocide in terms of incitement. In all three instances, the International Criminal Tribunal for Rwanda's Trial Chamber is at pains to examine the content of the speech to see if indeed it goes beyond the bounds of otherwise protected freedoms.

The first example concerns the cover of the November 1991 issue, No. 26, of Kangura. Here is how the Trial Chamber described it:

> In a black box on the left of the cover, the word "SPECIAL" is followed by the headline text: "THE BATUTSI, GOD'S RACE!" Under this title is an image of the former President of Rwanda, Gregoire Kayibanda, in the center and occupying most of the cover. Under the picture of President Kayibanda is the text: "How about re-launching the 1959 Bahutu revolution so that we can conquer the *Inyenzi-Ntutsi*." Just left of the picture of Kayibanda is a black box with vertical text reading: "WHAT WEAPONS SHALL WE USE TO CONQUER THE *INYENZI* ONCE AND FOR ALL?" and just left of this black box is a drawing of a machete. To the right of the picture of Kayibanda is the vertical text "We have found out why Nzirorera has a problem with the Tutsi", and to the right of this text are three smaller pictures lined vertically on the right margin, two of armed soldiers and one of a vehicle with a cannon on it.

The Trial Chamber agrees with a prosecution witness who said that since "no written answer was given to the question of how to defeat the *Inyenzi*-Tutsi … the answer is in the drawing. The answer is the machete, and the reference to the 1959 revolution is a reference to the war by Hutu against Tutsi, in which machetes were used to kill Tutsi."[9]

The second example is from the radio station founded by two of the defendants. In the middle of the killing spree that left 800,000 Tutsi dead, many RTLM broadcasts identified individuals by name and urged that they be killed. Here is an example of a broadcast.

> Another man … went to the market disguised in a military uniform and a gun and arrested a young man called Yirirwahandi Eustachwe in the market… In his Identity Card it is written that he is a Hutu though he acknowledges that his mother is a Tutsi. If you are Inyenzi you must be killed, you cannot change anything. … No one can say that he has captured an Inyenzi and the latter gave him money, as a price for his life. This cannot be accepted. If someone has a false identity card, if he is Inkotanyi, a known accomplice of RPF, don't accept anything in exchange. He must be killed.[10]

The Trial Chamber comments: "The chilling message of the broadcast was that any accomplice of the RPF, implicitly defined as anyone with Tutsi blood, cannot buy

[9] Media Case Trial Chamber judgment, para. 160.

[10] Ibid., para. 427.

his life. He must be killed."[11] And as the Court also says: "Many RTLM broadcasts named and denounced individuals, identifying them as accomplices or threats to security."[12] Lists of names of individuals were also broadcast. And the Court then explains that most of these people were in fact killed shortly after the broadcast of their names, and the vast majority were Tutsis.

The third example concerns the workings of the political party run by the defendants. The defendants, especially Ngeze and Barayagwiza, were instrumental in setting up, and running, a political party, CDR, which distributed weapons, organized demonstrations and roadblocks, and sometimes was even directly involved in killing. Here is the summary of a prosecution witness's testimony about Ngeze's activities.

> When the CDR was set up, Ngeze became an influential member of that party… they looted and threatened the Tutsi … Weapons were distributed by Ngeze and Barayagwiza. Training sessions were also arranged during these years on the use of these weapons… [I]n February 1994 .. a fax sent by Barayagwiza… was addressed to the Youth Wing of the CDR Party and the MRND Party, and it stated that now that the *Inyenzi* had killed the CDR President, all Hutus were requested to be vigilant to closely follow up the Tutsis wherever they were hiding. It said that even if they were in churches, they should be pursued and killed. Ngeze then went around the town in his Toyota Hilus, on which he had mounted a megaphone, saying that that was it for the Tutsis… From April until June 1994, CDR and *Interhamwe* groups held meetings every evening to report on the number of Tutsi killed. These meetings were attended by the leaders, including Barayagwiza and Ngeze.[13]

Concerning one specific incident at the very beginning of the genocidal killings, on April 6 1994, the Trial Chamber concludes: "Although there is no evidence that [Ngeze] was present during these killings, this attack was ordered by Hassan Ngeze, communicated through a loudspeaker from his vehicle."[14] The use of a loudspeaker directly to incite is surely one of the clearest examples of incitement, but the other examples are also thought to be significant incitement as well.

The newspaper *Kangura,* the radio station RTLM, and the CDR party, disseminated much hate propaganda against the Tutsis – what the Trial Chamber called a "drumbeat" leading up to and contributing to the genocide. In response to this charge, one of the defendants said that it was the shooting down of the President's plane that fuelled the genocide. The Trial Chamber responded:

> But if the downing of the plane was the trigger, then RTLM, Kangura, and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers that the killing of the Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, Kangura, and CDR, before and after 6 April 1994.[15]

The main way that the three defendants are said to be involved is in inciting people to kill, through the dissemination of propaganda and instructions in print media, radio broadcasts, and megaphone speeches.

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[11] Ibid., para. 428.

[12] Ibid., para. 429.

[13] Ibid., paras. 784–785.

[14] Ibid., para. 825.

[15] Ibid., para. 953.

Incitement to genocide, through the printed and spoken word, can be accomplished in the variety of ways illustrated above. The Trial Chamber assigns individual criminal responsibility for this incitement to genocide on the basis of what it calls "superior responsibility" of the defendants for failing to act to prevent the genocidal harm that they should have predicted would result from their publications, broadcasts, and speeches. The ICTR Trial Chamber ruled that Nahimana and Barayagwiza had superior responsibility for RTLM broadcasts and for publishing issues of Kangura. And Barayagwiza and Ngeze had superior responsibility for CDR. This is an additional reason why Nahimana, Barayagwiza and Ngeze are convicted of incitement to genocide.

2 The Jurisprudence of Incitement

Incitement means "encouraging or persuading another to commit an offence."[16] There are two ways that incitement tends to be treated in criminal law. As the Akayesu Trial Chamber said, "Under Common law systems, incitement tends to be viewed as a particular form of criminal participation, punishable as such," whereas "in most Civil law systems, incitement is most often treated as a form of complicity."[17] If incitement is treated as merely a form of complicity, then it may not be charged and punished in its own right. Under the Genocide convention, and also under the Rwanda Tribunal Statute, "direct and public incitement is expressly defined as a specific crime, punishable as such."[18] To be direct incitement, there must be "more than mere vague or indirect suggestion."[19] In this section I will examine several cases prior to the Media Case, namely two cases from Nuremberg and an earlier case from Rwanda, to get a sense of the extant jurisprudence about incitement in international criminal law.

As in most matters of criminal law, the hardest element to establish for the crime of incitement to genocide is *mens rea.* The ICTR's Akayesu Trial Chamber is forthright in recognizing that the intent of two different people must be proved.

> It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging.[20]

There is a desire to create in others a desire to commit a crime. And because of this odd type of mens rea, the crime of incitement to genocide is especially hard to prove, since in effect we must peer into the mind of two different people, or infer from their behavior what the mental states for two different people are.

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[16] Andrew Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1995), 462, quoted in *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber judgment, para. 555.

[17] Akayesu Trial Chamber judgment, para. 552.

[18] Ibid., para. 554.

[19] Ibid., para. 557.

[20] Ibid., para. 560.

The element of causation is also fraught with problems. The most important case to take up this issue was the case of Julius Streicher at the Nuremberg trial. As the ICTR Trial Chamber says, "Known widely as 'Jew-Baiter Number One,' Julius Streicher was the publisher of *Der Sturmer* from 1923–1945" where he often called "for the extermination of Jews."[21] Although this was the conclusion of the Nuremberg prosecutors, Streicher's defense counsel tried to show that Streicher was mainly arguing for removing Jews from Germany, perhaps to Madagascar, rather than for the killing of all Jews in Germany.[22] So, the defense argued for a lesser charge than would be true if Streicher had urged the extermination of the Jews. Most importantly, the defense made an unusual admission during its attempt to defend Streicher against the charge of incitement.

Streicher's defense counsel, Dr. Marx, said that it could not be denied that Streicher "continually wrote articles in *Der Sturmer* and also made speeches in public which were strongly anti-Jewish and at least aimed at the elimination of Jewish influence in Germany."[23] Indeed, the defense counsel went out of its way to paint Streicher in the most unflattering terms. "It cannot be denied that by writing ad nauseum on the same subject for years in a clumsy, crude, and violent manner, the Defendant Streicher has brought upon himself the hatred of the world" for which "absolutely no excuse exists."[24]

Streicher's defense counsel nonetheless raised the issue of causation as a part of the defense to the charge of incitement.

> But criminal action can only be seen here – and this is presumably the opinion of the Prosecution also – if this type of literary and oral activity led to criminal results… The prosecution … has not produced actual proof… If, however, the defendant Streicher is to be made legally responsible for this, then not only must it be proved that the incitement as such was actually carried through and results achieved in this direction; but – and this is the decisive point – conclusive proof must be produced that the deeds which were done can be traced back to that incitement.[25]

The Nuremberg Judges did not agree with the defense counsel on this issue, and convicted Streicher even though the evidence of causation was indeed not conclusive.

The Media Case Trial Chamber notes that another defendant at Nuremberg, Hans Fritzsche, who was head of the Radio Section of the Nazi's Propaganda Ministry, was acquitted, because he did not have "control over the formulation of propaganda policies," being merely "a conduit of the press directives passed down to him."[26] And there was no conclusive evidence to show that Fritzsche deliberately

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[21] Media Case Trial Chamber judgment, para. 981.

[22] *The Trial of the German Major War Criminals*, vol. 18, p. 197, available at http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-18/tgmwc-18-173-10.shtml.

[23] Ibid., p. 198.

[24] Ibid., p. 217.

[25] Ibid., p. 199.

[26] Media Case Trial Chamber judgment, para. 982.

falsified any of the information he conveyed, or that he knew it to be false. Unlike Streicher, there was no evidence that Fritzsche intended that his published views would inspire genocide or even the removal of Jews from Germany. Indeed, the Nuremberg Judges seemed to agree with the defense that Fritzsche intended only to convey information that was not significantly different from other information that journalists in many other societies conveyed to their readers.

While not claiming to be an opponent of Nazism, a plausible case is nonetheless made that Fritzsche "opposed abuses insofar as he could recognize them."[27] Fritzsche's defense counsel claimed that in order for his client to be convicted as an inciter, it must be shown that Fritzsche actually instigated specific individuals to do a criminal act, or at least that he had the intention to do so. Here is the conclusion of the defense:

> The evidence has not furnished the slightest proof in the Fritzsche case that he has committed an individual crime as instigator through his transmission of news; there is not the slightest evidence to show that he has instigated a single person to murder, cruelties, deportations, killings of hostages, massacres of Jews, or other crimes mentioned in the Charter, or had as instigator, caused a single crime by his speeches to the public. Not a single passage from his nearly 1,000 wireless speeches to the public could be produced from which individual responsibility could be deduced. That was not possible from his speeches, anyway. The crimes that were committed were carried out by people completely indifferent to Fritzsche's propaganda. They received their impulses or instructions from altogether different sources.[28]

Underlying this defense is the defense counsel's reading of German law concerning incitement: "An attempt at instigation presupposes that the person to be incited is not already determined to commit a criminal act of his own accord or under the influence of others."[29]

3 Incitement in Rwanda

The Streicher and Fritzsche cases set the stage well for the defendants on trial in Rwanda. In one of those cases, decided by the ICTR prior to its decision in the Media case, the ICTR said that there must be a connection between the dissemination of propaganda and someone's commission of crime. The ICTR's Akayesu Trial Chamber says:

> The prosecution must prove a definite causation between the act characterized as incitement … and a specific offence.[30]

Jean-Paul Akayesu, a bourgemestre of a commune, that is, a kind of mayor, is convicted on this standard.

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[27] *The Trial of the German Major War Criminals*, vol. 19, pp. 319–351.

[28] Ibid., p. 346.

[29] Ibid.

[30] Akayesu Trial Chamber judgment, para. 557.

But the Media Case Trial Chamber of the ICTR takes a somewhat different line, not requiring the prosecution to find a nexus between what the defendants said or wrote and some specific crimes of others. Indeed, when quoting the Akayesu opinion, the Media Trial Chamber does not cite the passage just quoted above but starts quoting just after that passage: "… [T]he Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content."[31] Focusing on this dimension of the judgment, namely, the variable meaning of causation, puts things in a very different light than seemed to be true for the "definite causation" required by the Akayesu Trial Chamber. Indeed, if a judgment of causation were open to cultural variation, then it would not easily admit of direct proof and may allow indirect forms of proof such as that provided by anthropologists or linguists.

Despite the other parts of the Akayesu analysis, the Media Case Trial Chamber concluded

> that this causal relationship is not requisite to a finding of incitement. It is the *potential* of the communication to cause genocide that makes it incitement.[32]

The Media Case Trial Chamber acted somewhat differently from both the Akayesu Trial Chamber and the Nuremberg Tribunal, by seemingly diminishing the importance of the causation element thereby perhaps emphasizing the inchoate nature of the crime of incitement to genocide, that is, that the crime does not require a successful instigation for prosecution.

The Appeals Chamber of the ICTR added quite a bit of clarity to these jurisprudential issues when it issued its opinion in the Media Case on November 28th of 2007.

> The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion.[33]

A defendant "cannot be held accountable for hate speech that does not directly call for the commission of genocide."[34] In this regard, the context in which the speech is made is relevant, at very least, in determining whether the speech can indeed be interpreted as having made a direct appeal to commit killing and other acts of genocide.[35]

In determining the meaning of a given speech, the cultural context must be taken into account. The Appeals Chamber ruled:

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[31] Media Case Trial Chamber judgment, para., 1011.

[32] Ibid., para. 1015, my italics.

[33] *Fernando Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, International Criminal Tribunal for Rwanda*, Appeals Chamber, Case No., ICTR-99-52-A, 28 November 2007, para. 692 [hereinafter "Media Case Appeals Chamber Judgment"].

[34] Ibid., para. 693.

[35] Ibid., para. 697.

> The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond a reasonable doubt to constitute direct and public incitement to commit genocide.[36]

The crime of incitement to commit genocide normally does involve speech, but not merely hate speech.

In addition, The Appeals Chamber qualified the nature of the crime of direct and public incitement to commit genocide, reaffirming that the crime "is an inchoate offense, punishable even if no act of genocide has resulted therefrom."[37] But the Appeals Chamber also recognizes a significant problem with such inchoate crimes. A defendant could be convicted merely for "programming" in some general way without showing that there were specific speeches that were likely to have specific effects, even if those effects did not result. Here is how the Appeals Chamber characterized the challenge from one of the defendants, Nahimana.

> He submits that the Trial Chamber improperly extended criminalization to 'the collective and continuing programming of speeches, which in themselves were not criminal and were by different authors,' thereby implying a form of collective responsibility that is impermissible in international law, and setting 'no clear criteria whereby a journalist can be aware, at the time when he is speaking, of the extent of his right to free speech.'[38]

The Appeals Chamber agrees with Nahimana on the general jurisprudential point about the nature of incitement, and concludes that the Trial Chamber needed to clearly identify the specific broadcasts that constituted incitement, and not rely on the entirety of broadcasts or newspaper articles.[39]

There is a sense in which incitement is integral to the participation of a number of people in the commission of a mass crime or other crime that requires multiple participants. But the question is at what point incitement, as an inchoate crime, blends into instigation, as a full participation in the crime. One way to think about it is that when a person incites she often also instigates, but not always. The way that incitement does lead to instigation may involve a significant temporal or spatial gap. For this reason, if for no other, it makes sense to distinguish incitement to genocide from instigation or some other direct participation in genocide. But it also makes sense to treat it as a separately punishable offence. In the case of participation, success is a necessary element. Yet incitement is so potentially dangerous an activity that perhaps it should be treated as punishable in itself, just as "attempted murder" is punishable independently of whether the defendant murdered. Indeed, incitement to genocide plays such a crucial role in setting the stage for genocide that punishing it is absolutely crucial to the deterrence of genocide.

Incitement derives from the Latin word "citare," which means to set in rapid motion. One of the most pressing conceptual problems with the category of

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[36] Ibid., para. 701.

[37] Ibid., para. 678.

[38] Ibid. para. 718.

[39] Ibid., paras. 726–727.

incitement to genocide is that there is a significant lag time between when the racist speech is broadcast or printed and when violence ensues – thus undermining the core idea of setting in *rapid* motion. The speeches surely did heat up the emotions of people in Rwandan society, but it is not clear that they were moved rapidly to engage in violence is not clearly seen in the Media Case with the exception of some of the acts of Ngeze, such as when he broadcast from his truck to crowds of people who were already primed to engage in violence. Incitement remains an inchoate crime in several senses of that term, but it is also true that punishable instances of incitement do not, but should, clearly resemble the core idea behind the Latin root of the term.

The Appeals Chamber recognized some of these points in its rejection of Trial Chamber arguments about sentencing in the Media Case. In particular the Appeals Chamber ruled that it was not enough that certain RTLM broadcasts were proved to be examples of "inflammatory speech." Instead, the journalists were shown to be engaging in such speech "to mobilize anger against the Tutsis" but not to incite people to commit genocide.[40] The Appeals Chamber also distinguished between evidence that proved incitement to ethnic hatred from that which proved incitement to commit genocide. In many cases only the former and not the latter was proven by reference to vitriolic broadcasts on RTLM. Things were different though in the articles published in *Kangura*. The Appeals Chamber found that "Kangura articles published in 1994 directly and publicly incited the commission of genocide."[41]

4 Incitement to Genocide Through the Media

In my view, incitement makes the most conceptual sense when it is linked with its Latin root, namely, where a person's actions begin a causal chain, and soon thereafter there is, or would normally be, a certain harmful result. In the case of incitement to genocide, the result of course is a series of genocidal harms. Incitement is not best understood as preparing the ground for harm, but rather as initiating a causal process. And it is also to do so intentionally, although as we will see the intention is only to take a risk not to do that which is risked. And here is where the inchoate nature of the crime arises, for if one were to start such a causal chain by one's words, spoken or written, and to intend that these words would have a certain result, then this is enough for incitement, as long as the so-called proximity condition is met, namely the condition that stipulates that the act must involve more than mere preparation.

In my view, incitement should be understood to involve a "close connection between the conduct engaged in by the accused, and the (kind of) offense which she

[40] Media Case Appeals Chamber judgment, para. 742.

[41] Ibid., para. 775.

or he is alleged to have" incited.[42] But there is a sense in which incitement crimes do not fit the standard definition of inchoate crimes since there really isn't any preparation to do something else involved in incitement. What makes the connection is more direct than mere preparation, hence the idea of setting in rapid motion. But incitement does fit with other inchoate crimes in the sense that what is done to start the causal chain, even though it is of a different sort than preparation, does not necessarily have to lead to completion in a harmful outcome. Yet in these cases, preparation is crucial to satisfy the proximity condition. It seems to me that incitement is significantly different from other inchoate crimes in that there is a more direct link between what the defendant is alleged to have done and the result that is harmful.[43] Once again, this will move our understanding of incitement closer to its Latin root.

I also think that incitement falls in between the stools of some inchoate crimes like attempts that involve intentional acts to do harm, and other inchoate crimes that merely involve recklessness. For this reason, incitement should be defined in terms of only one, not two, intention elements, although there is a second mental element that should be required. Incitement should be understood as the intention to do a certain act, where the act is known to be highly likely to produce harm, but where it may not be intended that those harms occur. In that sense, incitement is at minimum a crime of recklessness, not necessarily a crime of intention, to use Duff's terminology, since only knowledge of the risk of, not also intention to cause, serious harm is required.

Putting all of these pieces together, here is my favored way to understand incitement. Incitement involves the intention to take certain actions that initiate a causal chain that is known to risk serious harm, but where the risk of harm need not be intended, and the harm need not be effected. Incitement is thus an inchoate crime in that harm need not result from the inciters' action, but incitement is not like most other inchoate crimes in how the proximity test is to be met. There is a very limited sense in which preparation must be taken, in that the inciter must in fact do those things that, by strongly affecting others, risks causing these others to engage in harms. But this is not best thought of in terms of preparation, since it is not as if the inciter need be planning to do the things that those who are likely to be affected by his or her actions may cause, nor that he or she intend there to be a plan to produce these harms.

There will be degrees of incitement, and more severe penalties should be set for those who know and intend the risk than those who merely know of the risk and are hence reckless. The severity of the punishment turns not on the initial intent, but on a secondary mental element, namely, whether the specific harm is intended or merely the result of recklessness or negligence. Incitement is thus what is often called a crime of specific or special *mens rea*. Incitement to genocide is thus to be understood as the kind of crime where there must be both the intent to do an act of broadcasting or

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[42] Jeremy Horder, "Crimes of Ulterior Intent," in *Harm and Culpability*, ed. A.P. Simester and A.T.H. Smith (Oxford: Clarendon Press, 1996), 160.

[43] Antony Duff, *Criminal Attempts* (Oxford: Clarendon Press, 1996), 128.

publishing or public speaking in a highly prejudicial way about a social group's members, and where the risk of harm so created is at least known by the inciter.

Finally, let me say just a few words about how the defendants in the Media Case should be treated given my revised understanding of incitement. All three defendants acted in various ways that incited genocidal violence by publishing and broadcasting articles and speeches. There is still incitement even if it may be true that the defendants did not intend that harmful results would occur, just as seems to be true in the Fritzsche case before the Nuremberg tribunal. How exactly the responsibility of the defendants should be characterized has remained a bit of a difficulty, as I will now indicate in the ending paragraphs of this section.

In the case of Nahimana, if he claims that he did not intend to make, or allow to have made, prejudicial remarks that he knew would risk harm to Tutsis, and the prosecution cannot prove otherwise, then he will not be subject to conviction at all. Yet, some of the statements and actions attributed to Nahimana certainly seem to me to be reckless, and insofar as the prosecution could prove that they are, then Nahimana would be subject to conviction and punishment, although not as severe punishment as if he intended to fuel genocidal violence. In this context we might also wonder about the purchase and distribution of machetes on the part of these defendants. Such acts, along with the speeches Nahimana made, might make him guilty of participating in genocide although perhaps still not as an inciter.

Barayagiwiza cannot avoid successful prosecution by claiming that he merely knew about the risk that his remarks would fuel genocidal action, but that he did not intend to fuel the genocide. He seems to me to be clearly guilty of incitement to genocide based on his own admissions about his knowledge of the risk he caused. His admitted recklessness might count in favour of a less severe sentence than if he had intended these results. In neither case will it matter that the genocidal violence did not occur as a result of these actions. Unless there was evidence presented that Barayagwiza intended that his actions would incite and also intended that such incitement would fuel the genocidal violence, he should not be sentenced severely for what he did.

Ngeze is the one who should be most severely punished for having intended to incite given that he also intended that his inciting actions would cause harm, especially when he stood in his truck and while speaking through a megaphone urged Hutus to kill specific Tutsis. So, according to the model I have set up, Ngeze is the one who should be punished most severely since his actions were so much more clearly and directly connected to the genocidal violence that swept Rwanda, than were those other defendants in the Media case. Of course, one might also wonder whether the Hutus were not already primed to respond as they did, in which case Ngeze might be exonerated or his sentence might be diminished since there would be evidence that the violence may have occurred without his actions.

In the actual sentencing, the Trial Chamber of the ICTR gave life sentences to all three defendants, reducing the sentence for Barayagwiza slightly only because of due process violations concerning his case. I have given reasons to think that only Ngeze should have been sentenced so severely. Although I have admitted that if the prosecution could show that all three defendants intended to fuel the genocide

by their inciting actions then they could all be subject to the same severe punishment. By giving all three defendants the same sentence, the ICTR made a major mistake in not recognizing the importance of a second intent element for severity of punishment.

I do not embrace the ICTR's use of the doctrine of superior responsibility for the case of party leaders and the members of their parties, but I might support this theory for heads of corporations. The question in the Media Case is whether newspapers and radio stations are run like normal corporations where those executives in charge really do have the power to monitor and change the views of those who do the broadcasts and write the editorials. I do not have a firm view of this and suspect that it will vary quite a bit from newspaper to newspaper and radio station to radio station. But it is clear that the editorial policy would have to be known to be risking violence for the newspaper or radio station executives to be held responsible as inciters to genocide. In the cases we have been examining, I do not think this was indeed clear. So, Nahimana, Barayagwiza, and Ngeze would have to be found guilty on the basis of their own acts of incitement, not for superior responsibility for failing to stop others from being inciters.

Hijabs and Headwraps: The Case for Tolerance

Anita L. Allen

Abstract On March 15, 2006, French President Jacques Chirac signed into law an amendment to his country's education statute, banning the wearing of conspicuous signs of religious affiliation in public schools. Prohibited items included a large cross, a veil, or skullcap. The ban was expressly introduced by lawmakers as an application of the principle of government neutrality, du principe de laïcité. Opponents of the law viewed it primarily as an intolerant assault against the hijab, a head and neck wrap worn by many Muslim women around the world. In *Politics of the Veil,* Professor Joan Wallach Scott offers an illuminating account of the significance of the hijab in France. Scott's lucid, compact examination of the hijab complements previous feminist scholarship on veiling with a close look at its role in a particular time and place - contemporary France - where it has been the subject matter of a unique political discourse. How different is America's political discourse surrounding religious symbols in the schools as compared to the French? I offer a U.S. constitutional perspective on the rights of religious minorities and women in the public schools, and suggest that a ban on the hijab must be considered unconstitutional. A proposal for a national rule against the hijab in public schools or universities would fall flat in the United States. When compared to U.S. approaches to the hijab, the French experience underscores an important point: there is more than one way to be a modern, multicultural western liberal democracy with a Muslim population, and some ways are better than others.

Keywords Hijab ban • Hijab ban in France • Rights of religious minorities • Religious symbols in public schools • Rights of Muslims • Laïcité

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1 Introduction

Can a twenty-first century liberal society justly ban the wearing of clothing, such as a head-covering, commended by religion?[1] Just a few years ago France amended its law to prohibit school children from donning emblems of faith. The 2006 amendment banned conspicuous ("manifestant ostensiblement") signs of religious affiliation in public schools.[2] French lawmakers described the ban as an express application of a principle of secularity (principe de laïcité) deeply embedded in the nation's public philosophy.[3] The expulsion of religious symbols from schools was a response neither to turmoil within the schools nor tangible abuses within the families of school children. Instead it stemmed from a sense among lawmakers that state-supported institutions should be thoroughly neutral on matters of religion.

Many observers viewed the French law as an attack against the *hijab,* termed *foulard* in France, worn by some of the country's five million Muslims as a symbolic veil of modesty.[4] The *hijab* is a simple cloth head and neck covering that leaves the face fully exposed. Why would the French take up arms against the school girl's *hijab*? Prior to the ban, fewer than 15% of adult Muslim women and only a few Muslim elementary, middle, and high school girls in France wore the *hijab.* The ban may have been, as some have suggested, a preemptive strike against Muslim fundamentalism.

To explain the attack on the *hijab*, Joan Wallace Scott in *Politics of the Veil* assigned important roles not only to secularism (laïcité) as a public philosophy in France, but also to liberal individualism and liberal feminism as public commitments in France. Individualism and gender equality are both threatened by a population of seemingly subordinate girls wearing at the seeming insistence of a religious orthodoxy what appear to be uniform modesty garments. Scott offered a fourth factor contributing to the French *hijab* ban: racism and colonialism towards people of north African and Muslim descent, pointing toward assimilation and suppression as necessary correctives.[5]

No doubt French lawmakers would take objection to Scott's assessment that colonialism and racism were factors behind the ban on conspicuous symbols of religion. They could point out that the law on its face banned Christian, Jewish and Hindu

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[1] This paper is an outgrowth of an earlier book review article, Anita L. Allen, review of *The Politics of the Veil*, by Joan Wallach Scott, *Berkeley Journal of Gender, Law & Justice*, Vol. 23 (Spring 2008): 208.

[2] *Journal Officiel de la République Francaise*, 17 Mars 2004, page 5190, reporting an amendment to the Education Code article I. 141-5 with an insertion, new article, I. 141-5.1, prohibiting "manifestant ostensiblement" articles of religion "Dans les écoles, les colleges et les lycées publics."

[3] Ibid. The law is expressly described as "en application de principe de laïcité, le port de signes ou de tenues manifestant une appurtenance religieuse".

[4] "The Reach of War: Religious Symbols; Ban on Head Scarves Takes Effect in a United France," *New York Times* 3 September 2004, A8.

[5] Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007), 60.

garb, no less than Muslim. They could also point out that some Muslim leaders believe sovereign nations are entitled to pass laws banning religious attire such as the *hijab*.[6] The European Court of Human Rights has held that governments are within their rights when they prohibit religious attire in schools.[7] The European Court of Human Rights heard the case of a Turkish university student woman had objected to a ban on the *hijab* in schools, a policy the Turkish Parliament reconsidered in 2008 because it was effectively excluding non-secular women from getting a university education at all.

It is a mistake to think that liberal neutrality, individualism and feminism require or even permit bans on modes of dress called for by a major world religion. With this assertion in mind, I would like to make a twofold argument. The first argument is a claim about the law, the second is a claim about political morality. The claim about the law is that a ban like the one adopted in France would be unconstitutional under the Constitution of the United States. The claim about political morality is that liberal societies, whether French or American, should not categorically banish symbols of faith from public schools. French positive law is French law binding France and U.S. positive law is U.S. law binding the U.S. But the values at play in the opinions of the U.S. Supreme Court are values the French should also embrace. Due respect for religious difference and diversity demand that there should be a very strong presumption against religious clothing bans. If I am wrong about the first claim – because my interpretation of American constitutional law is implausible – I could be right about the second. The U.S. may be, in this regard, better than France.

2 The Constitution

To make the case that banning religious attire in public schools would violate the United States Constitution, I rely on three bodies of First and Fourteenth Amendment precedent: (1) case law regarding parents' rights to educate their children according to their own religions and traditions; (2) case law regarding the right to refrain from conduct in school, such as flag saluting, that violates religious beliefs; and (3) case law regarding dress, uniforms and grooming codes in schools, the military, public employment and adult entertainment.

I acknowledge, at the outset, that Supreme Court cases holding that religious minorities must comply with certain laws of general application are facially recalcitrant. *Reynolds v. United States* (1878) and *Employment Division of Human Resources of Oregon v. Smi*th (1990), for example, prove that the Supreme Court is capable of upholding government bans on a religious minority groups' distinctive

[6] "Muslim Leader Says France Has Right to Prohibit Head Scarves," *New York Times*, 31 December 2003, A5.

[7] *Leyla Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. (10 Nov. 2005).

practices when those practices touch on what are thought to be vital public priorities.[8] But these cases do not undercut my argument. When considered in context and in the light of other major Court decisions, these cases do not provide support for the constitutionality of a school ban on the *hijab*.

The *Reynolds* case upheld a law applicable to the U.S. territories, banning the practice of polygamy, a practice Mormons church leaders at the time openly permitted and encouraged.[9] Petitioner Reynolds was a prominent Utah Mormon, who purposefully broke the law by marrying second wife with the blessing of Mormon church officials. Eager to test the constitutionality of the polygamy ban, Mr. Reynolds cooperated with prosecutors, but appealed his conviction as a violation of the First Amendment.

The First Amendment provides in relevant part that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech". The protections of the Free Exercise clause are not absolute. Free exercise privileges extend most broadly to holding and professing belief rather than engaging in conduct. The Court in *Reynolds* characterized plural marriages as "odious" conduct, held in low regard. Wives and children of plural marriages suffered from the taint of immorality and illegitimacy.[10] Reynolds was not convicted because he believed in the righteousness of polygamy, but because lawmakers had criminalized the practice for the harm to women, children and the institution of marriage they thought it entailed. As explained by the Court: "Laws are made for the government of actions, and while they cannot interfere with near religious beliefs and opinions, they may with practices."[11]

The *Reynolds* Court's interpretation of free exercise as allowing restriction on harmful religious practices played a role in the Court's decision many years later in *Employment Division of Human Resources of Oregon v. Smith*.[12] In that case two members of a Native Americans church lost their social services jobs due to admitted sacramental use of peyote in worship. The men were denied unemployment benefits on the ground that they lost their jobs "for cause," namely, because they used controlled substances illegally. The Court held that the First Amendment did not require that the men's use of peyote in religious practices be treated any differently from the use of peyote or other illegal drugs in recreation. The state interest in protecting the public from the dangers associated with use of powerful drugs is a weighty one and, insisted the Court: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[13]

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[8] *Reynolds v. United States*, 98 U.S.145, 166 (1878).

[9] See generally, Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002).

[10] *Reynolds v. United States*, 164.

[11] Ibid., 166.

[12] *Employment Div. Dep't. of Human Resources of Oregon v. Smith*, 494 US 872 (1990).

[13] Ibid., 878–879.

The question I am considering is whether the state is free to regulate the head covering of Muslim girls attending public schools. My answer is that the Constitution will not allow a *hijab* ban, whether to promote assimilation, for the sake of national unity, or in furtherance of an otherwise valid school dress code. It bears emphasis that *Reynolds* and *Employment Division* both involved major areas of public policy. *Reynolds* involved what we might characterize today as family policy, women's rights and child welfare policies. *Employment Division* involved drug law enforcement and public health policy. In these core public policy contexts it is easy to see why minority religious preferences might not be fully tolerated. But when it comes to the matter of what youth belonging to a religious minority choose to wrap around their hair, restricting conduct called for by faith directly implicates no major public policies. The wearing of *hijab* does not touch on matters of broad public concern and, when motivated by religion, is precisely the sort of personal religious conduct that ought to be tolerated and accommodated.

2.1 Case Law Regarding Parents' Rights to Educate their Children According to their Own Religions and Traditions

Meyer v. Nebraska (1923) evidences a strong abhorrence to public laws whose sole purpose is to ensure assimilation.[14] In this case, the Supreme Court struck down a state law prohibiting instruction in the German language in a parochial school.[15] The law in question criminalized teaching German to children younger than 13, a crime for which Robert Meyer, a teacher at Zion Parochial School was prosecuted. The apparent purpose of the Nebraska law was assimilation – to ensure that young children became well-assimilated citizens who spoke and thought like "Americans." The Court held that the 14th Amendment does not permit compelling English language instruction:

> [The 14th Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[16]

In *Wisconsin v. Yoder*, the Supreme Court struck down convictions of members of the Old Order Amish religion who refused to send their children to school for formal education beyond the eighth grade.[17] A Wisconsin state law mandated that children attend private or public school until the age of 16 years. In finding that the Wisconsin law violated the Free Exercise Clause of the First Amendment, the court

[14] *Meyer v. Nebraska*, 262 U. S. 390 (1923).

[15] Ibid., 403.

[16] Ibid., 399.

[17] *Wisconsin v. Yoder*, 406 U.S.205, 206 (1972).

stressed that the application of the compulsory school attendance law could very well destroy the ability of the Amish to perpetuate their unique way of life.

Only the Amish youth's absence from school was at issue in the *Yoder* case, not the "different" clothing they wore to school when they attended. Yet part of the way of life the Court seemed reluctant to disturb included the Amish style of dress: "Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical."[18] The Old Order Amish reject what they call "English" dress. Instead they wear simple rural attire, not unlike their nineteenth century ancestors. Deference shown to the Amish way of life and educational values suggest that other groups' religiously inspired requirements of their school aged children would be similarly protected by the Court. If government may not constitutionally ban instruction in a minority language in a parochial school or require formal secondary education for members of a minority religious group, it arguably cannot ban the *hijab*, an article of clothing worn by a religious minority attending public schools.

2.2 Case Law Affirming a Right to Refuse Conduct Prescribed for School Children that Violates Religious Beliefs

Article I of the constitution of France provides that: "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances." This declaration that all are equal under the law, that origin, race and religion are not bases for distinction, and that the beliefs of all are to be respected, is apparently thought to be consistent with a ban in conspicuous symbols of religion in public schools. The United States is also secular (laïque), with a constitutionally mandated separation between church and state. The same broad constitutive ideal has been given quite different interpretations in the United States and France as the U.S. flag salute case shows.

The famous "flag salute case," *West Virginia State Board of Education v. Barnette* (1943) is an especially strong precedent in support of the claim that banning the *hijab* when worn as an expression of religious belief would be unconstitutional in the United States.[19] A West Virginia Board of Education resolution required public school children to salute the flag and recite the Pledge of Allegiance: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.'" Practitioners of the Jehovah's Witness religion objected to the requirement on the ground that it violated their interpretation of a Biblical commandment prohibiting the making or

[18] Ibid., 217.

[19] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

bowing down before graven images. Nonetheless the children of Jehovah's Witnesses were expelled and threatened with adjudication as insubordinate juvenile delinquents, their parents threatened for contributing to delinquency.

The Court in *Barnette* held that despite the strong state interest in promoting citizenship and national unity, the First Amendment does not allow the state to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Overruling its own decision in *Minersville School District v. Gobitis* (1940), the Court condemned the flag salute and the pledge as transcending "constitutional limitations on their power" and invading " the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control."

The principle against prescribed orthodoxy is described in *Barnette* as a "fixed star in our constitutional constellation." The lodestar of tolerance for diversity and difference would prohibit public schools from insisting on the removal of *hijab* as surely as it prohibits public schools from requiring the flag salute or the Pledge.

2.3 Case Law Regarding Dress, Uniforms and Grooming Codes

Thirty years ago many public secondary schools adopted strict grooming codes in response to the popularization of long hairstyles. Twenty years ago many urban public schools districts adopted school uniform requirements to promote discipline, self-respect and safety.[20] On a number of occasions the federal courts have addressed the question of whether schoolchildren are constitutionally entitled to wear their hair in styles prohibited by school administrators. Analogous questions have arisen in relation to public employees' hairstyles. Wearing a Muslim headscarf to school is comparable to wearing a particular hairstyle and choice of clothing. The court's dress, uniform and grooming cases are relevant evidence of how the Supreme Court would approach assessment of the constitutionality of a *hijab* ban.

2.3.1 Schools and Public Employment

In *Stull v. School Board of Western Beaver Junior–Senior High School* (1972), the Third Circuit Court of Appeals recognized that "the length and style of one's hair is implicit in the liberty assurance of the due process clause of the 14th amendment."[21] A school rule prohibited styles in which a boy's hair covered

[20] "Students dress up for school: Trenton shows off potential uniforms for September," *The Times,* 22 February 2008, A01. ("According to the federal government's "Manual on School Uniforms," a unified wardrobe is one way to reduce discipline problems and increase school safety.").

[21] *Stull v. School Bd. of W. Beaver Junior–Senior High School*, 459 F.2d. 339 (3d Cir. 1972).

his ears or fell below his collar line. The *Stull* court held the policy invalid and unenforceable, "except as applied to shop classes," where safety was an apparent issue.

In *Kelly v. Johnson* (1976), the Supreme Court refused to invalidate hair length regulations promulgated by a police department.[22] Chief Justice Rehnquist argued for the majority that: "choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the states' police power..."[23] The requirement that police officers wear their hair in short styles was a requirement of uniform and uniformity. In a dissent joined by Justice Brennan, Justice Marshall made the case for individuality. Justice Marshall's reasoning was in line with that of the Third Circuit Court of Appeals in *Stull*, which struck down a categorical hairstyle requirement for high school boys:

> [A]n individual's personal appearance may reflect, sustain, and nurture personality and may well be used as a means of expressing his attitude and lifestyle. In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well. To say that the liberty guarantee of the fourth amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect.[24]

Kelly v. Johnson is Supreme Court precedent for this principle: courts should presume the validity of uniform grooming requirements that confer public benefits, notwithstanding any individual's interest in individuality. Following this principle, one reasonably could conclude public schools may constitutionally impose uniform dress requirements that impair individuality, as indeed many public and private schools do. Some schools have uniform requirements that dictate clothing style and color. Boys are often asked to wear khaki pants and polo shirts in conservative colors. Girls are sometimes asked to wear plaid "jumpers" or skirts and blouses. Short of a strict uniform requirement, some schools ban logo shirts, excessively baggy pants, short shorts, tank tops, ball caps and ostentatious jewelry. Certain clothing is prohibited because it can be used as a place to conceal contraband. Some school districts are persuaded that school uniform requirements further the goal of instilling pride and improving school discipline.[25]

It is one thing to tamp down individuality and something else to interfere with a person's religion. Schools with uniform requirements could be constitutionally required to make exceptions to accommodate bona fide religious difference among their pupils. Some schools explicitly exempt from dress code requirements the

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[22] *Kelly v. Johnson*, 425 U.S. 238 (1976).

[23] Ibid., 238.

[24] Ibid., 250–251. (Marshall, J., dissenting).

[25] Cf. "Outfitting students for unity, security: Presentation of uniforms set for tomorrow in city," *The Times,* 19 February 2008, A03.

hijab and *yarmulke,* a Jewish head covering worn by men and boys. In Shermia Issac's Howard County Maryland public school, hats and other head-coverings were prohibited in the classroom, but an exception was made for the *yarmulke* and *hijab*.[26] An African-American eighth grader of Jamaican ancestry, Shermia lost her court battle to wear an ethnically-inspired head dress to school. The girl admitted that the multicolored head wrap her school forbade was not required by her religion or cultural traditions, and that she chose to wear it some days for style to conceal a "bad hair day." However the wraps were an expression of her ethnic pride, and were of a sort commonly worn by her mother. Shermia Issac's case suggests that head coverings not dictated by religion or cultural traditions of modesty need not receive the deference given a schoolgirl's *hijab*.

Some schools with dress codes, like the Maryland school just cited, have concluded that they should or must make exceptions for bona fide religious attire. As a logical matter, the constitutionality of dress codes and school uniform requirements does not entail the constitutionality of banning the *hijab* or other religious attire. The case must be made that the First and Fourteenth Amendments permit so substantial an interference with religious liberty.

In the U.S. the *hijab* is commonly worn both by Muslims immigrants and also by indigenous U.S. Muslims, including African American Muslims. A small percentage of U.S. practitioners of Islam also wear the *niqab* or *burqa*. In 2005, the Muskogee School District's Benjamin Franklin Science Academy suspended an 11-year-old Oklahoma Muslim American, Nashala Tallah Hearn. Nashala had refused to remove her *hijab* head-covering when asked to do so by a teacher who cited a school dress code against wearing hats, bandanas and other head coverings in the classroom. Nashala's family, Muslim civil rights groups and the U.S. Justice Department Office of Civil Rights cried foul over the suspension. Indeed the Office of Civil Rights prepared to intervene on behalf of a Muslim girl's right to wear the *hijab* to school.[27] In short order the Muskogee School District school board agreed to overturn the suspension.

The United States Supreme Court has not directly addressed restrictions on headscarves. In the past the United States Supreme Court has upheld laws aimed at compelling religious minorities to conform to a variety of majority practices. However, the weight of the Court's decisions point to recognition of a constitutional right of minority group members to wear distinctive religiously inspired garb in educational settings. The Justice Department "got it" and easily sided with Nashala in her brief battle with school administrators. On the precedent of *Meyer* and *Yoder*, and the evidence of the Nashala Hearn case and public reaction to it, I believe it is unlikely that a federal court would sustain a school dress code or uniform requirement that did not make an exception for pupils' bona fide religious or cultural modesty garb.

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[26] *Isaacs ex rel. Isaacs v. Bd. of Educ. of Howard County, Md.*, 40 F.Supp.2d 335 (Md. 1999).

[27] "U.S. takes opposite tack from France Bush administration intervenes to allow Muslim schoolgirl to wear scarf," *International Herald Tribune*, 2 April 2004.

2.3.2 Military

The courts should – and I predict would – distinguish schools from the military, a limited context where concerns about uniformity have been held to trump religious expression. The Supreme Court has upheld military policies limiting the right to wear the *yarmulke.* In *Goldman v. Weinberger,* the Court held that a Jewish rabbi and clinical psychologist, serving as an active duty member of the military could be prohibited from wearing a *yarmulke*.[28] The case for permitting the military to ban religious headgear was based on the same reasoning used to make the case for permitting municipal police departments to prohibit long hairstyles in *Kelly v. Johnson* – the importance of uniformity.[29] Uniforms and uniformity communicate discipline, professionalism, and submission to a common authority.

It can be argued that categorical uniformity in the military – and in law enforcement – is a legitimate, important, or even compelling state interest. The case for categorical uniformity in school is less strong. The needs of schools on the one hand, and police departments and the military on the other, are sufficiently different to warrant constitutionally different approaches to religious or cultural exceptions. A boy in khakis, a polo shirt and *yarmulke*, like a girl in a plaid jumper and *hijab*, inherently offends no legitimate state interest such as school discipline or safety. Categorically banning religious or cultural headgear in schools is incompatible with due respect for the religious and expressive freedom of children and their families.

2.3.3 Adult Entertainment

Religious Muslims sometimes say that wearing the *hijab* is an expression both of religious identity and of modesty required by religion. Thus another pertinent angle from which to view government imposed restrictions on the *hijab* would be U.S. cases upholding modesty as (1) a dimension of constitutional privacy protected by the Fourth and Fourteenth Amendments or (2) a public value embodied in state and local of decency laws historically rooted in Judeo-Christian notions of sexual modesty and shame.[30]

The choice of modesty is a prerogative of U.S. women and girls who want it. This conclusion was borne out by the Supreme Court's decision in *Safford Unified School District v. Redding*, the 2009 case which held that public school administrators violated a middle school girl's Fourth Amendment rights against warrantless search and seizure when they conducted a strip search. When another student told school a administrator that Redding had given her ibuprofen, Redding was forced

[28] *Goldman v. Weinberger*, 475 U.S. 503 (1986).

[29] *Kelly v. Johnson*, 425 U.S. 238 (1976).

[30] Anita L. Allen, "Disrobed: The Constitution of Modesty." *Villanova Law Review,* Vol. 51 (2006): 841–858.

to strip down to her panties and bra to search for concealed pain-relievers. She was then forced to pull her underwear away from her body to prove nothing was hidden inside. Administrators believed neither a warrant nor parental or pupil consent was required for a strip search.

Prior to *Redding*, the Court had held that a "special needs" exception to the Fourth Amendment warrant requirement permits public schools to conduct non law-enforcement searches of the personal belongings of enrolled children and youth to enforce rules against contraband. The Court had also held that schools may collect urine as a condition of participating in sports and other extracurricular activities, to check for evidence of drug use. But with the *Redding* decision, the Court recognized modesty as a limit of privacy on school's right to conduct bodily searches of youngsters.

The Supreme Court decision in *Union Pacific Railroad v. Botsford* has been overruled.[31] (Citing the importance of modesty and privacy, the case had held that a woman who filed a tort action alleging physical injuries need not submit to a medical exam at the request of the defendant.) But as *Redding* illustrates, the notion that women have a "right to be let alone" that permits them to keep themselves covered lives on.[32] The privacy sentiment advanced in the *Botsford* case has been enduring: "No right is held more sacred, or more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from restraint or interference of others, unless by clear and unquestionable authority of law."[33]

In the U.S., the salient legal modesty battles of our time are mainly about women seeking the freedom to dress *less* modestly than others expect, and only occasionally about women seeking freedom to be more modest than expected or required. Without success, tavern dancers and owners have gone to the Supreme Court seeking a right to totally nude performances. A battle for compelled modesty has been symbolically won in the Supreme Court in cases concerning bans on totally nude dancing.[34] Over First Amendment objections, the Supreme Court has twice upheld laws that require women to cover up, a little. The Court has bought the argument that public safety in some community hinges on the difference between total nudity and the donning of "G strings" covering the genitalia and "pasties" covering the nipples of performers. In a country in which states attempt to impose a symbolic vestige of modesty on its female citizens to such an absurd degree, it is unlikely that women and girls exhibiting greater than average modesty would ever be required to remove modesty garments, solely for the sake of uniformity or cultural assimilation.

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[31] *Union Pac. R.R. v. Botsford*, 141 U.S. 250 (1891).

[32] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy." *Harvard Law Review,* Vol. 4 (1890–1891): 193–220.

[33] Ibid., 251.

[34] *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (upholding constitutionality of city ordinance prohibiting public nudity); *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991) (upholding constitutionality of state statute prohibiting public nudity).

3 Political Morality

I have ventured the argument that a national ban on the *hijab* would be unconstitutional and virtually unthinkable in the United States where religious expression and voluntary modesty are greatly valued. When compared to U.S. approaches to the *hijab*, the French experience underscores an important point: there is more than one way to be a modern, multicultural western liberal democracy with a Muslim population, and some ways may be normatively better than others. In light of the respect for religion, cultural difference and the protection of feminine modesty evinced by U.S. courts, the French ban appears wrong-headed. To say this is not to attack French sovereignty, but it is to reject as unfair an aspect of French public policy priorities.

The U.S. is a better place for its acceptance of the *hijab* in schools. But the U.S., like France, struggles with how to incorporate religious and cultural minorities fully and equally into the life of the society. A clash with police over the deaths of two Muslim teenagers on October 27, 2005, in a Paris suburb, Clichy-sous-Bois, sparked racially-charged rebellions throughout the country, leading to loss of life, property destruction, injuries and arrests.[35] Lack of opportunity, isolation and discrimination fueled the frustration of young people who participated in the rioting. Doubtless, ghetto-ized French minorities living in the *cités HLM* – the public housing projects – wanted the same, things ghetto-ized U.S. minorities have wanted, including jobs, and respect.[36] A disaffected population is a concrete problem for French democracy. As Joan Scott has argued, the school girl's *hijab* emerged in French political discourse as a problem the French could do something about. It was easier by far to muster political will to "liberate" Muslim school girls than to adequately house, educate and employ their parents and brothers.

The terrorist attacks of September 11, 2001 left many Americans suspicious of religious Muslims and people suspected of being from Muslim countries. Before and after 9/11 women in Muslim attire faced discrimination in employment and while traveling. Racism and bigotry have resulted in hardship for many Muslim women and girls.[37] Because it is well-tolerated in the U.S., in cities like New York and Philadelphia, the *hijab* has lost some of its power to symbolize an unassimilated minority, repressed or rebellious.

We should accept the *hijab,* yet there may be isolated contexts in which a woman is properly asked by her government to remove Muslim dress for brief

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[35] Paul Silverstein and Chantal Tetreault, "Urban Violence in France," *Algeria Watch: Information on the Human Rights Situation in Algeria*, November, 2005, http://www.algeria-watch.org/en/policy/urban_violence.htm.

[36] The *HLM* (*habitation à loyer modéré*) is low and moderate income public housing in French cities and suburbs. Many immigrants from North Africa live in these facilities.

[37] See e.g. *Campbell v. Avis Rent A Car System, Inc.*, No. 05-74472, 2006 WL 2865169, (E.D.Mich. Oct.5, 2006); *Wiley v. Pless Sec., Inc.*, No. 1:105-CV-332-TWT, 2006 WL 1982886, (N.D.Ga. July 12, 2006) *Alsaras v. Dominick's Finer Foods, Inc.*, No.00-1990, 2000 WL 1763350, (C.A.7 (Ill.) Nov. 22, 2000).

identification purposes, without seriously compromising principles of religious freedom or privacy. The courthouse may be one such context. The Michigan Supreme Court recently held that judges have the power under rules of evidence to order a woman to remove a *niqab* face covering in a court proceeding. It may be reasonable to expect that even a very religious woman will remove her veil briefly to take a passport photograph, or in private to conduct an airport security check. At least one court has held that for purposes of being photographed for a state driver's license, a religious Muslim can be required to momentarily remove her *niqab* – the veil that covers her entire face except her eyes.[38] Requiring momentary removal of the *niqab* in the presence of a female official does not substantially impair religion. In the future biometric technologies will allow for positive identification without disrobing or traditional photographs.

The morally just society will permit women and girls to wear Islamic dress wherever it practically can be worn. This includes courthouse holding cells – the Ninth Circuit got it wrong in *Khatis v. Orange County* (2010) – and public schools. Just societies should not categorically banish the *hijab* and other symbols of faith from public schools, even if they are conspicuous. Adjustments may have to be made to dress codes and to "shop," cooking, and physical education classes to accommodate children and youth in religious modesty dress. But these are not difficult or insurmountable problems.

Immigrant and native diversity are features of western nations. To deal with difference, a country may seek to obliterate its symbols. But undressing Muslim girls from the neck up is a very poor way to create a unified society. We must hope it is possible for modern liberal democracies to truly incorporate people of various racial, religious, cultural and national origins in a single body politic without coercive assimilation. Legislating against symbols of difference is not the way to go.

[38] *Freeman v. State*, No. 2002-CA-2828, WL 21338619, (Fla.Cir.Ct.2003).

"Conspicuous" Religious Symbols and *Laïcité*

Christine T. Sistare

Abstract In March of 2004, the French government approved a regulation which forbids "the wearing of signs or clothes conspicuously denoting a religious affiliation" in public schools. A number of commentators have taken the French government to task for failing to respect the religious rights and identity claims of citizens – particularly French Muslims – in pursuit of a policy of nationalism and assimilation. It is this assessment of the French approach, broadly captured in the notion of *laïcité* and of a republic 'one and indivisible,' that I wish to address. I argue that the French principle of *laïcité* and the recent school clothing legislation can be defended plausibly in relation to deep-seated French attitudes towards individual freedom, education, and national identity. I explicate specifically French conceptions of church-state relations, citizenship, autonomy, and equality, their relationship to the profound fear of factionalism rooted in French history, and the role of education from the French republican perspective. Finally, I offer a brief comparison of U.S. law on religious freedom and state neutrality with the French approach and raise some questions as to the presumed superiority of the former.

Keywords Religious symbols in public schools • Laïcité, hijab ban • Hijab ban in France • Assimilation • Assimilation of Muslims • French culture and secularism

In March of 2004, on the recommendation of a national commission (*commission Stasi*),[1] the French government approved an amendment to the French Code of Education which forbids "the wearing of signs or clothes conspicuously

[1] The *commission Stasi*, named for its leader, Bernard Stasi, was created in 2003 by Prime Minister Shirac to prepare a white paper on the question of religious garb in public schools. Accessible at http://www.fil-info-france.com/actualites-monde/rapport-stasi-commission-laicite.htm

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[or, 'ostentatiously'] denoting a religious affiliation"[2] in public schools. A number of American academics and legal scholars have argued that the French law would not pass constitutional muster in the United States.[3] This is probably correct, although there is room for further exploration of the issue. However, a number of commentators have gone further and taken the French government to task for failing to respect the religious rights and identity claims of citizens – particularly French Muslims – in pursuit of a policy of nationalism and assimilation.[4] It is this assessment of the French approach, broadly captured in the notion of *laïcité* and of a republic 'one and indivisible,' that I wish to address.

Rather than argue in the abstract as to whether what has been described as the French tendency to essentialize their national identity is more or less desirable than a multicultural or pluralistic conception, I believe we should examine the French principle of *laïcité* in the context of France as a particular nation with a specific history and a social understanding of liberalism grounded in that history.[5] That the French conception of national identity differs from a particular liberal American conception[6] does not render the former automatically inferior. Assuming that context means something – though not everything – we may find that the French principle of *laïcité* and the recent school clothing legislation can be defended plausibly in relation to deep-seated French attitudes towards individual freedom, education, and national identity.

I begin by exploring the idea of laïcité that the French regard as crucial to their own approach to matters of church and state; next, I explicate specifically French conceptions of citizenship, autonomy, and equality, their relationship to the profound fear of factionalism rooted in French history, and the role of education from the French republican perspective. In the last sections, I offer a brief comparison of

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[2]Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics ("Law #2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools"); *Journal Officiel de la Republique Francaise* (Official Gazette of France) March 17, 2004, 5190.

While there are ample sources for the history and legal details of the 'ban,' I recommend, as a starting place, Jeremy Gunn's "Religious Freedom and Laïcité: A Comparison of the United States and France." *Brigham Young University Law Review* (2004): 419–506.

[3]Ibid. See also, Elizabeth Zoller, "Laïcité in the United States, or The Separation of Church and State in a Pluralist Society." Indiana Journal of Global Legal Studies, Vol. 13 (2006): 561–594 and Frederick Mark Gedicks, "Religious Exemptions, Formal Neutrality, and Laïcité." Indiana Journal of Global Legal Studies, Vol. 13 (2006): 473–492.

[4]See, e.g. Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007).

[5]Scott provides a very interesting history of French relations with North African peoples, both colonial and recent, and an analysis of what she describes as French racism towards 'Muslims.' I would not deny this aspect of French history or its relevance to the 'affair of the scarf,' but I believe there are deeper philosophical commitments that explain the French ban on conspicuous religious and political garb in public schools.

[6]Undoubtedly, there are competing 'American' conceptions.

U.S. law on religious freedom and state neutrality with the French approach and raise some questions as to the presumed superiority of the former.

1 La France est une République … Laïque[7]

Laïcité is famously difficult to explicate for those of us who do not share in the French national heritage. The term originally meant simply 'laity' or 'of the laity,' i.e., not of the clergy. The closest concept in American usage seems to be 'secularism.' Indeed, according to Article One of the French Constitution (1958), *"La France est une République indivisible, laïque, démocratique et sociale*," and '*laique*' is normally taken to mean 'secular.' But what do the French mean when they state that theirs is a secular republic? Historian and sociologist Jean Baubérot has described *laïcité* as an effort to balance 'freedom of conscience' and 'freedom of thought,' but with a particularly French-liberal emphasis on the latter:

> It is important to distinguish "freedom of conscience" from "freedom of thought." Freedom of conscience, along with its constituents, freedom of religion and freedom of belief, guarantees diversity of belief in society and the freedom to express those beliefs. Freedom of thought ensures the right to independently reexamine beliefs received from family, social groups, and society as a whole. This way, a person can freely adhere to these beliefs, adapt them, or turn from them to something else. Naturally, this is a conceptual distinction, and daily life produces constant disharmony between these two freedoms. But the perspective is not the same, and the French view school as the perfect institution to teach future citizens to exploit their faculties of reason and to help them exercise freedom of thought.[8]

Thus, although French democracy shares with that of the U.S. a formal respect for religious beliefs, the tendency of French thought since the Revolution of 1789 – and increasingly since the *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*,[9] the law concerning the separation of church and state – has been to conceive the state as a force for the promotion of reason and to be suspicious of the indoctrinating power of religious faith. Ingrained French fearfulness of "'clericalism,' understood as control of the mind by an established discourse rejecting all debate"[10] follows from France's own history and the long struggle between clerical and anti-clerical factions. The depth of this fearfulness and the French commitment to freedom of thought – understood as reliance on Reason – is evidenced in the comments of historian Claude Nicolet:

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[7] "*La France est une République indivisible, laïque, démocratique et sociale*." Article 1 of the current French Constitution.

[8] Jean Baubérot, "Secularism and French Religious Liberty: A Sociological and Historical View." *Brigham University Law Review* (2003): 451–464.

[9] *Loi du 9 décembre 1905, Loi concernant la séparation des Eglises et de l'Etat. version consolidée au 29 juillet 2005V.*

[10] Jean Baubérot, "The Secular Principle." Accessible at http://ambafrance-us.org/IMG/html/secularism.html.

> In every one of us, always ready to awake, sleeps the little "king", the little "priest", the little "important person", the little "expert" who will seek to impose himself on others or on himself by force, specious argument, or quite simply laziness and stupidity.[11]

The secular challenge of French republicanism is that citizens accept "a difficult but daily effort to preserve oneself from [any 'little expert']." "It seeks maximum freedom through maximum intellectual and moral rigour," and it "demands free thought, and what is more difficult than real thought and real freedom?"[12] According to Nicolet, personal autonomy and freedom of thought are not merely the rights of citizens, but also obligations of citizenship in the French republic:

> The République is based on freedom of thought: not only on the simple possibility but on the obligation for all to think freely […]. The Republic, at the risk to deny its self, should not tolerate that one individual gives up, in advance and by principle, his freedom of thought. Neither can the Republic tolerate that a man gives his allegiance in advance and without debating.[13]

In a similar vein, Prime Minister Jean-Pierre Raffarin argued that "secularity means freedom, the freedom to imagine the future" and that it "looks for the source of right reason and the human will. It is therefore a fundamental value of our humanism." Indeed, according to Raffarin, "Because the State is the protector [of freedom of thought], it has a duty to intervene when proselytism" threatens "that fundamental liberty at the heart of our Republican pact."[14] The first principle of the 1905 law states that "La République assure la liberté de conscience," and this means that the state ensures the individual's liberty of conscience *against* religious proselytism.

No doubt this would seem pretty strong stuff to most citizens of the U.S. While academics might wish that every U.S. citizen aspired to the rule of reason, such a substantive liberalism is controversial. In particular, the French view seems to be that the state has a duty and right to impose rationality on its citizens – at least in their public lives *qua* citizens. The dominant American view, by contrast, is that the state should not impede the development of personal autonomy or use of reason. Furthermore, in the U.S., the effort to balance the claims of freedom of conscience and freedom of thought in matters of religion has tended to favor the former rather than the latter. This is partly due to our own history as a people sympathetic to religious faith, but it is also because we have been spared the religious strife which marked so much of France's history.[15] F. M. Gedicks observes

> The conception of the good that informs American government is more procedural and less substantive than that which informs the French state. In Rawlsian terms, one could say that

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[11] Claude Nicolet, *La République en France*, (Paris: Seuil, 1992), 65–66; quoted in J. Baubérot, n. 9.

[12] Ibid.

[13] Ibid.

[14] Bill on the principle of laïcité in State schools. Speech by M. Jean-Pierre Raffarin to the National Assembly. (Paris. 3 February 2004); http://www.ambafrance-au.org/spip.php?article481.

[15] In the sixteenth century, France was torn by the 'Wars of Religion' between Catholics and Huguenots. In 1789, the Revolution aimed to overthrow not only the monarchy but also the dominance of the Roman Catholic Church and its clergy. The ugly memory of anti-semitism during the Second World War still stings many in France, and continued anti-semitic activity is a source of public concern.

> the United States has a much "thinner" theory of the good than does France. Whereas "religious freedom" in the United States typically suggests freedom of religion from state interference, in France laïcité often connotes the state's "protecting citizens from the excesses of religion," and this makes all the difference.[16]

2 La France est une République Indivisible

Integral to the French republican concern to protect freedom of thought is the conviction that citizens and the nation must be protected from the disruptions caused by intense extra-civil relationships. In France, *communautarisme*, or factionalism, is generally regarded as a threat to national unity. In advocating passage of the bill banning conspicuous religious symbols in public schools, Prime Minister Raffarin explicitly referred to "the threatened development of *communautarisme* [splitting society into communities]" and described the legislation as the "answer to those wishing to put their membership [in] a community above the laws of the Republic."[17] And, while the French typically dislike any form of identity-politics, they are especially sensitive to religious identity-politics. The brutality and devastation of the Wars of Religion, fought from 1562–1563 and 1567–1568 between French Catholics and Protestants, figure prominently in the national history of the French people. The French Revolution brought its own waves of religious upheaval and violence, during which members of the clergy and their supporters were most commonly the victims. Today, collective guilt over French collusion with the Nazis and the transportation of over 77,000 Jews from France to their deaths in Auschwitz keep the perils of religious strife fresh in the French national consciousness.

It is not surprising that Raffarin warned specifically against the threat of religious factionalism: "In the French Republic, religion can't and won't be a political project." He defended the religious symbols restrictions by claiming that "certain religious signs…are in fact taking on a political meaning and can no longer be considered simply personal signs of religious affiliation."[18] The 'political meaning' is not a specific one, as some might assume;[19] rather, the political meaning simply is *communautarisme.* It must be stressed that fear of factionalism is not restricted to the non-theistic and Christian segments of the French population. Even in the face of anti-Semitic activity, many French Jews are primarily concerned to deny the existence of a Jewish 'community' in France:

> When Israeli Prime Minister Ariel Sharon announced that French Jews "could find themselves in great danger," and encouraged them to make aliyah, the French Jewish community was horrified, seeing the statement as *communautarisme* and seeking to dissociate themselves from it. Likewise, the Jewish historian Esther Benbassa wrote to *Le Monde*

[16] Gedicks, 476.

[17] Raffarin, Speech to the National Assembly, 2004.

[18] Ibid.

[19] Scott argues that the ban is directed at Muslim students and evinces French antipathy to Muslims, specifically.

> (12/18/01) to denounce what she considers to be an over-reaction by Jewish leaders and to reject the dangerous "mirage" that there even is a Jewish community. 'We are not victims,' she declares. A Jewish adjunct mayor with the ironic name of Henri Israël attacked Jewish community leaders for encouraging the belief that Jews are guilty of a 'sentiment of double allegiance, of double attachment.'[20]

Thus far we have identified two features of what might be termed the French Republican Perspective: the valorization of free thought and rational autonomy, on the one hand, and the antipathy to *communautarisme*, on the other. As a perspective on religion this amounts to a distrust of faith as a threat to rationality and a deep fear of religious factionalism. But it is also central to the French conception of their Republic as a unique enterprise. Here, again, we must remind ourselves that the nation-building experience in France was quite unlike our own:

> [The] idea of the nation emerged with particular strength and clarity in eighteenth-century France. …. France was distinguished by the self-consciousness with which the issues were discussed, the unusually strong emphasis on political doctrine as the foundation stone of the nation (as opposed to language or blood or history), and the amazing suddenness and strength with which a coherent nationalist program crystallized during the French Revolution.[21]

Perhaps many of us would insist that the building of our own nation was highly intentional and free of reliance on 'language, blood, or history,' but the French revolutionaries were notably concerned to create not only a nation but a national identity – indeed, a kind of person. Jacobin playwright Marie-Joseph de Chénier addressed the National Convention with this injunction: "What is our duty in organizing public instruction? It is to form republicans; and even more so, to form Frenchmen, to endow the nation with its own, unique physiognomy."[22] The more infamous Maximilien Robespierre described the Republican project in similar terms: "I am convinced of the need to effect a complete regeneration and, if I may so express it, to create a new people."[23]

The creation of the new nation required the creation of a new person – a person identified almost entirely by his/her nationality as 'French.' Historian David Bell notes that the growing significance of national identity was evident before the Revolution itself:

> By 1770, the "nation," whether defined by reference to its historical rights or to its "character," had become a central organizing category in French political culture and cultural politics. It was incessantly referred to, deferred to, and treated as the fundamental ground on which other forms of human relations were built.[24]

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[20] Michael Shurkin, "France and Anti-Semitism," (Zeek, November 03), http://www.zeek.net/politics_0311.shtml.

[21] David A. Bell, "The Unbearable Lightness of Being French: Law, Republicanism and National Identity at the: End of the Old Regime," *The American Historical Review,* Vol. 106, No. 4 (Oct., 2001): 1216.

[22] Quoted in Bell, 1217.

[23] Quoted in Bell, 1221.

[24] Ibid, 1221.

The last phrase is telling in its echoing of Rousseau: "The social order is a sacred right which serves as the foundation for all others."[25] True to their Rousseauian intellectual allegiance, the early French republicans regarded civic identity as the sinecure of national peace and the guarantor of individual well-being. Whatever distracts the citizen from his/her national identity undermines that identity and opens the door to *communautarisme*; *communautarisme*, in turn, imperils the Republic. Thus, the Republic must be conceived of and defended as "une et indivisible"[26] – one and indivisible. As Veronique Dimier describes it, an important strain of French republican advocacy insists that

> The Republic, one and indivisible, is the result of a contract between individuals included in the same sovereign nation, that is, the same political project, who by nature are supposed to be rational and independent. …. [P]olitical uniformity indicates cultural uniformity and vice versa: only people who share the French civilisation can be part of the Republic, excluding all others. However, these 'others' can always be assimilated culturally.[27]

And while, as Dimier argues, this is not the only live understanding of French national identity, even among French republicans, it was a dominant one among the founders of the Revolution, notably the Jacobins. It is not surprising, then, that this conception of the Republic as an entity which unites individuals into a single, unitary people remains so powerful in France.

3 Education for Citizenship

To create a new kind of person required aggressive education – or re-education – and the Jacobins were quick to imagine a system of compulsory, free education. Without minimizing The Terror over which the Jacobins presided, nor the totalitarian character of their educational policies, we can observe that they believed education was the key to creating the new Frenchman and Frenchwoman. Their particular concern to have all children – and, eventually, all citizens – become literate in a common language illustrates their determination to create a single national personality ['physiognomy']. "Talleyrand in the Convention called for a French-speaking primary school teacher in every commune,"[28] and Abbe Gregoire reported to the Convention in its second year,

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[25] Jean-Jacques Rousseau, *The Social Contract or, Principles of Political Right*, trans. and ed., Charles Sherover (New York: Harper & Row: 1984), 4.

[26] This statement, the first line from the Constitution of 1793, is repeated in the modern Constitution and appears on the national seal.

[27] Veronique Dimier, "Unity in Diversity: Contending Conceptions of the French Nation and Republic," *West European Politics*, Vol. 27, No. 5 (2004): 837.

[28] Sue Wright, "Jacobins, Regionalists, and the Council of Europe's Charter for Regional and Minority Languages," *Journal of Multilingual and Multicultural Development,* Vol. 21, No. 25 (2000): 418.

> Unity of language is integral to the Revolution. If we are ever to banish superstition and bring men to the truth, to develop talent and encourage virtue, to mold all citizens into a national whole, to simplify the mechanism of the political apparatus and make it run more smoothly, we must have a common language.[29]

The Jacobins' hopes for imposing linguistic homogeneity faltered following the Thermidorean Reaction, but that end was achieved in the educational system of the Third Republic,[30] and France continues to be a nation particularly wed to its shared language.[31] Nonetheless, the attention to a single national language was primarily based on the perceived need to unite people of diverse regional groups at the time of the Revolution and is but a marker of French concern for a national identity. Insistence on the ability to speak and write in French as a prerequisite for citizenship should not mislead us as to the real issue, which is not language but identity. Of course, a shared language is a relatively easy way to signify assimilation for recent immigrants, but the more meaningful end is that all citizens are French 'first.' French of many political persuasions reject the concept of 'hyphenated' identities; thus, as sociologist Margaret Adsett notes, "There are no French Muslims, French Italians, etc., as far as the state is concerned. There is just a French citizenry."[32] Indeed, in France no official notice may be taken of anyone's religious affiliation or ethnicity; as Joan Wallach Scott observes, "If differences are not documented, they do not exist from a legal point of view."[33] Scott regards this peculiar official disregard of "differences" as a mere device to preclude tolerating or celebrating them, but the refusal to acknowledge, politically and legally, that citizens are differentiated by personal interests and sub-group memberships is consistent with the French republican conception of the citizen *qua* citizen. And if, as Adsett claims, "In present day France, religion is the primary social marker of difference,"[34] it follows that this particular social marker should be most carefully unobserved.

If individuals of disparate religious beliefs are to be fully integrated as French citizens, rather than as persons of hyphenated identities, they must be educated for citizenship. This relation between education and the French sense of citizenship and nationality is central to any understanding of the arguments of the Stasi Commission and its recommendation of 'the ban.' A citizen of *la Republique* is not a formally conceived individual with minimal value attachments. While the French

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[29] Gibson Ferguson, *Language Planning and Education* (Edinburgh: Edinburgh University Press: 2006), 74.

[30] Colin Jones, *The Great Nation: France from Louis XV to Napoleon*. (New York: Columbia University Press, 2002), 558.

[31] Wright, n. 19.

[32] Margaret Adsett in French and Canadian Approaches to Diversity as Reflections of Different Conceptions of Liberty, Equality, and Community. (Department of Canadian Heritage: 2002), http://www.culturescope.ca/file_download.php/canfran_e.pdf?URL_ID=3472&filename=10812742681canfran_e.pdf&filetype=application%2Fpdf&filesize=140591&name=canfran_e.pdf&location=user-S/.

[33] Scott, 80.

[34] Ibid.

citizen is to be committed to universalist values of rationality, autonomy, and liberty, s/he is also to be committed to a historically and philosophically rich conception of the self *qua* French citizen. This conception demands allegiance to specifically French values of (i) a shared public life – one quite separate from private, and especially from 'communitarian,' relations – and (ii) the unity and indivisibility of the Republic. It is in these robust values that we find the meaning of *'un republique indivisible et sociale*' – one in which all citizens are united and equal. As Rousseau explained, "Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an *indivisible part of the whole*."[35]

It is to Rousseau whom we must look, as well, to more fully understand French republican conceptions of 'freedom' and 'autonomy' in the context of citizenship. These are not mere formal (or 'thin') ideals for the French; rather, they are quite substantive ('thick'). In particular, to become autonomous and free requires more than a passive attaining of maturity and negative freedom from interference. For Rousseau and French republicans, freedom and autonomy must be developed and *secured*, and a constant struggle to maintain these conditions is assumed, as Claude Nicolet's passionate statements evidence.[36] American liberals might find the French rejection of *communautarisme* paradoxical when conjoined with the notion of autonomy and freedom as goods obtained within and ensured by civil society. But this – to us, strange – interweaving of communitarian and individualist liberalisms is classically Rousseauian.[37] As Katrin Froese observes

> While the freedom of the individual self is his primary concern, Rousseau, unlike many of his contemporaries, insists that making oneself part of a larger community is a necessary condition of individual freedom. Freedom is not simply the ability to determine the course of one's life without the interference of others, but is also an act of creation through which the boundaries of the self are continuously transformed as a result of social interaction.[38]

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[35]Rousseau, 4; emphasis added. The tension between universal values of equality, liberty, and rationality, on the one hand, and the allegiance to a more concrete national identity which can be discerned in the law and cultural history of France, on the other, also are consistent with difficulties attendant on Rousseau's desire to create a community that is more than a group of persons united by abstract reason entirely by appeal to such reason. See N. J. H. Dent, *Rousseau: An Introduction to his Psychological, Political and Social Theory* (Oxford: Basil Blackwell, 1988) and Katrin Froese, "Beyond Liberalism: The Moral Community of Rousseau's Social Contract," *Canadian Journal of Political Science,* Vol. 34, No. 33 (2001).

[36]Nicolet. Jacques Chirac's televised speech on the Stasi Commission specifically addressed the historic French struggle to achieve the full liberty and equality of all citizens and cited *laïcité* as a pillar of France's achievements in these respects. Accessible at http://translate.google.com/translate?hl=en&sl=fr&u=http://www.fil-info-france.com/actualites-monde/discours-chirac-loi-laicite.htm&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dlaicite,%2BChirac%26hl%3Den%26lr%3D%26as_qdr%3Dall.

[37]Adsett explicitly links the differences she discusses to French liberalism's Rousseauian heritage.

[38]Froese, 579.

Individual freedom, from the French republican perspective, is best achieved through citizenship which transcends both personal interests and sub-group identities. To recognize this allows us to comprehend the distinctive French view of the role of public education. It is through the public and secular education of its citizens that France creates Frenchmen and Frenchwomen. Prime Minister Raffarin argued that "School is a place of Republican neutrality and must remain so because it is above all the place where minds are formed, where knowledge is passed on and where children learn to live as citizens."[39] The central role of education as education for citizenship can be traced back, as we have seen, to the Jacobins and to the Third Republic. It is this belief in the power of education, "which promotes an openness to the universal,"[40] on which the French largely base their notion of the universalist aspects of French exceptionalism. The French see their polity as one that frees persons to transcend differences of class, religion, ethnicity, gender, and immigrant status. It does so by transforming the individual particularized by sub-identities into a citizen of France:

> France was considered capable of absorbing … varied populations – not only foreign ones, but the different types at its extremities – because the possession of French culture was another part of what it meant to be a Frenchman. This meant that a peasant, as much as an immigrant, had to be made French and that it was the inculcation of traditional values, particularly through the schools … that was primarily responsible for creating the nation.[41]

Because of its crucial role in creating citizens, public education in France is the product of centralized control to an extent which most Americans cannot imagine. The Ministry of National Education oversees a vast system of public education, certifies all private schools, and determines basic curricula. In 2005, the Ministry articulated "Seven Skills' or learning goals for all French students, including "autonomy and initiative." The inclusion of 'autonomy' as a *competence* is striking as an aim of a national curriculum, and its articulation in 2005 – a year after the enactment of the ban on religious and political symbols in schools – bears note. There can be little doubt that France's recent difficulties in integrating Muslim immigrants and the reassertion of *laïcité* to deal with the so-called 'headscarf affair[s]' inspired this explicit affirmation of personal autonomy as central to French education. That religious belief – as well as membership in religious groups – endangers autonomy is a long-established view in France, however tolerant of religious diversity the French may aspire to be. True freedom is to be found through citizenship, and French citizenship presupposes *laïcité*.

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[39] Raffarin, Speech to the National Assembly, 2004.

[40] Ibid.

[41] Theodore Zeldin, *A History of French Passions* (New York: Oxford University Press, 1993), 17. Also see Baubérot, "Secularism and French Religious Liberty."

4 Equality and Pluralism

Appreciating the substantive conception of freedom and personal autonomy characteristic of French thought and the importance of education in creating citizens also helps us to understand the concern for gender equality expressed by the Stasi Commission and others. The Commission report returns again and again to the specter of gender inequality as represented in the Muslim *hijab*. Much of the Commission's reasoning turned on its assumption that most Muslim girls wearing the *hijab* do so out of fear of retaliation by other Muslims and that the *hijab*, itself, is a symbol of gender oppression.[42] That the assumption was not investigated is evident; that it might have been grounded in anti-Muslim bias is quite possible.[43] However, the French have a view of the responsibilities of the state which is consistent with their conceptions of personal autonomy and the supremacy of Reason and with their insistence on the ideal of *egalite*: it is the duty of the state to *promote* equality and autonomy. Prime Minister Raffarin captured that sense of duty when he proclaimed that "the State is the protector of freedom" and has "a duty to intervene" when "a refusal to recognize the equality of the sexes threaten[s] that fundamental liberty at the heart of our Republican pact."[44] Given the French tendency to assume that religious group membership undermines autonomy and the conviction that the state should advance equality, the Stasi Commission's focus on the possibility of coercion and gender oppression seems more reasonable and less suspect.

Nonetheless, I believe that worries about French citizenship – 'becoming French' – and the importance of education as the primary tool for creating French citizens were the salient reasons for the Stasi Commission's recommendation and for the cross-party support the ban on conspicuous religious symbols in schools received.[45] As Joan Wallach Scott and John Bowen observe,[46] the French attitude towards cultural diversity does not meet the standards of genuinely multicultural pluralism. The French are quite clear that their conception of nation-sharing entails sharing an existing, if vaguely defined, French national identity. Maurice Barber notes that the Commission included among the 'principles' of *laïcité* the claim that *laïcité* imposes a "duty on the part of religions and their congregations to adapt and conduct themselves in moderate fashion, so as to make co-existence possible, in exchange for the guarantees and protections afforded them by the state."[47]

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[42] I am indebted, for translations of the Commission report, to Jeremy Gunn, "Religious Freedom and *Laïcité*".

[43] Ibid.

[44] Raffarin, Speech to the National Assembly, 2004.

[45] The bill was passed by a majority of 484 to 16 and was supported by parties from the center-right to the far left.

[46] See Scott; See also John Bowen, "Why the French Don't Like Headscarves: Islam, the State, and Public Space," (Princeton: Princeton University Press, 2006).

[47] Maurice Barbier, "Towards a Definition of French Secularism".

Similarly, Raffarin proclaimed that "Integration is a process which presupposes a desire on both sides: to move towards the acceptance of certain values, a choice of lifestyle, support for a particular way of looking at the world which is peculiar to France."[48] And, again, he connected that idea of French nationality with the role of education: "Throughout these years, how many young immigrants have been integrated thanks to primary and secondary school teachers for whom the Republic is still a mission."[49]

Once more, we can look to Rousseau to understand the French conception of *egalite*, as a condition achieved through citizenship in the Republic. This conception is more formal than that embraced by many contemporary liberals; it is the equality of citizens seeking the common good, rather than the equality of individuals seeking their own goods. Furthermore, it is an equality that can only be formally assured by law and policy. To be sure, French policy and practices have never been fully purist. As a number of French theorists note, France – as any other nation – has compromised its principles on occasion to address both immediate needs and historical realities.[50] Nonetheless, the French republican vision of equal citizenship abstracts from individual and, especially, group identities, and France has been far more resistant to the claims of multiculturalism and pluralism than other nations. A 1993 report on immigrants seeking citizenship noted that applicants must reject "the logic of there being distinct ethnic or cultural minorities" for "a logic based in the equality of individual persons."[51]

This, of course, is precisely the point on which many American theorists criticize French republican policy. The United States has attempted, to an extent, to recognize the ethnic, racial, gender, and religious identities embraced by many individual citizens. The motto on the National Seal of the United States is "*e pluribus unum*," which we are sometimes pleased to interpret as signifying our commitment to cultural pluralism (despite its original meaning).[52] Certainly with respect to religious diversity, U.S. legal policy has become increasingly open, even to the extent that our courts have effectively declined to provide a clear, positive definition of 'religion' for legal purposes.[53] Again, to an extent, the tendency of U.S. legal policy has been to respect and acknowledge cultural, linguistic, and racial differences; being a 'hyphenated' American is quite common. France and the majority of

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[48] Raffarin, Speech to the National Assembly, 2004.

[49] Ibid.

[50] See, e.g. Dominique Schnapper, *La relation à l'Autre: Au coeur de la pensée sociologique* (Editions Gallimard, 1998).

[51] Scott, 82.

[52] Joseph McMillan, "The Arms of the USA – Blazon and Symbolism" (The American Heraldry Society), http://americanheraldry.org/pages/index.php?n=Official.National.

[53] U.S. courts have shown an increasing tendency to cut away substantive positive criteria for 'religion.' In *Torasco v. Watkins*, 367 U.S. 488, 495 (1961), the Supreme Court rejected the claim that a belief in a 'Supreme Being' is a necessary feature of 'religion.' Also see, *U.S. v. Seeger*, 380 U.S. 163 (1965). In *Welsh v. U.S.*, 398 U.S. 333 (1970), the Court treated "deeply and sincerely [held] beliefs that are purely ethical or moral in source" as equivalent to religious belief.

French citizens, by contrast, have chosen to pursue their vision of universalist republicanism. That vision recognizes the extra-civil identifiers of individuals only reluctantly and in certain instances. The dominant model of citizenship in France is that of the Frenchman or Frenchwoman, the citizen, whose public persona is largely indistinguishable from that of any other citizen. The features of individual identity which do distinguish individuals are, by this logic, necessarily private and should be treated as such.

This is not our model of nation-sharing, or of citizenship, but it is the French model. Naturally, France has achieved neither perfect integration of its immigrant population nor perfect secularism in its laws.[54] No doubt gender equality has not been fully attained by the French. However, if consistency in law and social practices is to become the standard whereby national cultures are evaluated, few if any nations will pass the test. And, we do well to bear in mind that multiculturalism and the welcoming, or celebrating, of diversity are not uniformly advocated among our own citizenry. Nor is it self-evident that our approach to religious freedom and state neutrality is the single legitimate one. Indeed, the French view of education for citizenship and *laïcité* may well be more consistent than anything American-style liberalism, as fitfully practiced in the United States, can offer.

5 Back in the U.S. of A.

In this final section, I want to briefly explore the possibility that French *laïcité* might offer a more promising way to balance freedom of religious belief with separation of church and state ('neutrality') than our own approach in the United States. The French solution is not, as admitted, one that embraces diverse groups on their own terms. But the effort to ensure both freedom of belief and expression *and* neutrality in the U.S. has hardly proven to be a resounding success. Indeed, I think our somewhat schizoid effort to achieve both aims has resulted in legal and policy inconsistencies which are more troubling than the accidents of history which mark the French system. Our law is pockmarked with bizarrely reasoned judicial decisions such as *Yoder*[55] – in which the attractiveness and self-reliance of the Amish figured more significantly in the Court's decision than any claim to religious diversity, with endless efforts to sort through which religious groups or expressions of religious faith are to be permitted in schools and on football fields, and with tortured reasoning about the tax exempt status of 'churches' and acceptable state support for their activities. The crabbed and convoluted thinking evinced in our

[54] See Jeremy Gunn, "French Secularism As Utopia And Myth." *Houston Law Review*, Vol. 42 (2005–2006): 81–102.

[55] *Wisconsin v. Yoder*, 406 U.S. 205 (1972). My point, here, is not to quarrel with the exception granted to the Amish. Rather, I have in mind Justice Burger's odd ruminations on the 'self-sufficiency' of Amish people, their pleasantness, and their need to keep their communities supplied with young members, as relevant to the determination of the suit.

national discourse about, and case law on, in-public holiday displays, alone, might suffice for us to view *laïcité* more favorably.[56] Unlike the French, we are determined to set off in two directions at once, and we have burdened ourselves and our courts with endless judicial gerrymandering to try to straddle the divergence.

Let us consider the question of a ban on conspicuous religious symbols in public schools in the United States. Many American theorists concur that such a ban could not pass constitutional muster. But we can imagine a few problematic scenarios. Start with a Rastafarian family which sends its son to school wearing a t-shirt emblazoned with marijuana leaves – or, perhaps, with pictures of famous Rastafarian figures wreathed in marijuana smoke. In most school districts, a non-Rastafarian child wearing such a shirt would be summarily dismissed from the school grounds and, probably, required to undergo anti-drug counseling as a pre-requisite for returning. Or, imagine the daughter of a family that belongs to the *O Centro Espirita Beneficiente União de Vegetal* who wishes to sip the ritual and mildly hallucinogenic tea [*ayahuasca*] at lunchtime, or simply to wear items symbolizing the tea at school. Perhaps our *O Centro* daughter has a tattoo of *Banisteriopsis caapi* on her right wrist. Could she be expelled, denied enrollment, or required to wear long sleeved shirts to cover the offending image? How would U.S. law deal with challenges brought by the students and parents in these cases? Would schools be required to allow Rastafarian and *União de Vegetal* students to wear symbols of their preferred entheogen, while continuing to forbid other students the same choice? If my family converts to the Church of Lukumi Babalu Aye, will my son – and only he – be permitted to wear symbols celebrating animal sacrifice at school? Few American public schools would welcome such 'religious displays.'

I don't think the legal outcome of such hypothetical cases is at all clear. Recent cases, such as that of the *União de Vegetal* church and the *Church of Lukumi Babalu Aye*,[57] indicate that changing patterns of religious *affiliation* and immigration are giving us trouble in our effort to both respect religious difference and determine where religious expression must give way to broader civil demands.[58] As Katherine Ross argues,

> Despite the apparently widespread belief that the U.S. Constitution protects the right to wear religious symbols in school (Marshall, 2003), the reality is far more complicated. A school may not prohibit a student from wearing religious garb to school solely on the grounds that the garb makes a religious statement because personal religious statements are

[56] For an amusing overview of this area of law, see Stephen Young, "The Establishment "Claus": A Selective Guide to the Supreme Court's Christmas Cases" (LLRX: Law and technology resources for legal professionals, January 2003). Accessible at http://www.llrx.com/features/christmas.htm.

[57] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

[58] Where issues of religion intersect parental rights and the well-being of children, we encounter particularly daunting questions, as we have seen in cases of parents whose religious convictions were judged – by the majority population at least – to endanger their children. See, e.g. *Commonwealth v. Barnhart,* 497 A.2d 616 (Pa. Sup. 1985).

> generally protected. On the other hand, a student does not currently have a right to wear religious garb that is prohibited for other rational reasons. Further, Supreme Court doctrine about the religion clauses of the Constitution is in flux, and the Court has never considered a case that bears directly on the issue of student religious garb.[59]

And it is important to remind ourselves that U.S. public schools do exert considerable control over students' dress and appearance: no pictures of guns or knives, no 'drug' symbols, no 'Goth' apparel, no facial piercings, and so on. My fifteen year old son was given a man's sports coat to cover his "Cheney's Got a Gun" t-shirt, with a cartoon of the Vice-President wielding an oversized rifle, and told not to wear it to school again: the school has a firm 'no images of weapons' rule. Apparently, even irony can be forbidden on school grounds.

Indeed, this authority over expression is most successfully challenged only on grounds of religious freedom. If a school determines that dreadlocks are dangerous on the playground, it is likely that most courts would favor the school authorities. If, on the other hand, a dreadlocked student and her parents challenged a dreadlock ban on religious grounds, she would have a case, the uncertainty of winning that case notwithstanding. Simply to raise a complaint of religious discrimination or suppression of religious expression gives one a legal foot in the door in this country.

And this is part of *American* exceptionalism: we are more respectful of religious expression than any other nation that makes a reasonable pretense to the separation of church and state. We, not the French, are the odd ones out. The reluctance of the U.S. courts to attempt a determinate definition of 'religion,' while admirably open-minded, only exacerbates the problem.[60] We really cannot know, until the courts address each case – case by case – what the law *might* be concerning the rights of schools to limit 'religious' garb. U.S. law on religious freedom and state neutrality is an American Legal Realist's dream, or, as H. L. A. Hart might have characterized it, a nightmare for the ordinary citizen.

Moreover, our attempts to maintain state neutrality while honoring all claims to religious expression often result in offense to people of faith. It does not strike these people as respectful to be informed, judicially, that a crèche or a menorah is neither more meaningful than, nor different in kind from, a plastic reindeer or a Santa Shack.[61] Similarly, it ought not to be received as much of a victory that religious monuments are allowed to remain in public spaces on the grounds that these are merely historical artifacts.[62] We demean religious faith by accepting expressions of

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[59] Katherine Ross, "Children And Religious Expression In School: A Comparative Treatment Of The Veil And Other Religious Symbols In Western Democracies," GWU Law School, Public Law Research Paper No. 408; Islamic Law and Law of the Muslim World Paper No. 08-31 (2008): 9. Available at SSRN: http://ssrn.com/abstract=1136366.

[60] Whether the courts have been reluctant or unable to arrive at a clear definition of 'religion' is an open question.

[61] *Lynch v. Donnelly*, 465 U.S. 668 (1984).

[62] *Van Orden v. Perry*, 545 U.S. 677 (2005).

it only on terms other than its own. The French approach, to make the public sphere religion-free and to leave religious faith to the private sphere, at least has the virtue of not confusing religious expression with the detritus of the past or holiday fun.

The French polity, for all its flaws, raises secularism – neutrality – over personal religious expression, *in the public sphere*, and it is particularly adamant about the secularity of its public schools. That approach may not be ideal, but, if consistently pursued, it might offer a more rational and less judicially-dependent method for reconciling national identity and educational authority with personal commitments than we have achieved. Our own model drives us to pursue what may be incompatible aims and to attempt to reconcile what, arguably, ought not to be reconciled. No doubt France has not achieved perfect consistency in practice. Nonetheless, the path the French have set for themselves as a people makes consistency possible. As a self-described nation of pragmatists, we in the United States should not be too quick to dismiss that aspiration.

Part III
Intersections with Other Rights

When Free Speech Meets Free Association: The Case of the Boy Scouts

Emily R. Gill

Abstract This paper explores the tension between freedom of speech and freedom of association. First, as an expressive association the Boy Scouts is on firmer ground asserting the centrality of theism than the importance of heterosexuality. Nevertheless, although I deplore the exclusion of gay Scouts, I offer qualified support for the Scouts' right to set their terms of membership. Second, I examine the public reaction to the Scout case, arguing that "free speech" by the Scouts as a discriminatory organization is in tension with freedom of association, insofar as the Scouts have had to forfeit some support from other groups. Finally, I shall briefly discuss President Bush's faith-based initiative as a further illustration of how the maintenance of one's message may properly result in the forfeiture of public support. A robust defense of freedom of association does not require that voluntary associations be supported either by other private organizations or by public entities.

Keywords Boy Scouts • Boy Scouts exclusion of gays • Freedom of association and free speech • Expressive association • Free speech and funding

We tend to think of the First Amendment freedoms of religion, speech, press, assembly, and petition as inherently compatible. Each involves the free expression of beliefs or ideas. In ways championed by John Stuart Mill, each promotes individual self-development, social diversity, and political freedom. When we examine specific issues, however, we find inherent tensions in the application of these freedoms. These are particularly sharp in cases related to the free expression of both individuals and voluntary groups. Individuals may wish to participate in particular groups, but not on terms the groups accept. Alternatively, groups may desire to convey specific messages to maintain their identities, but may have to forego the support of others to do so.

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Boy Scouts v. Dale[1] illustrates both of these types of conflict. In this case, the Supreme Court allowed the Boy Scouts to expel an openly gay scoutmaster on grounds of associational freedom of expression, despite a state antidiscrimination law previously upheld by the New Jersey Supreme Court. Although the Scout Oath had long affirmed a belief in God, it had said little for public consumption regarding homosexuality. The Court found, however, that just as religious organizations may uphold their own beliefs with or without public notice, the Scouts could do likewise. Since the Scout rejection of open homosexuality has become public knowledge, however, much support from the public sector has evaporated or become a subject of controversy. According to the court decision, freedom of speech, or the public admission of same-sex attraction, is in tension with freedom of association for some aspiring Scouts. In the public reaction, similarly, the public message that gays are not appropriate candidates for Scouting is in tension with support that has long been an enabling condition of the Boy Scouts' freedom of association.

According to what Nancy Rosenblum terms the logic of congruence, some argue that the health of liberal democracy requires voluntary associations to reflect democratic principles in their own organization and internal life.[2] The thoroughgoing practice of congruence would make all voluntary associations inclusive, so that anyone who wanted to join or remain a member could do so. Although associations would be voluntary for individuals, they could lose their defining characteristics and their messages. It is for this reason that Chandran Kukathas maintains that freedom of association is not characterized by the individual freedom to enter associations of one's choice. Christian organizations, for example, should be able to exclude atheists, and some ascriptive communities or organizations do not themselves prize freedom. Rather, "freedom of association exists when individuals are free to leave the group or community or enterprise of which they are a part," a definition that protects the consciences of both those who remain and those who leave to form new associations.[3] Although freedom to relinquish one's current allegiances and to form new ones is certainly a mainstay of liberal freedom of association, I also believe, however, that Kukathas's libertarian leanings deemphasize the importance of the context within which this freedom exists. That is, it is imperative that society allow not only exit rights, but also the potential for other opportunities for association – or the slack, as it were – that makes freedom to leave meaningful.

Concerning the tension between freedom of speech and freedom of association, first, I shall argue that as an expressive association, the Boy Scouts is on firmer ground asserting the centrality of theism than the importance of heterosexuality.

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[1] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

[2] Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton, N.J.: Princeton University Press, 1998), 36–41.

[3] Chandran Kukathas, "Freedom of Association and Liberty of Conscience," in *The Liberal Archipelago: A Theory of Diversity and Freedom* (New York: Oxford University Press, 2003), 95.

Nevertheless, although I deplore their desire to exclude gay Scouts, I shall offer qualified support for the Scouts' right to set their terms of membership. Second, I shall examine the public reaction to the Scout case, arguing that "free speech" by the Scouts in establishing itself as a discriminatory organization is also in tension with freedom of association insofar as the Scouts have had to forfeit some of their support from other groups. Finally, I shall briefly discuss President Bush's faith-based initiative as a further illustration of how the maintenance of one's identity or message may properly result in the forfeiture of public support. A robust defense of freedom of expressive association does not require that voluntary associations be supported or enabled either by other private organizations or by public entities.

1 The Scouts as an Expressive Association

In the 1990s, prior to *Boy Scouts v. Dale*, both nontheists and gays challenged Scout policies with some frequency and mixed results. In 1996, however, with the approval of the national Boy Scouts, the San Francisco Bay Area Council of Boy Scouts, representing 33,000 Scouts in two counties, approved a policy akin to the armed forces' policy of "don't ask, don't tell": gays can participate in Scout activities if they do not openly advocate homosexuality. "The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already in scouting." Although local spokespersons explained that the new policy redefines scouting as "asexual and apolitical," national leaders asserted that this represented no change, as "we don't allow registration of avowed homosexuals."[4]

James Dale was a New Jersey Eagle Scout and assistant scoutmaster who wanted to participate in adult scouting. He realized in college that he was gay, became an activist, and was featured in a news article that led to the revocation of his Scout membership. He argued that scouting involves no explicit message about sexual orientation and that the scoutmaster handbook refers sex and sexuality issues "to the child's parents or pastor. It isn't something that's discussed."[5] In 1998, a New Jersey state appeals court ruled in his case that because the Boy Scouts publicly recruits nationwide and troops often meet in public places, it is a public accommodation and violated the state antidiscrimination law by excluding Dale.

The New Jersey Supreme Court unanimously ruled in 1999 that the Boy Scouts is a public accommodation and that Dale's expulsion violated state antidiscrimination laws. The Boy Scouts is not selective in membership, is not an intimate or

[4] "Gay Issue Embroils Scouts After a Chapter's Policy Memo," *New York Times,* 19 December 1996, A15.

[5] Joyce Wadler, "A Matter of Scout's Honor, Says Gay Courtroom Victor," *New York Times*, 3 March 1998, A18.

expressive association, and does not "associate for the purpose of disseminating the belief that homosexuality is immoral." Therefore, retaining gay Scouts did not violate the organization's expressive rights.[6] The California Supreme Court ruled in 1998, however, that because the Boy Scouts is a private and selective group, it is not governed by state civil rights laws and can therefore exclude agnostics, atheists, and gays.[7] Reactions to these competing opinions were mixed. Most interestingly, the president of Gays and Lesbians for Individual liberty criticized the New Jersey ruling as harmful to the rights of all associations that seek to provide "safe" spaces for persons who are different.[8] A later opinion piece noted, "If the Boy Scouts were required to admit leaders who advocated a position contrary to its own, then men could assert the right to lead the Girl Scouts, gentiles could assert the right to head Jewish groups, and heterosexuals could assert the right to lead gay groups."[9]

The common thread running through this controversy is whether the Boy Scouts is a public accommodation that must therefore be inclusive or a private association that can unilaterally establish its criteria for membership. Two relevant tests may be applied to determine an organization's status. First, in *Roberts v. United States Jaycees*, the Supreme Court ruled not only that Minnesota's interest in eradicating sex discrimination was a compelling one, but also that offering the Jaycees' advantages to women would neither "impede the organization's ability to engage in these protected activities or to disseminate its preferred views," nor would it "change the content or impact of the organization's speech" in more than minimal ways.[10]

In her concurring opinion Justice Sandra Day O'Connor argued, however, that the constitutional protection of membership selection should depend not on the content or rationale of its message but on a second distinction. In an expressive association, its very formation "is the creation of a voice, and the selection of members is the definition of that voice."[11] In a commercial association, or one not formed to disseminate a message, however, activities enjoy only minimal protection.[12] O'Connor argued that the Jaycees was primarily engaged in recruiting and selling memberships,[13] and was therefore a commercial association. She implied, then, that even if the public regulation of membership does alter the group's message, this regulation is legitimate for a predominantly commercial association. A predominantly expressive association, however, should enjoy full autonomy in its membership selection, even if lack of this autonomy would *not* change the message.

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[6] Robert Henley, "New Jersey Overturns Ouster of Gay Boy Scout," *New York Times*, 5 August 1999, A5, A21.

[7] Todd S. Purdum, "California Supreme Court Allows Boy Scouts to Bar Gay Members," *New York Times*, 24 March 1998, A1, A19.

[8] Steffan Johnson, "Pro-Gay Policy in New Jersey Hurts Gay Rights," *Wall Street Journal*, 11 August 1999, A18.

[9] "A Case the Scouts Had to Win," *New York Times*, 30 June 2000, A27.

[10] *Roberts v. United States Jaycees*, 468 U.S. 609, 627–628 (1984).

[11] Ibid., 633.

[12] Ibid., 635.

[13] Ibid., 639.

Regarding theism, the Boy Scouts is clearly an expressive association. The Scout Oath and the Scout Law set forth shared principles that are affirmed at every meeting. One promises on his honor "To do my duty to God and my country and to obey the Scout law; … To keep myself physically strong, mentally awake, and morally straight." According to the Scout Law, "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent."[14] The *Boy Scout Handbook* explains that one's family and religious leaders teach one how God is served and that "as a Scout, you do your duty to God by following the wisdom of those teachings in your daily life, and by respecting the rights of others to have their own religious beliefs."[15] The explanation of reverence is similar: "A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."[16] Boys generally join the Scouts for the camaraderie and training, not because they want to focus on religion. Nevertheless, the theistic orientation is clear and public.

Scouts therefore must choose between speaking freely about their religious beliefs, if these are unconventional or nonexistent, and remaining in scouting, a classic example of a conflict between freedom of speech and freedom of association. Although nothing prevents Scouts from taking the Oath with mental reservations, the *Handbook*'s explanation of trustworthiness is that "a Scout tells the truth. … Honesty is a part of his code of conduct."[17] Moreover, the Oath's "on my honor" means that one is giving one's word; the *Handbook* instructs that "you must hold your honor sacred."[18] Those whose nontheistic convictions are strongest will experience the greatest difficulty: honesty and trustworthiness impel them to speak up, but this will then get them expelled. Although the Scouts accepts Buddhists, who do not believe in a supreme being, and Unitarians, who honor many traditions but pointedly avoid setting their own creed, I think that with regard to religious belief, the Boy Scouts is an expressive association within the meaning here discussed, although many nontheists could benefit from and contribute to other focuses of scouting.

The Scouts' status is murkier regarding sexual orientation. Scouts promise in the Oath to keep themselves "morally straight," which in the *Handbook* means "to be a person of strong character; guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant."[19] Those who believe that nontheists and gays have a least a moral right to join an organization in which they seek only to participate, not to change, will see irony in the admonition to respect and defend the rights of all. No heterosexual

[14]Boy Scouts of America, *Boy Scout Handbook* (Irving, TX.: Boy Scouts of America, 1990), 5–8.
[15]Ibid., 550.
[16]Ibid., 8.
[17]Ibid., 7.
[18]Ibid., 550.
[19]Ibid., 551.

affirmation parallels the theistic affirmation in the Oath, and therefore there is not the same possibility of hypocrisy. Boy Scout troops undoubtedly contain gay members and will admit others in future. The San Francisco Bay Area Council policy of "don't ask, don't tell," adopted with the approval of the national organization, admits as much. Although under this policy gays can be Scouts, they must sacrifice their freedom of speech to exercise their freedom of association.

Further evidence of the lack of any clear and public affirmation of heterosexuality, apart from national leadership statements against allowing the registration of "avowed homosexuals," is found in Dale's 1998 statement mentioned above. If sexual orientation and related issues are referred to parents and pastors and are not discussed at Scout meetings, the Scouts is not an expressive organization with regard to sexual orientation. Its formation and maintenance are not grounded in a publicly stated, shared set of principles concerning sexual orientation. If such a viewpoint is not explained in the *Handbook*, how fundamental can it be? And if it is not explicit, how can it be undermined? The fact that Dale is gay would not have conflicted with his teaching the scouting agenda, as there is no agenda in this area. When the national office accepted the "don't ask, don't tell" compromise, this move not only acknowledged that gays might be admitted; it also implied that one's sexual orientation has no bearing on one's qualifications to participate in scouting. The Boy Scouts may be more concerned, admittedly, about the possibility of open advocacy than about mere membership.

In its 2000 decision, United States Supreme Court Chief Justice William Rehnquist ruled that forcing the Scouts to accept or retain members it does not desire infringes on its freedom of expressive association. Although the language that boys should be "morally straight" and "clean" is not self-defining, the fact that Scout officials interpret it to exclude homosexuals is reason enough to allow their exclusion.[20] Internal position statements have consistently suggested that homosexuals do not provide positive role models. Citing an earlier decision that allowed the private organizers of a St. Patrick's Day in Boston to exclude members of a gay, lesbian, and bisexual group who wanted to march behind a banner declaring their sexual orientation, Rehnquist found the Scout case similar. "It boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to be beyond the government's power to control."[21]

He argued, first, that associations are entitled to First Amendment protection regardless of whether they have associated for the purpose of disseminating particular messages. The parade organizers did not express a view on sexual orientation but were nonetheless protected from being forced to convey a view they did not wish to express.[22] Second, the fact that Scout leaders do not discuss issues concerning sexuality does not negate the sincerity of their beliefs.[23] Finally, the existence of

[20] *Boys Scouts v. Dale*, 530 U.S. 640, 650 (2000).

[21] Ibid., 654. See also *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

[22] *Boy Scouts v. Dale* 530 U.S. 640, 657 (2000).

[23] Ibid., 655.

disagreements within an organization's ranks does not mean that there can be no official positions. "The presence of an avowed homosexual and gay rights activist … sends a distinctly different message from the presence of a heterosexual … who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other."[24]

In his dissent, Justice John Paul Stevens concentrated on the disconnection highlighted above regarding the *Handbook*'s discussion of the Scout Oath and Scout Law and the interpretation then assigned to these by the Scouts. The Scouts never adopted a public and unequivocal position regarding sexual orientation.[25] For Stevens, the Scouts were similar to the Jaycees in that the admission and retention of gays does not impede its activities and message.[26] Regarding the St. Patrick's parade, Stevens argued that the gay group would have been conveying a message that might well have been attributed to the parade organizers. As a scoutmaster, on the other hand, Dale would not be conveying a message, especially since the Scouts do not discuss sexuality. The majority, therefore, was wrong to suggest that the symbolic meaning of Dale's inclusion would qualify as speech or as sending a message.[27] In sum, Stevens disagreed that the Scouts had made its case as an expressive association.

I must reluctantly support the Scouts in this case. In a liberal polity, like-minded individuals should be able to associate to express and practice their beliefs in private organizations without being forced to accept those who disagree. This is especially true for those whose beliefs may be out of favor in mainstream organizations. Nancy Rosenblum suggests that an association is expressive and that its membership should be protected regardless of "whether public expression is regular and consistent or spontaneous and sporadic." In the case of the Scouts, the messages of theism and heterosexuality merit protection, then, not because they define the association but because the members have created them. "Expression has to do with who we are and are perceived to be, not just what we say."[28] Larry Alexander, moreover, notes that although the regulation of membership in any organization, whether "creedal" or commercial, bears upon its subsequent expression, creedal organizations should be able to organize around their beliefs. As he quotes from the Boy Scout court brief, " 'A society in which each and every organization must be equally diverse is a society that has destroyed diversity.' "[29]

I want to pose a major qualification, however. The liberty to leave organizations and to form new ones, especially when one is forced to leave, depends on a society that affords other opportunities for association. Such opportunities are crucial to ensure that exclusion is not overly punitive. Classic arguments for religious

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[24] Ibid., 655–656.

[25] Ibid., 677–678.

[26] Ibid., 684.

[27] Ibid., 693–695.

[28] Rosenblum, *Membership and Morals*, 198–199. See also 191–203.

[29] Larry Alexander, "What Is Freedom of Association, and What Is Its Denial?" *Social Philosophy and Policy*, Vol. 25, No. 2 (Jul., 2008): 15; see also 6–8.

toleration such as John Locke's recognize that civil authority must establish a civil criterion of worldly injury to life, liberty, and property that then determines the appropriate scope of religious practice. That is, to avoid harm to the this-world rights or interests of citizens, the line between what is secular and what is religious must be determined by civil government, and this line may change along with the demands of the public interest.[30] When Locke argues that no religious organization need retain individuals whose practices offend its principles, he is defending the freedom of the like-minded to associate without threat from those who might alter these principles and corresponding message through their membership. When he argues that no individuals should be denied ordinary civil enjoyments because of their religious beliefs, however, he is indirectly addressing the importance of maintaining a forum that provides alternative opportunities. The first point addresses the free exercise of conscientious belief and practice; the second takes up the danger that establishment of an orthodoxy can pose to the exercise of alternatives.

Although the liberal commitment to diversity requires freedom for associations that are not themselves inclusive internally, it also allows for greater encouragement of those that *are* inclusive. If enough voluntary associations were internally exclusive, and exclusive in the *same way*, this would affect the very existence of alternatives, and diversity would be compromised in a different way. Participation in organizations like the Boy Scouts provides training in skills, leadership, and character, which can translate into enhanced career opportunities for members. If the vast majority of such organizations excluded agnostics, atheists, or homosexuals who were honest about their status, the combined effect would curtail drastically the breadth of the forum within which individuals exercise their freedom. I would then be gravely concerned about the prejudice toward these individuals, in Locke's terms, in their civil enjoyments, or in their career opportunities as compared to those of others not excluded on the basis their identities.

I would also be concerned about what Amy Gutmann calls the public expression of civic inequality. "Discriminatory exclusion is harmful when it *publicly expresses* the civic inequality of the excluded even in the absence of any other showing that it *causes* the civic inequality in question." Regardless of the impact of exclusion on individuals' civil enjoyments and career opportunities, the combined effect of parallel criteria for exclusion by a majority of voluntary associations would amount to a public expression of inequality, even if this expression were manifested by voluntary associations constituting civil society rather than by public institutions. Says Gutmann, "A voluntary association that serves public purposes may justifiably be regulated even if it also serves private purposes for its members."[31] Although people may differ in their definitions of public purposes, I believe that avoiding the public expression of inequality represented by multiple organizations with parallel exclusions should be among them.

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[30] John Locke, *A Letter Concerning Toleration* (New York: Liberal Arts Press, 1950), 39–40. See also 17–18, 23–24, and Kirstie McClure, "Difference, Diversity, and the Limits of Toleration," *Political Theory*, Vol. 18, No. 3 (Aug., 1990): 373–381.

[31] Amy Gutmann, *Identity in Democracy* (Princeton, N.J.: Princeton University Press, 2003), 97, 98.

We might then want to revisit the *Roberts* case, arguing that given the critical mass of exclusive organizations with parallel criteria of exclusivity, the resulting limitation of individual opportunities renders many of these organizations more commercial than expressive in nature. With less diversity, the formation and maintenance of these organizations is less than otherwise the creation and definition of a distinctive voice and message. The access that they function to provide or deny to individuals makes them more like public accommodations, or institutions in the mainstream of commerce that do not disseminate a distinctive message. If so, they should be open to all comers. I would not welcome such developments. But if a critical mass of organizations truly did share parallel criteria of exclusivity, as in the regime of Jim Crow in the south, we might have to admit that we no longer possess the context of choice of forum that should be characteristic of a liberal political culture.

2 The Consequences of Expressive Association

Boy Scouts v. Dale is illustrative of the conflict that can occur between freedom of speech and freedom of association for individuals. Voluntary associations and organizations themselves face this same tension, however. As they create distinctive voices and publicly disseminate the messages flowing from them, they elicit varied public reactions to these developments. Alluding to the objection that the Scouts did not have a clear heterosexual orientation parallel to its theism, one sympathetic commentator stated that apparently "the only way to avoid being sued by gays is to be more virulently anti-gay."[32] The Scouts do now send a clear message that gays are not appropriate members of the Boy Scouts. After the court victory, it posted this statement on its website that remains there today: "We believe an avowed homosexual is not a role model for the values espoused in the Scout Oath and Law. Boy Scouting makes no effort to discover the sexual orientation of any person. Scouting's message is compromised when prospective leaders present themselves as role models inconsistent with Boy Scouting's understanding of the Scout Oath and Law."[33] It has now been certified as a bona fide heterosexual organization with the Supreme Court bestowing the "*Good Housekeeping* seal of approval."

Following the decision, major cities such as Chicago, San Francisco, and San Jose, California, told local Scout troops that they could no longer use parks and other municipal sites as meeting locations, major corporations such as Chase Manhattan Bank and Wells Fargo withdrew monetary support for both local and national scouting, and United Way chapters across the country cut off funding. The latter's dilemma was that they did not want to curtail valuable opportunities for young people, yet also did not want to violate their own

[32] Mark Steyn, "A Merit Badge in Looniness," *Chicago Sun-Times*, 30 June 2000, 39.

[33] "Word for Word: The 1910 Boy Scout Manual; Stoking the Campfire's Magic And Other Tips for 'Lusty Boys'," *New York Times*, 9 July 2000, WK7.

nondiscrimination policies.[34] Furthermore, "Do these same charities cut off financing to groups chartered to serve, say, Latinos? Do states stop allowing Roman Catholic youth groups to use public campgrounds or school meeting rooms because the church does not ordain gays?"[35] Some local Scout councils, however, did not agree with the ban, at least privately. The Southeastern New England United Way in Providence, Rhode Island, said it would require any Scout council receiving funding to sign a form pledging nondiscrimination. The national Scouts organization, however, stated that it would not allow local councils to disavow any of the national charter, on pain of eviction if such a policy *required* them to admit gays.[36]

In 2001 in central Illinois, the Illowa Council of the Boy Scouts refused $23,000 from the Knox County United Way, which had recently adopted an antidiscrimination clause covering sexual orientation, rather than alter Scout policy.[37] A 2002 attempt by United Way members to overturn the antidiscrimination policy was voted down. Unhappiness over this reaffirmation, where some argued that the United way "is putting pressure on the Boy Scouts to violate their own conscience," prompted an editorialist to wonder, "Indeed, if the Boy Scouts are entitled to follow their 'conscience,' why can't the Knox County United Way? The charitable agency had a vote of its contributors, which is about as democratic as it gets. … [W]hat the Supreme Court clearly did not do was give the Boy Scouts the right to make the rules for everybody else. The Knox County United Way's position is emphatically not a denial of the Scouts' First Amendment rights. The Scouts are free to say and think whatever they want. No one ever said that came without a price."[38]

On the other hand, columnist Dennis Byrne stated that the Evanston, Illinois, United Way could now "claim the honor of being the first chapter locally, and perhaps nationally, to sink low enough to participate in a nationwide get-Scouting campaign." To Byrne, individuals and groups pushing for a withdrawal of funding from the Scouts were not fighting for equality or tolerance. Rather, "Their demand is that those who disagree with them must now agree with them. Everyone must accept their outlook and belief system. Which is utter nonsense. It is still legally and morally permissible to believe that homosexual behavior is abhorrent." Byrne argued that the move to defund the Scouts would harm not only youth in scouting, but also other United Way beneficiaries, as many donors would stop giving to United Way and give directly to the Scouts instead.[39]

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[34] "Scouts' Successful Ban on Gays is Followed by Loss of Support," *New York Times*, 29 August 2000, A1. See also "Scouts' Gay Ban Limiting Funding," *Chicago Sun-Times*, 28 August 2000, 1–2.

[35] Kate Zemike, "Scouts' Successful Ban on Gays is Followed by Loss of Support," *New York Times* 29 August 2000, A1.

[36] Ibid.

[37] Matt Adrian, "Boy Scouts Return Money over Discrimination Clause," *Peoria Journal-Star*, 15 June 2001, B3.

[38] Dennis Byrne, "Scouts' Anti-gay Stance Has a Price," *Peoria Journal-Star*, 19 January 2002, A6.

[39] Dennis Byrne, "Evanston United Way is United No More," *Chicago Sun-Times*, 1 October 2000, 37. There have been no recent reports of funding controversies, presumably because those wishing to withdraw funds have already done so.

I would argue, however, that when a group refuses to fund another group or activity because it disagrees with that other group's policies, it is not stating that everyone must join in this disapproval. Rather, like the Knox County United Way, it is simply stating that it cannot in good conscience, based on its own principles, continue to support that other group. Just as the Scouts may take a stand regarding sexual orientation while not demanding that everyone else agree, so too may a United Way chapter take a similar stand. United Way chapters that choose not to fund the Scouts are not being intolerant of the Scouts' freedom of expressive association; they simply choose not to fund it. And this choice is a function of their own freedom of expressive association.

Religious organizations have also registered a range of response to *Boy Scouts v. Dale*. On January 5, 2001, Reform Judaism's Joint Commission on Social Action suggested that Reform congregations cut their ties to the Scouts or at least protest Scout policy by ending funding for local Scout groups unless they rewrote their charters. At that time, religious organizations sponsored about 65% of Scout troops, although very few were sponsored by Jewish organizations. Reform Judaism ordains gays and lesbians as rabbis, and Reform rabbis may officiate at same-sex commitment ceremonies. As stated by one reporter, "The dispute over gay Boy Scouts is a clear culture clash between a traditional organization that views homosexuality as a threat to 'family values' and a minority religious group that sees discrimination against gays as a violation of civil rights."[40] Similarly, a small, self-declared "open and affirming" United Church of Christ congregation in Connecticut made what was for them a tough decision to cease sponsoring a Cub Scout pack.[41]

In early 2001 south of Chicago, the Scouts' Des Plaines Valley Council dumped seven Cub Scout packs in Oak Park by rejecting their annual chapter charter renewals because they challenged the Scouts' exclusionary policy. Oak Park village ordinances and school policies ban discrimination on the basis of sexual orientation. Said one pack leader, "We don't tolerate it [discrimination] in race or religion, and we don't feel sexual discrimination is tolerable either." A national Scouts spokesman responded, "It they don't agree, no one is forcing them to participate. It wouldn't be fair to the millions of members and families in the organization to allow people to pick and choose between the values and beliefs of the organization."[42] A council in Massachusetts, on the other hand, adopted a "don't ask, don't tell" bylaw.[43] The national Scout spokesman affirmed that this comported with national policy. "If people don't avow their homosexuality, there is not a way for us to know.

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[40]Laurie Goodstein, "Jewish Group Recommends Cutting Ties to Boy Scouts," *New York Times*, 11 January 2001, A12.

[41]Matthew Purdy, "A Church and a Rural Community are Caught in a Moral Knot over Scouting," *New York Times*, 1 April 2001, A23.

[42]Sabrina Walters, "Scouts Dump Seven Packs in Oak Park," *Chicago Sun-Times*, 26 January 2001, 1, 18. See also Mark Brown "Scouts' Honor is Undermined by Anti-gay Policy," *Chicago Sun-Times*, 29 January 2001, 2.

[43]"Council to Allow Gay Scoutmaster," *Peoria Journal-Star*, 2 August 2001, A6.

If they do, we cannot have them as role models in our program."[44] More informally, the Scouts' Central New Jersey Council signed a letter agreeing not to discriminate on the basis of sexual orientation, thus retaining the support of the Central New Jersey United Way.[45]

Municipalities have also weighed in on the nondiscrimination issue. As far back as 1998, the city of Chicago declined to continue its sponsorship of Boy Scout programs as long as the organization would not change its stance toward nontheists and gays. Formerly, it had simply paid the salaries of city employees involved in career-focused Explorer Scout programs as part of their duties; subsequently, city employees could still participate, but on their own time and without compensation.[46] In 2007 after 3 years of controversy, the city of Philadelphia refused to allow the Cradle of Liberty Council to continue to headquarter for a nominal fee in a historic building that it had built on prime city land and used since 1928. City officials stated that civil rights laws precluded taxpayer support for any discriminatory group, although the Scouts could rent at market prices.[47] The American Family Association interpreted the new municipal policy as punishing the Scouts because of their beliefs. Although the Scouts discriminates, "the city finds nothing wrong with *their* discrimination against the scouts because of the scouts' belief."[48] Most recently, in 2009 the Scouts appealed to the Supreme Court an establishment clause-based denial of leases for campsites and a youth aquatic center in a San Diego public park that were built and maintained free of charge by the Scouts and that are open to the public.[49]

Once again, I would suggest that although the Scouts is a private voluntary association that is entitled to maintain its own beliefs and values, it is not discriminatory for other organizations, be they voluntary associations like United Way, corporations like Wells Fargo, or even public entities such as Chicago and Philadelphia, to react to the Scout message through the application of their own private or public values. Some evidence exists indicating that the Scouts are a somewhat more sectarian and less universalist organization than they once were. When the Boy Scouts of America was first incorporated in 1910, it "tried to pitch as wide a tent as possible," acting as a religiously pluralist and ethically neutral advocate of the American way of life.[50]

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[44] "Boy Scout Council Adopts 'Don't Ask' Rule," *New York Times*, 2 August 2001, A16.

[45] Maria Newman, "United Way to Continue Aid to Scouts," *New York Times*, 31 August 2001, A19.

[46] Cam Simpson, "Deal Severs City's Tie to Boy Scouts," *Chicago Sun-Times*, 5 February 1998, 3.

[47] Ian Urbina, "Boy Scouts Lose Philadelphia Lease in Gay-Rights Fight," *New York Times*, 6 December 2007, A16.

[48] Donald A. Wildmon, "Philadelphia Punishes Boy Scouts because of their Beliefs," press release from American Family Association, 20 October 2007, http://www.citizensforaconstitutionalrepublic.com/AFA10-20-07.html. In another recent case, the Sea Scouts lost a free berth at Berkeley Marina in *Evans v. City of Berkeley*, 38 Cal. 4th 1, 129 P.3d 394, 40 Cal. Rptr. 3d 205; (2006) (cert. denied 2006).

[49] *Boy Scouts of America v. Barnes-Wallace*, 530 F.3d 776 (9th Cir. 2008), petition for cert. filed (U.S. March 31, 2008) (No. 08-1222).

[50] Benjamin Soskis, "Big Tent: Saving the Boy Scouts from Its Supporters," *New Republic*, 17 September 2001, 20.

In the 1980s, however, the Scouts became more attuned to the culture wars. Although there was some unofficial discrimination against gays, its lack of codification allowed different interpretations by different Scout troops and leaders.

The gay rights movement, however, prompted a more formalized response, and conservative religious denominations that were once suspicious of the Scouts' ethical neutrality had long-since warmed to it. "The Church of Latter Day Saints now sponsors more troops than any other single institution. In fact, religious bodies now sponsor 65 percent of all troops, compared with just over 40 percent 15 years ago."[51] According to Benjamin Soskis, the significant support emanating from Mormons, both in membership and money, influences Scout policy. Meanwhile, in 1992 the liberal Unitarian Universalists withdrew as an official Scout sponsor. In 1998, the Scouts refused to recognize the Unitarian version of the Religion in Life or God and Country Award, a religious badge earned by fulfilling certain requirements set by a Scout's own religious leader. The Unitarians' award manual included material critical of the Scouts' policy regarding sexual orientation. A Scouts spokesman explained that this language "was just not consistent with Scouting's values, particularly regarding the commitment to duty to God and traditional family values."[52] Soskis's overall point is that although President George W. Bush remarked in 2001 that "the values of Scouting … are the values of America," this is not true now in the way that it once was.

These developments mean that the Scouts has defined itself as a more particularistic organization than formerly. This in turn affords it a stronger claim to freedom of expressive association, as its membership is the definition of its voice and message. By the same token, it is less representative of the country at large, and membership in the Scouts perhaps functions less strongly than formerly as a constituent of individual success. Although the rank of Eagle Scout has had automatic value as a character reference in the past, one letter to an editor wondered "if listing the Eagle rank on applications will now raise questions as to whether the applicant is intolerant, coming from an organization that proclaims some people less worthy than others."[53] I believe that in the vast majority of cases, the boys involved in scouting are the innocent victims of this controversy. This sort of question, however, is once again illustrative of the tension between freedom of speech and the impact of this speech on freedom of association. The Boy Scouts' speech and message is much clearer than formerly on the subject of its attitude towards sexual orientation. There is a price to pay, however, which the Scouts is now paying in the coin of public opinion and funding.

If the Boy Scouts' current particularism is part of what entitles the organization to its freedom of expressive association, this particularism also means that membership is less likely to embody an orthodoxy that may deprive nonmembers of ordinary civil enjoyments in Locke's sense. The Scouts is not part of a critical mass of

[51] Ibid., 21.

[52] Ibid., 22.

[53] Jon Wartes, letter to the editor, *New York Times*, 10 September 2000, WK16.

organizations that are all exclusive in the same way. Membership may be helpful in enhancing Scouts' future opportunities, but it is not crucial. Therefore, the Scouts resembles a public accommodation less than formerly, and this fact reinforces its claim to freedom of expressive association. Although Richard Epstein opines that for organizations such as the Scouts, "the question of monopoly power is quite beside the point,"[54] in my own view this *is* a central point. The Scouts would not appreciate my argument that its claim to freedom of expressive association is reinforced in part by the judgment that it is more marginal than previously. Nevertheless, I believe that the less an exclusive organization contributes to the public expression of civic inequality, in Gutmann's sense, the more entitled it is to freedom of expressive association.

3 Lessons from the Faith-Based Initiative

Regarding public support for voluntary organizations, the tension between freedom of speech and freedom of association is also exemplified in President George W. Bush's faith-based initiative, pioneered in 2001 under the "charitable choice" provision of the 1996 welfare reform law, which itself permits partnerships between government agencies and religious as well as secular social service organizations. Many faith-based organizations have long received public funds, often through separate, nonprofit arms that specifically provide social services in ways that are formally walled off from the organization's promotion of religion. Charitable choice, however, states that "Religious groups have a right to retain their religious character by displaying religious symbols or using religious criteria in selecting employees" while providing social services.[55]

The faith-based initiative might be regarded as neutral in that public funding may be accorded to both secular and religious social service organizations. Any aid to religion is incidental to support for the secular public purpose or social function that an organization pursues. On the other hand, although this accommodation may exempt religious organizations from seemingly burdensome nondiscrimination laws, these exemptions render it more costly for individuals of the "wrong" faith tradition or sexual orientation to find social service employment or to be open about their identities. These exemptions aid religious institutions and their adherents, but they support with public funding the private placement of burdens on individuals. Constitutional scholars argue that religious exemptions control hiring by default unless legislation specifically mandates nondiscrimination. A 2005 case found that

[54]Richard A. Epstein, "Should Antidiscrimination Laws Limit Freedom of Association? The Dangerous Allure of Human Rights Legislation," *Social Philosophy and Policy,* Vol. 25, No. 2. (Jul., 2008): 133; see 132–137.

[55]Laurie Goodstein, "Church Groups Urge Use of Widened Welfare Law," *New York Times*, 14 December 1997, 16A. See also Richard W. Stevenson, "Bush Will Allow Religious Groups to Receive U.S. Aid," *New York Times*, 13 December 2002, A28.

the Salvation Army could continue to engage in faith-based hiring while receiving public funds because this selectivity cannot be attributed to the government.[56] Although as a candidate, President Barack Obama declared that his administration would allow neither proselytization nor discriminatory hiring, as President he has suggested that these issues will be decided on a case-by-case basis, fueling the hopes of both evangelicals and secularists.[57]

The faith-based initiative also reveals the tension between freedom of association and freedom of speech. Religious social service providers want to maintain the integrity of their religious character. But the message they convey to clients, potential employees, and taxpayers affects many individuals who are not members and who cannot easily exercise their freedom to exit these associations and form new ones. Therefore, when religious social service providers accept public funding, I believe that their speech and message should be inclusive and their restrictive hiring decisions prohibited. Jeffrey Rosen, on the other hand, argues that "it's obvious on reflection, that without the ability to discriminate on the basis of religion in hiring and firing staff, religious organizations lose the right to define their organizational mission enjoyed by secular organizations that receive public funds." As in the Scout case, all private associations should be exempt from discrimination laws "whenever necessary to preserve their distinctive character."[58]

In my view, however, no organization, private or public, need support a voluntary association whose principles are at odds with those of the putative supporter. Moreover, no publicly funded entity *should* support with public funds a voluntary association whose membership policies conflict with public policy. This is not "punishment" for the Boy Scouts or for anyone else. Private organizations are simply utilizing their own freedom of expressive association to refrain from supporting other associations with whose policies they disagree. Public entities are entitled favor those who principles accord with public purposes over those whose principles do not. In my view municipalities and other public entities need not and should not support discriminatory organizations such as the Boy Scouts. The pluralism manifested in freedom of expressive association is a good of liberal democracy and should be vigorously defended. Nevertheless, public support should not be allowed to promote pluralism that counteracts public purposes to which we are collectively committed.

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[56]Ira G. Lupu and Robert W. Tuttle, The State of the Law 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations, The Rountable on Religion and Social Policy, www.religionandsocialpolicyorg/docs/legal/state_of_the_law.2008.pdf, 29-33; see 27-43. The case is *Lown v. Salvation Army, Inc*., 393 F. Supp. 2d. 223, 2005 U.S. Dist. LEXIS 22260 (S.D.N.Y. Aug. 30, 2005).

[57]Dennis R. Hoover, "Keeping the Faith-Based," *Religion in the News,* Vol. 12, No.2 (Spring 2009): 5–6, 24.

[58]Jeffrey Rosen, "Religious Rights: Why the Catholic Church Shouldn't Have to Hire Gays," *New Republic*, 26 February 2001, 17.

Oaths and the Pledge of Allegiance: Freedom of Expression and the Right to Be Silent*

Kenneth Henley

Abstract Expression of belief can be free only with a background of freedom to be silent. Individual liberty flourishes when the state and society are excluded altogether from the realm of private individual belief. While guarding against abuse of governmental power, very carefully specified limits to the dissemination of racist, bigoted beliefs might be acceptable in a free society. But legal or social intrusion into privately held belief is not consistent with individual liberty. Oaths, the Pledge of Allegiance, and intrusive questioning of creedal and political belief or personal feelings must be treated with great suspicion in a liberal society. The right of silence has a more central place within the realm of liberal principles than the right to disseminate.

Keywords Oaths • Private beliefs • Creedal beliefs • Right to be silent • Freedom of conscience • Right to be silent and individual liberty

1 Framing the Issue of Freedom of Expression

Freedom of expression is usually understood as the right actively to communicate or disseminate one's thoughts or creative works. This framing of the issue raises questions of whether expression should be limited to prevent such harms as press undermining of the right to a fair trial, defamation, incitement, sedition, and offense caused by obscenity and pornography, hate speech and group defamation. This approach requires an account of the justification of freedom of active expression or dissemination. A different way of framing the issue of freedom of expression is in

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terms of the right of silence – the right to maintain one's beliefs and feelings without exposure. Such a right may be impinged upon by oaths of political loyalty or religious conviction, the Pledge of Allegiance, intrusive questioning regarding beliefs, polygraph lie-detector tests in employment, limitations on the right against self-incrimination, testimony under subpoena that goes beyond the percipient and intrudes into beliefs, coerced depositions that go beyond the matter litigated into beliefs, intrusive questioning during required diversity or sexual harassment training, and outing of sexual orientation. I shall argue that focus upon active dissemination has obscured the centrality of the right of silence within the realm of liberal principles.

2 Religious Silence

In contrast to our current American political culture's demand for public exposure of religious belief, the Constitution embodied a privileged position of privacy for religious belief. Until the addition of the Bill of Rights, freedom of expression appeared in the U.S. Constitution only as a specific right of silence, an exception within otherwise compelled speech. In the penultimate Article VI, oath or affirmation of loyalty to the Constitution is required, but religious silence is guaranteed: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Although the office of President is not directly specified and the Presidential oath or affirmation is in Article II (without the phrase "so help me God"), the right of silence clearly applies to the President also. The sudden switch from mandating a Constitutional loyalty oath for state as well as Federal officials to limiting the right of religious silence solely to Federal officials prefigures the original restriction of the First Amendment (and other fundamental rights of the Bill of Rights), until incorporated as against the states by the courts through the Fourteenth Amendment, as rights only as against the Federal government. The Massachusetts Constitution was in some aspects a model for the U.S. Constitution, but it guarantees no right to be silent. As part of his oath of office, the governor was required to affirm or swear in front of both houses of the legislature; "I believe and profess the Christian religion, from a firm persuasion of its truth...."[1] Religious tests for office were found in

[1] John Adams, "The Report of a Constitution, or Form of Government, for the Commonwealth of Massachusetts," in *The Revolutionary Writings of John Adams* (Indianapolis: Liberty Fund, 2000), 311. Adams wrote the Massachusetts Constitution, including the religious test oath, except for the provision of tax support for religion and the special status accorded Harvard, which were added in committee. At the age of 85, Adams was elected to the Convention to revise the Massachusetts Constitution and tried unsuccessfully to secure complete religious freedom. See David McCullough, *John Adams* (New York: Simon & Schuster, 2001), 631.

most states, and it seems that there was a religious test for citizenship in Rhode Island, which barred Jews and Catholics.[2] Originally neither the Article VI right of silence nor the First Amendment protections sheltered individuals from speech imposed by the several states.

Although clearly there is no Constitutional or legal barrier to a non-Christian or even an atheist becoming President (or Governor of Massachusetts now), current public opinion, operating (in Mill's phrase) "a powerful police"[3] serves as an effective religious test for public office. It is noteworthy that elite public opinion (at least) at the Founding was so different that the only objection to prohibiting religious tests was that it was unnecessary to state the obvious: "Mr. Sherman thought it unnecessary, the prevailing liberality being a sufficient security against such tests."[4] Sherman's mild objection (the vote was unanimous) also indicates that the rejection of religious tests, though confined to the federal level as was the First Amendment, rested on grounds of liberal principle or sentiment, not only on states' rights grounds. James Madison considered the privacy of religious and moral belief absolute, and proposed as part of the Bill of Rights a completely general freedom of conscience (broader than freedom of religion), binding the states explicitly.[5] Madison even objected to including questions concerning religion in the census.[6]

However now the force of public opinion allows no effective moral right of silence regarding religious belief for those who realistically hope to achieve public office. Every Presidential aspirant is subjected to a public inquisition regarding religious belief. In the Republican Presidential primary campaign of 2008, Gov. Mitt Romney's Mormon faith was a subject of probing inquiry. And Senator Barack Obama had published a book that included an account of his becoming a professing Christian. His choice to give a detailed account of his religious conversion fits the ever increasing culture of self-expression and destruction of innerness. But the culture demands even more disclosure. During the 2008 campaign *Newsweek* had a cover story on Senator Obama, "Faith & Politics: What He Believes."[7] The article included an interview with a series of intrusive questions about the religious life and beliefs of Obama and his family. The final, most invasive question was: "Is there a time you have had to make a decision that was important and you called on God? Can you walk us through that?" Obama replies, "Well, that's pretty personal.

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[2] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 33, 325.

[3] John Stuart Mill, "On Liberty," in *The philosophy of John Stuart Mill*: *ethical, political, and religious*, ed. Marshall Cohen (New York: Modern Library, 1961), 278; for a clear account of the role of social coercion, see 221–225.

[4] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W. W. Norton, 1987), 561.

[5] Amar, 22. Madison's "prophetically numbered Fourteenth Amendment" also protected freedom of the press and trial by jury from infringement by the states. It died in the Senate.

[6] Ralph Ketcham, *James Madison: A Biography* (Charlottesville: University Press of Virginia, 1990), 165.

[7] "Faith & Politics: What He Believes," *Newsweek*, July 21, 2008.

I'm not sure I'd want to walk you through that."[8] He then, all too predictably, answered the inquisitor, citing his decisions about marrying his wife Michelle and running for President. Our political culture allows for no space for truly inner, private belief on the part of office-seekers.

In contrast, despite the likelihood that he added "so help me God" to the Constitutional oath, the religious beliefs of George Washington are still in doubt. Washington seemed to resent the drawing of inferences about his inner beliefs even from his publicly observable behavior within the context of religious practice. When the Washingtons' Episcopalian pastor remarked in a sermon that it was an unfortunate example that, unlike Mrs. Washington, the President never remained for Communion, he simply stopped attending on Communion Sundays, "as he had never been a communicant, were he to become one then, it would be imputed to an ostentatious display of religious zeal, arising altogether from his elevated station."[9]

It seems unlikely that George Washington (or several other Founders) could hold office in the very different popular culture Barack Obama inhabits and accepts.

3 Political Silence

Just as those entering into a business contract cannot claim a right of silence vis-a-vis parties to the contract regarding their joint enterprise, so those seeking or entering political or judicial office cannot claim a right of silence regarding their official obligations. But does this disclosure requirement also apply to ordinary citizens – is citizenship itself a kind of minimal public office in the relevant sense, with official obligations? Article VI of the U.S. Constitution implies the liberal distinction necessary for individual liberty: express commitment to political and legal obligation can be required of officeholders, but religious commitment is a private matter even for them.[10] The question then is about the penumbra of the concept "public office" in the context of a liberal society. Again Article VI offers the key, for it uses a combination of general terms ("all executive and judicial Officers, both of the United States and of the several States") and synecdoche (listing "Senators and Representatives before mentioned"). These are positions exercising and administering the coercive authority of the polity.[11] Once the Article VI right of religious

[8] Ibid, 320.

[9] William B. Sprague, *Annals of the American Pulpit; or Commemorative Notices of Distinguished American Clergymen of Various Denominations, From the Early Settlement of the Country to the Close of the Year Eighteen Hundred and Fifty-Five*, v. 5 (New York: Robert Carter & Brothers, 1861), 394.

[10] Separately from American constitutional issues of religious liberty, Mill explains the irrationality of injecting religious belief into any oath taking in "On Liberty," 219–222.

[11] Also note the list of offices in Amendment XIV, Section 3. I explain the relevance of this Section to the question of citizen oaths below.

silence is extended to hold against the states, both federal and state offices must be construed as implied by Article VI.

Citizenship is not a public office in a liberal society, rather it is a status usually acquired at birth. Unlike in totalitarian societies, citizens are not instrumentalities of the state in the job of law enforcement or administration. The Constitution's omission of oaths of allegiance for citizens *qua* citizens stands in stark contrast to the constituting organic laws of most of the American colonies, which required shared communitarian values of all citizens or even all residents. For instance, Maryland required an oath of allegiance of all inhabitants of 18 years or older; a first refusal was punished with imprisonment, and a second refusal with forfeiture of property and banishment.[12] As Donald Lutz commented, "Colonial America was flooded with oath taking as a primary means of achieving compliance, membership, citizenship, and accountability."[13] Lutz has argued that despite the absence of a citizenship oath in the Constitution, there is an implied oath on the part of every citizen: "Today we still use an oath to produce citizens and to activate the formalities of citizenship (such as oath-taking in court), so in a real sense we still view our Constitution as equivalent to a covenant because it rests on the actual or implied oaths of all citizens. That is, because new citizens are required to take an oath to uphold the Constitution, it must be assumed that citizens born here did something that was equivalent to an explicit oath at some point in their life."[14]

Lutz's view ignores the deliberate decision of the framers to omit any reference to God anywhere in the Constitution, even the Preamble – for only invocation of a higher authority than the people can, according to Lutz, make a covenant.[15] And his argument turns the deliberate omission of an oath of citizenship into an oath-taking by every citizen. But the whole point of oaths is that they are express, not tacit or implied.

Lutz is in error in reading an oath-taking into citizenship not only because the framers deliberately chose not to adopt the citizen oaths found in many state constitutions, but also on the strongest of grounds: the Constitution itself includes black-letter law that draws a bright line between those who have voluntarily taken an oath of allegiance to the Constitution of the United States and those who have not, even if they are natural born citizens. Section Three of the Fourteenth Amendment prohibits rebels from holding Federal or state office only if they had once taken an oath to support the Constitution. Even in the immediate aftermath of a bloody civil war, Americans in the mid-nineteenth century maintained the Lockean and liberal distinction between implied obligation to obey ordinary law, applicable to all residents and even visitors, on the one hand, and, on the other hand, express political allegiance, that requires an individual's voluntary act of undertaking

[12]Donald S. Lutz, ed. *Colonial Origins of the American Constitution: A Documentary History,* (Indianapolis: Liberty Fund, 1998), 303–304.

[13]Ibid, 227.

[14]Ibid, xxxvi–xxxvii.

[15]Ibid, xxxv–xxxvi.

the obligations of loyalty. Lutz seeks to find a continuity between the illiberal thought of the early American colonies and the decidedly Enlightenment, although still evolving, liberal thought of the Framers. Those taking an oath of allegiance to become naturalized citizens have voluntarily placed themselves in a position requiring speech regarding political allegiance, but even in this special context the current legal interpretation of the impact of the oath is that it does not affect dual citizenship, although the words seem to require sole allegiance to the U.S. The citizenship oath, like the oaths of jurors, witnesses, affiants, and members of the military, is interpreted to mean only that the person accepts the legal obligation relevant to the particular matter at hand, although the citizenship oath is about a very wide matter: whatever is encompassed in the legal obligations of citizenship.

In the U.S. the legal obligations of citizenship do not include participation in political life; even voting is optional. The contrast with illiberal polities of the past and present is immense. Individual liberty extends to political loyalty. Legal obligation is imposed regardless of personal belief, but even self-conception as a citizen is optional. This is most obvious in the case of religious groups (such as the Amish) who conscientiously confront the political and legal structure with silence. But the ground of the silence is none of society's business. For the citizen *qua* citizen, setting aside public offices within the polity, political silence and religious silence are much the same. This is in a sense an exact reversal of Lutz's argument, for he seems to see political loyalty as a kind of religious obligation, and he hears everyone as swearing (or affirming?) even in the case of chosen silence. Individuals are never allowed true silence, for express oath is read into the silence.

The insertion of the Pledge of Allegiance into our culture was part of a reversion to the less than fully liberal past. The Pledge is a kind of back door citizen oath, like those state citizen oaths the framers chose to omit. The Pledge heralded a notable change in public culture from the generation that experienced the Civil War and ratified Section 3 of Amendment XIV, with its clear rejection of the idea that full loyalty and allegiance are established merely by birth. The Pledge began as part of a movement directed specifically at inculcating loyalty in children – who, on Lockean and liberal views, are not competent actually to commit to full allegiance. (Because children were being indoctrinated, in Virginia white public schools in the late 1950s and early 1960s, controversy surrounded not the phrase "under God," but rather "one Nation…indivisible.") The Pledge was originally entirely secular-nationalistic, advocated in the 1890s by Francis Bellamy, a Northern Baptist minister and a socialist with communitarian rather than liberal sentiments. The illiberal reversion grew remarkably worse with the addition of "under God" by a Congressional statute of 1954, rather obviously in violation of the First Amendment ("Congress shall make no law..." surely bars Congress from legislating anything about God). The addition of the reference to God was precisely intended to block the socialist and secular-nationalist piety, in effect reverting to the early Colonial covenanting under God's authority. Although Lutz seems mistaken to me about the Framers, he certainly correctly echoes the recent and current American piety.

We liberals recoil from both required invocations of the deity and group expressions of secular solidarity, when performed under social pressure by the whole

society or all members present. Such coerced expressions of conviction violate the liberal principle that matters of conscience lie outside the public realm. And genuineness of individual conviction is undermined by fully public proclamation. Among the earliest expressions of this liberal distaste is one found in Matthew 6:5: "And when you pray, you must not be like the hypocrites....when you pray, go into your room and shut the door."[16] This passage requiring privacy and denouncing public prayer immediately precedes the Lord's Prayer (the "Our Father"), which many who consider themselves Christians want to have inserted into such public occasions as high-school football games. The distance between public prayer and the Pledge of Allegiance (before or after the addition of "under God") is significant, but not infinite – the issue of state coercion or social pressure to express belief arises for both. This concern to exclude state authority from expression even of secular belief led Justice Robert Jackson to base rejection of mandating the Pledge (as yet without "under God") not upon freedom of religion, but upon freedom of expression.[17]

Our courts have allowed affirmative loyalty oaths for public employees, although oaths requiring specific denials (e.g., "I have never been a member of the Communist Party...") have been ruled unconstitutional – silence has been vindicated to a certain extent.[18] However, the crucial distinction has been largely ignored: some

[16]For a subtle commentary, see William Ian Miller, *Faking It* (Cambridge: Cambridge University Press, 2003), 9–13. Mill's point about requiring oath takers to express belief in God is also pertinent: only those (but not all of those) who take expressions of belief seriously will resist the pressure to conform in public, and so actual belief cannot be authenticated by public conformity, where reputation and other benefits and burdens are at stake.

[17]*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Despite this decision, attempts to coerce expression of belief through the Pledge continue, modified with various opting out clauses that purport to make the legislation consistent with *Barnette*. See *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008). The court considered a Constitutional challenge to the Florida Pledge of Allegiance statute, section 1003.44(1), Florida Statutes ("Pledge Statute"), which applies to students at all grade levels from kindergarten to twelfth grade: "The pledge of allegiance to the flag … shall be rendered by students... The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes….". The court held that a straightforward construal of the statute's requirement to stand at attention applied even to those excused from the pledge, and that this severable provision therefore violates the First Amendment. The court did not invalidate the parental authority provision as such, but left open the possibility that as applied to older students the balance might sometimes tip toward protecting the student's separate right to freedom of expression rather than the parental right to rear children. From my perspective, the opting out procedure places both the student and parents in the position of having silence taken, correctly or incorrectly, as an expression of disloyalty. Also see *Wooley v. Maynard*, 430 U.S. 705 (1977), holding that New Hampshire violated the First Amendment by requiring all automobile vehicles to bear license plates with the state motto, "Live Free or Die." The opinion relied upon *Barnette*, and proclaimed that the state is not authorized to require that individuals profess ideological views they find unacceptable.

[18]*Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

public employees are involved in the application of law (Constitutional and other) in a direct way, while others are really only citizens who happen to be getting paid by government or a government agency. My distinction overlaps F. A. Hayek's distinction between the exercise of the state's coercive powers and the provision of services such as education by the state.[19] A math instructor is not engaged in a different official role in a state university than she is at a private university. A secretary dealing with the administration of toll plazas in the transportation department is not in an official public role vis-a-vis the law and Constitution (federal or state) as is an official (or perhaps even a secretary) in the Justice Department or the State Attorney's office. Oaths (or affirmations) in a liberal polity must be limited to the specific role, and being paid from the public purse is not the same thing as having an office under the public trust in the sense that requires express constitutional loyalty. And so, even without considering issues of academic freedom or the right to disseminate opinions, the right of silence should be sustained against loyalty oaths such as those imposed upon all state employees by the California Constitution.[20] Those employed by the state merely to render services that in kind are the same as found outside of government are merely citizens, and, *contra* Lutz, Americans are not generally subject to citizenship oaths. Citizenship is not a public office in liberal societies.

4 The Ethos of Individual Liberty

The development of the ethos of individual liberty occurred through a series of exclusions, primarily the exclusion of the state from an increasing list of topics. The first exclusion was the realm of religious belief, but then came private self-regarding conduct, and eventually relationships such as family structure. The exclusion also extended from the formal coercion of the state to the sanctions of public opinion when their force approaches that of the state's authority. It is misguided though understandable that liberal philosophers and liberal legal theorists seek some account of the value which such exclusions promote. These proposed values range from utilitarian to Kantian: the exclusions promote long-term social benefits, or protect an autonomous self seen as an ultimate value. Mill offers a complex account, utilitarian in its teleological structure but with the distinctive view of human happiness as requiring an active use of intellect, imagination, and wide sympathies.[21] Mill's value

[19] Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 257.

[20] In 2008 California State University, Fullerton reversed its decision to terminate the employment of Wendy Gonaver, who had refused to sign the loyalty oath unless she was allowed to attach a pacifist qualification. In a compromise the University allowed a revised statement to be attached. On my view, no oath is reasonably required of such employees, with or without attached qualifications.

[21] Mill, "Utilitarianism," 331–335.

theory has more affinity with Aristotle than Bentham.[22] Thus a society of contented passive ciphers wallowing in unity and solidarity and dependent upon a benevolent totalitarian state for their "happiness" might have some appeal for a Benthamite, but it would not serve as a picture of human happiness or well-being for Mill.

The exclusion of the state's power and of required social solidarity from the spheres of self-regarding conduct and the sphere of thought and discussion creates space for individuality as "one of the elements of well-being."[23] But surely Mill here argues in a circle: if individuality is not seen as independently valuable, then nothing but the promotion of utility remains as the point of fostering individuality; including individuality as a separate component of utility, regardless of its hedonic value, clearly would make the argument circular. Precisely because of its circularity, Mill's account of the value of the exclusion is the best available: the exclusion is part and parcel of the liberal valuing of individuality, for without a sphere excluding social and political power there can be no individuality. Of course those who find liberal polities and societies distasteful will reject the exclusions – and they may argue against liberal society by invoking communitarian values that compete with those advanced in the unnecessary liberal assertion of values promoted or protected by the exclusions. The battle between conflicting ultimate pictures of the best human life in the best polity can have no victor except through historical development. No philosophical argument can settle the matter, for everything depends upon responses to competing pictures of the good society. Perhaps, as Mill indicates,[24] the preference for individuality comes down to aesthetic rather than strictly moral judgment: an aesthetics of liberty, glorying in individuality, independently valuable as an element of human flourishing.

5 An Atheist Utopia and the Rejection of Homogeneity

When I imagine any society of full conformity to any detailed way of life I recoil with distaste. Imagine a contented atheist society that fully shares devotion to the common good conceived in a secular manner. Unlike the standard dystopias of *Brave New World* and *1984*, this society is democratic and there is no ruling elite. And let us assume for the sake of argument that this imaginary society gets everything "right," so that the shared views are either the only correct ones or among equally acceptable views. There are no worries like those found in Mill (and recently in Frederick Schauer)[25] that society or the state will err when it requires conformity of

[22] Consider, for example, Mill's reference to "the judicious utilitarianism of Aristotle," in "On Liberty," 213.

[23] Ibid, 248. Mill explicates the idea of the intrinsic good of individuality as a component of well-being throughout the chapter, but especially in the first nine paragraphs: 248–258.

[24] Ibid, 257.

[25] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1983), 86.

either conduct or thought and expression. Two of Mill's three arguments for freedom of thought and expression depend upon fallibility, with the third depending upon the need to understand fully the meaning of true beliefs. So let us also assume that devil's advocate arguments are widely used in this utopia to bring home to everyone the full meaning of the truths the society inculcates. There are in this utopia, however, no exclusions of political or social authority over the individual.

Everyone is held responsible to society as a whole for every aspect of life, including even thought and discussion. Children are reared into full social responsibility, both at home and in the unified state education system. Allegiance is frequently pledged to the state and to the society: "I pledge allegiance to the flag and to our society of equal persons, one for all and all for one. I respect everyone equally and I shall do my best for the common good, so help me All." The creed of responsibility, social morality, equality of persons, and community solidarity is inculcated at every opportunity. Seldom does anyone need to be reminded not to express objectionable or divergent opinions regarding such matters as race, religion, sexual equality, sexual orientation, patriotism, family structure, the point of human life, or any other socially delicate matter.

This society has over time seen a withering away of religious belief, and it wears its atheism lightly – but openly. The occasional expression of curiosity regarding religious beliefs is not seen as itself a sign of distress – the history of religion, like the history of witchcraft beliefs or pre-Columbian Mayan beliefs, has a certain odd interest. But an expression of actual religious belief is seen as a sign of distress – the person needs help, and, of course, help is offered freely. Anti-supernaturalist, social solidarity political correctness achieves the same level of backing through the social sanction as the rejection of the "N word" (except when used in self-reference) in our present society. This picture of the best society disgusts liberals like me just as much as a picture of a fully homogenous religious society that recognizes no exclusions. Although a full account of the limits to social intervention in individuals' lives is beyond my scope, I argue below that the right to silence regarding moral, religious, and political convictions can be vindicated as a crucial exclusion of social control: without this right individuality itself is endangered.

6 Silence as An Easy Absolute

Freedom of the press began as simply a cessation of the licensing of publications – no state imprimatur required, just as no episcopal imprimatur. There was no affirmation of the value of allowing the resulting publications, only the decision to exclude the state from the process of publishing. Publishing became private – almost an oxymoron – just as public worship had become a private matter – another seeming oxymoron. There were no debates about a protected sphere of publishing, in contrast to the prolonged debates regarding religious toleration and privacy of religious belief. This difference rests on the fact that publishing is as clear a case of a fully public act as any possible. Publishing not only can affect public life, authors

and disseminators often intend precisely that. Unrestrained freedom of the press can and does undermine the fairness of jury trials. Impact upon the public sphere is also found when religious belief leads to religious practice, especially when there is proselytizing or advocacy of policy. Thus in Britain freedom of belief, except for officeholders, predated freedom of openly public worship. Roman Catholic and dissenting Protestant believers (as well as non-Christians) were even later burdened with disabilities regarding office-holding (enforced by various religious tests—required speech) because of fear of conduct opposed to the Crown and its established Church. Although lasting longer than was factually reasonable, this distrust originally had a firm basis because of actual attempts to destroy the established order. As F. A. Hayek wrote, "Since there is no kind of action that may not interfere with another person's protected sphere, neither speech, nor the press, nor the exercise of religion can be completely free. In all these fields (and, as we shall see later, in that of contract) freedom does mean and can mean only that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all."[26]

But silence is another matter entirely. The right to maintain silence about one's beliefs and feelings can be – and I shall argue should be – absolute. Here we need Joel Feinberg's distinction between the scope and the "incumbency" of a right.[27] The scope of the right of silence is circumscribed by the rights of others and the legal system to one's testimony regarding allegations of criminal wrongdoing by others and civil wrongs even concerning oneself. The testimonial oath or affirmation merely signals that testimony is given under penalty of perjury. Testimony about what one has perceived or done is indeed testimony about beliefs, but not in the relevant sense of "belief." "I believe in God the Father Almighty...." or "I believe in the rule of law and the Constitution" and "I believe the car fleeing the scene was a red Saab convertible" are not about beliefs in the same sense. In certain clearly defined contexts a liberal society requires that there be speech, not silence, about everything except one's beliefs and feelings regarding moral, political, or religious convictions. There is an additional exception to the scope of the right of silence where someone undertakes an office governed by legal rules and expectations: oaths or affirmations are reasonably required as long as they do not go beyond fidelity to the relevant rules. But within the circumscribed scope of the right of silence, the incumbency of the right is absolute: there is no weighing against other interests or even other rights. There are in private life only very rarely impacts upon the rights of others, and when there are the centrality of the right of silence regarding fundamental convictions argues for its vindication.

On the other hand, in the public sphere there would admittedly be significant impacts upon the rights of the public, especially voters, if the public had a right to know about the religious convictions of those seeking public office. But there is no

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[26] Hayek, 155.

[27] Joel Feinberg, "The Concept of an Absolute Constitutional Right," in *Freedom of Expression*, ed. Fred R. Berger (Belmont, CA: Wadsworth, 1980), 83–84.

such general right to know about religion, for religion as such lies outside the realm of civil interests. Since political convictions and policy commitments are relevant to public office, religious views that impact the political conduct of candidates or officials can be expected to surface indirectly as the political or policy commitments are probed and explained. For example, views concerning the legal right to abortion are relevant for specific offices. But direct probing of the connection between the political or legal view and the individual's religious belief should be considered as off limits as direct questioning about the private sexual life of a candidate or official taking a stand on same-sex marriage.

7 Loud Silence

In addition to the assertion of the public's right to know, there are at least two salient objections to a clearly circumscribed yet absolute right of silence, and I believe both can be rebutted. The first objection is that silence sometimes constitutes speech, and then the distinction between silence and the active dissemination of belief collapses. An illustration of such loud silence is Thomas More's silence regarding the oath accepting the Act of Succession, which stated that King Henry VIII's marriage to Catherine of Aragon was unlawful. More carefully remained silent about why he would not take the oath. In Robert Bolt's *A Man for All Seasons*, More says, "in silence is my safety under the law."[28] In a later passage, Cromwell exclaims, "This 'silence' of his is bellowing up and down Europe."[29]

Let us update the illustration. A candidate for President is asked whether he believes in God, and he responds, unusually in our popular culture, with silence or a polite rejection of the question: "I'm not going to answer questions about my private religious beliefs." Such silence would indeed be interpreted, correctly or incorrectly, as expressive of belief, or rather disbelief. But in liberal societies, unlike Tudor England, the exclusion of public opinion and the law from this sphere of protected silence must be absolute in principle, though implementation can only be partly successful. At least in the fully public sphere of the legitimate communications media, religious belief as such should be considered a private matter. Further, a fully liberal social ethos would mount a "powerful police" against such questioning. Just as anyone using the "N" word in asking a question would meet with universal public outrage, so should anyone publicly asking intrusive questions about religious beliefs in a context where silence will inevitably be taken as speech. (Of course, if the topic has already been introduced by the person himself, the questioning may not seem intrusive. But as in the example above of then Senator Obama, there is still room for restraint in detailed questioning.)

[28] Robert Bolt, *A Man for All Seasons* (New York: Vintage Books, 1990), 95.

[29] Ibid, 98.

As I have indicated, there already is such a sphere of silence regarding sexual behavior. Unless some incident has already become public, no one directly asks, without basis, whether an office-seeker is faithful to his or her spouse. If the question were directly asked, silence would be taken as a confession – but the inquisitor would be subject to condemnation. The same silence, unless there is a publicly known prior incident, surrounds sexual orientation. On the other hand, since our law prohibits racial, ethnic, sexual, and religious discrimination, silence regarding these matters, like silence regarding loyalty to the Constitution, is not privileged. The only reason "Are you a racist?" is not normally a legitimate question is that it seems to imply some reason to suspect that the office-seeker might actually be a racist.

8 Dangerous Silence

The second objection is that sometimes a person's beliefs are predictors of disastrously harmful behavior, such as mass murder. But those posing a danger surely will not be silent if asked by authorities about their fundamental beliefs. They will usually lie. Oaths or expressions of loyalty are worthless in ferreting out those planning to do great harm out of fanatical religious or political beliefs. Not only speech but truthful speech must be somehow coerced, and that raises the issue of torture. Torture is the ultimate violation of the right of silence. The question whether torture to uncover factual information can ever be justified in "ticking time-bomb" scenarios is beyond my scope. Forcing confession through torture of moral, political, or religious beliefs as such cannot ever be justified in a liberal society, for such beliefs lie outside the realm of civil interests.

9 Conclusion: Silence is Golden

It can be argued that in the U. S. the Constitutional rights of freedom of speech and the press are also absolute, once the scope is circumscribed and such matters as defamation and incitement are set aside. I do not here enter into that debate. My point is that much can be said against as well as for a free society having such a Constitutional provision of absolute freedom of speech and press within the defined scope, a scope that must surely in U.S. Constitutional law privilege politically relevant speech that is racist, sexist, or bigoted, as clearly within the protected core. A liberal society (indeed as do most existing liberal societies) may choose to weigh in the balance the devastating social impact of hate speech or group defamation, or the rights of defendants to a fair trial, always guarding against the misuse of state authority for partisan purposes or to stifle legitimate dissent. There is great danger, however, from such concern with general social impact, rather than harm to individuals or public institutions such as courts. In arguing for an extensive right of liberty, Mill uses a *reductio* in response to the objection that so-called self-regarding

conduct such as drinking alcohol invades social rights because of various impacts upon the community, including the impact of impeding the moral development of others. This theory of social rights, argues Mill, "acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them: for the moment an opinion which I consider noxious, passes any one's lips, it invades all the 'social rights' attributed to me by the Alliance."[30] Mill seems to consider the right of private belief almost nothing, or nothing of worth. But the evolution of individual liberty was impossible without the right of silence in the face of a disapproving state and society. Mill did not in practice always consider the right of secret belief worthless, for he agreed to stand for election to Parliament only on condition that he not be questioned regarding his religious beliefs.[31]

The right of silence is an easy absolute, for unlike an absolute freedom of speech and press, it does not provide a significant opening for social impact arguments. Once circumscribed in scope, silence is a better candidate than dissemination for absoluteness in a liberal state and a liberal social ethos. Silence is, or ought to be, golden. Out of such protected silence, genuine free expression and self-revelation can arise.

[30] Mill, "On Liberty," 289.

[31] Marshall Cohen, "Introduction," in Ibid, xxxii.

Speaking Freely

Wade L. Robison

Abstract We tend to think of freedom of speech in grand political terms, as the freedom to criticize and protest policies and politicians. But a society that honors freedom of speech ought to honor it in all the relations citizens may have with one another, whether private, professional, or civic. Freedom of speech ought to permeate a society. A condition of our having such freedom is that we choose whether, when, and what we shall say as well as to whom we say it. We thus have a modicum of control over what others know about us and what we believe, and a condition for those conditions is that we have a right to privacy. There is thus a connection between the right of free speech and the right of privacy, a connection signaled by our having the right to speak freely. Getting clearer on the relations between speaking freely and privacy in our personal and professional relations with each other will help us clarify the Constitutional relations between freedom of speech and the right to privacy as well as the Constitutional weight freedom of speech and the right to privacy ought to have.

Keywords Right of privacy • Right of privacy and free speech • Right to speak freely

Justice Douglas argued that the Constitutional right to privacy is to be found in the "penumbra" of the Bill of Rights. The word has an unfortunate connotation. In an eclipse, the shaded space between the full light of the sun and the full darkness of the moon is a penumbra, and using that term to describe the right to privacy makes it sound as though the right has a shadowy existence – as though it were not fully there, as bright as, say, freedom of speech. What Justice Douglas meant is that the right is not in the Constitution explicitly, but is implied by rights that are there explicitly. We cannot just look at the Bill of Rights and see it there,

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but must work on the Bill of Rights to determine what those rights imply, what is in the shadows, as it were.

Yet if we put it that way, and in addition call what we find part of the "penumbra" of the Bill of Rights, we make the right to privacy sound as though it were a secondary right, without much Constitutional weight, if any. If it is only an implication of freedom of speech, some may say, then we can have freedom of speech without having a right to privacy. We need not recognize every implication of every right, the crucial premise would run.

That line of reasoning would be a mistake, however. If one right is a necessary condition for another, then we must have that one right if we are to have the other. The right that is a necessary condition for that one right is a right without which that one right cannot exist. Put another way, if we can show that the right to privacy is a necessary condition for freedom of speech, as I shall argue it is, then we are showing that without a right to privacy, we cannot have freedom of speech.[1] The right to privacy turns out to be a very weighty right indeed, not in the shadows, but a condition for having a right that everyone recognizes, freedom of speech. Working out the implications, in other words, will tell us not just the relation between the right to privacy and freedom of speech, but also their Constitutional weights vis-à-vis the other.

I shall argue that freedom of speech has little value if we are not able to speak freely and that speaking freely requires that we have a right to privacy, a right that at the least enables us to control who hears what we say.[2] I shall start with some of the conditions that are necessary for freedom of speech and for speaking freely, beginning with issues that arise in the personal context. We shall draw lessons from that context which we will find helpful when we return to the political context.

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[1]For an excellent explanation of how we justify necessary conditions, see Robert Paul Wolff, *Kant's Theory of Mental Activity* (Cambridge, M.A.: Harvard University Press, 1963), 52–53. Wolff makes several points that are of importance for what follows. We might think that if a is a necessary condition for b, say, then we must show that if we have a, then we have b, but the opposite is true. A necessary condition is to be deduced from, implied by, what it is a necessary condition for. So we start with b and show that b implies a. That may seem counterintuitive, but it is important to be clear on the matter since if we were to show that a implies b, we would be showing that a is a sufficient condition for b: if we have a, then we have b. What I shall be arguing is not that if we have privacy, then we have freedom of speech, but rather that if we are to have freedom of speech, we must have privacy.

[2]I shall use as examples only those situations where we actually speak, putting to one side other situations where we communicate through signs, or gestures, or anything else. Since anything can be a sign, freedom of speech as a generic, not Constitutional, concept obviously covers anything that is used to convey meaning – symbols, a raised middle finger, anything at all. I want to bypass the complications that may arise from considering other forms of communication besides verbal ones. I do not think that exclusion will taint my analysis. In regard to anything's being capable of being a sign, see Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics* (Boston, M.A.: Charles C. Little & James Brown, 1839), reprinted in the *Legal Classics Library* (New York: Gryphon Edition, 1994), 14ff.

1 Speaking Freely

Freedom of speech is not identical with our being able to speak freely. We can readily find ourselves in situations where we maintain our freedom of speech, but cannot speak freely. We want to talk with our spouse, for instance, about a matter of some importance, but cannot speak freely when one of the children enters the room. We want to tell a political joke, but cannot because the person who always gets upset at such things walks up just as we begin. Such examples are commonplace, and they illustrate three important points about our freedom of speech.

First, it is a standing condition. If we have it, we have it even if we are unable to speak freely or are having trouble speaking freely. It stays with us, as it were, despite difficulties we may have in being able to say what we want to say. If I am continually interrupted by someone who will not let me finish my sentences, but insists on telling me and everyone else what I am about to say before I have said it, I still maintain my freedom of speech. It is just that exercising that freedom is not as easy as it could be.

Second, though freedom of speech is a standing condition, it has little value unless we are able to speak freely. Indeed, its value will disappear if I am never able to speak freely.[3] I can hardly be faulted for at least feeling that I have been denied the freedom to speak if the person keeps on completing my sentences and never allows me to get out what I had intended to say. There are many different kinds of constraints on our being able to speak freely, social and personal as well as political, and if a constraint of any sort is persistent and continuous enough to preclude our being free to say anything, it will come off as a hollow joke for someone to tell us that freedom of speech is a standing condition, standing by while we are unable to get a word in edgewise. "Enough is enough," we want to say, and if the interruptions continue so that it becomes impossible for me to say what I want to say in that particular context, then I cannot be faulted for feeling that I have lost my freedom of speech – in that context at least. Freedom of speech and our capacity to speak freely are not independent of one another. Denying our capacity for speaking freely in some context denies our freedom of speech in that context if sustained over a long enough period of time, and if I am never able to speak freely, then I do not have freedom of speech.

Third, our capacity to speak freely depends upon our having a modicum of control over five different variables that mark that capacity[4] – whether we speak, when we speak, what we say, how we say what we say, and whom we say it to.

1. Whether we speak – The right against self-incrimination is a Constitutional right, and torturing someone to compel testimony is an obvious instance of denying a person's right to remain silent in such a situation. Being forced to speak prevents us from speaking freely – our freedom to control whether we shall speak or not.

[3] See in this regard Alan Rubel, "Privacy and the USA Patriot Act: Rights, the Value of Rights, and Autonomy," *Law and Philosophy* (2007) 26: 119–159.

[4] It is an interesting question, though beyond the scope of my concerns in this paper, what degrees of control are necessary and how different degrees and forms of control impact our capacity to speak freely.

Being denied speech – by a gag, for instance – similarly prevents us from speaking freely. Even if we do not wish to speak, gagging, like being tortured to speak, takes away our capacity to control whether or not to speak, and it is the lack of control over whether we are to speak or not that precludes our being able to speak freely. When we are compelled to speak or prevented from speaking, we have then lost our capacity to speak freely.[5]

2. When we speak – The same sort of impediment to our speaking freely arises regarding our choosing when and when not to speak. We have all been in situations where we cannot refuse to speak without suffering some harm that we would much prefer not to suffer. A spouse asks, "Did you remember your mother's birthday?" Not saying anything to such a question amounts to saying that, no, you did not remember your mother's birthday. A police officer asks, "Why were you driving so fast?" Not saying anything to such a question is going to ensure at the least that you get a ticket for driving at the speed you were clocked at driving, with no lessening of the charge. Are we then not speaking freely when we do answer such questions? We could choose not to answer. So we might say that we are speaking freely, but a nuanced understanding of the situation would make it clear just how constrained are our responses to such questions.
3. What we say – We do have control in such situations over what we say – if we have the presence of mind and restraint to exercise that control. We could say to the officer, as my 75 year-old mother-in-law said when asked why she was going 81 in a 45 mph zone, "I like to speed." Or we could say, "F--- off!" We could also say that to our spouse when asked about our mother's birthday. This choice of words is not wise for either situation, but it indicates just how free we are in such a situation. We all have examples of situations where we said what we later wished we had not said and did not say what we later realized we should have said, but in either event, we chose to say what we did say. Speaking is not like grunting when being hit. It is not involuntary, and we can exercise control over what we say, whether we do or not.
4. How we speak – It matters enormously how we say what we say. We regulate how we say what we say. I have a public voice that I use for lectures and a different public voice that I use for meetings where I am not lecturing, but discussing with peers some important issue. I have a private voice that I use with my friends and an intimate voice I use with those I am intimate with. If I were to open a lecture by saying, in a very low and, hopefully, sexy voice, a stage whisper, "We have to stop meeting like this," I would get a very different reaction – laughter, I would hope – and project a very different persona, than I would were I to say that to a lover, for instance. If I were to use the voice I use for lecturing when speaking with my wife, I would myself be lectured in turn about how inappropriate was my tone of voice and manner of relating to her. I can modulate my voice, in summary, tailoring it to the circumstances, and that is one form of control I have over my speaking freely.

[5]If our loss of control is permanent, then, as we saw above, we will also have lost our freedom of speech.

5. Whom we speak to – We do not think our freedom to speak freely is harmed in any way by our taking into consideration our audience and by choosing not to say some things to some people that we would say to others. After Obama was elected, I was speaking to a colleague of mine who, I then learned, had grown up in Birmingham, had missed the fire bombing at the church only by luck, and had been in the marches. He said that he wept election night, with joy, with relief, and with wonderment that we had come so far in such a short time. He also said that now he was worried that if Obama failed in any way, people would say, "Well, what did you expect of his kind?" I said, "Well, yes, everyone knows your kind are lazy and dumb." I then added, after a pause, and his laugh, "Obama really proved it with the campaign he ran." That first line is not something I would say to everyone.

Choosing whom to speak to about something, and whom not to speak to, is one feature of the control we can exercise over our speech, and it is no constraint on our speaking freely for us to tailor our words to our audience. We can no doubt all think of situations where we said something to someone we later realized we should not have said, not realizing how that person would construe what we said, for instance. We can also no doubt all think of situations, as I said, where we do not say some things to someone. I do not talk to my mother about my lack of religious belief, for instance. Being able to speak freely does not mean that we say whatever we want wherever and whenever we want to say it. Choosing who hears us and who does not is a crucial variable that conditions our capacity to speak freely.

In summary, if we lack control over whether we shall speak or remain silent, or over when we shall speak, or over what we say, or over how we say it, or over whom we shall say it to, our capacity for speaking freely is certainly diminished and may be denied. The less we are able to speak freely because of a denial or diminution of any of these conditions, the less valuable our freedom of speech. Should we eventually reach the point where we have no capacity to speak freely, the phrase "freedom of speech" will ring hollow. It will become only a phrase, with no bite in it at all.

We shall examine a situation where there is agreement that these variables matter to speaking freely, a professional relationship where speaking freely is normally presumed because of a client's or patient's need to communicate with a professional to get good legal or financial advice or medical help, for instances. We will suppose that for some reason a third party is present and that neither we nor the profession has any control over the presence of that third party. What I want to mirror here is the situation where we know a third party is, say, listening in on our phone conversations. We will see that a change in this one variable – our control over the audience to whom we speak – will reverberate through the other variables as well, making us think more carefully about whether we want to mention this or that, about how we should phrase what we decide to say, about how to modulate our voice if we say it, and about when to say what we need to say. "Perhaps another meeting would be helpful?"

After examining this situation, we will be in a better position to see the relevant relations between free speech, speaking freely, and privacy in our other relations. That in turn will help us understand the Constitutional relations and weight of freedom of speech and the right to privacy.

2 Uninvited Guests

We are all familiar with the confidentiality presupposed in certain professional relationships – physician/patient, lawyer/client, social worker/client, psychiatrist/patient. Imagine a third person sitting in on a meeting I am having with my lawyer about changing my will to cut out someone. Though what I say to my lawyer is prima facie privileged, precluding my lawyer from being obligated to report on what I say, what I say to my lawyer while in the presence of a third party can readily be reported by that third party and by the lawyer as well since the conversation is no longer privileged. That third person is not in a lawyer/client relation that precludes disclosure, and the presence of that third person has prevented my having a lawyer/client relation with my lawyer.

So I may watch what I say, and I am that much the loser for it whether I do or do not. If I do not speak freely, fearful of disclosure by that third party, I hobble the lawyer and so hurt my own interests. The lawyer no longer knows everything relevant to the situation for which I am there, and the advice provided will be correct only by accident. Even if I do speak freely, despite the presence of the third party, the lawyer is not free of the same epistemic problem.

The presence of that third party thus fundamentally alters our relationship. The lawyer will know, and ought to tell me to be sure I know, that having a third party there changes the privileged position of the information I provide. The lawyer will also know, and ought to tell me to be sure I know, that I ought to be chary of providing any information that would harm my interests should it not remain confidential. But the lawyer can no longer be sure that I have been completely forthright – even if I have. Indeed, the lawyer ought to presume that I have not been completely forthright, but have withheld information that I judge would harm my interests. The lawyer's advice may be accurate in such a situation, but the lawyer cannot know that, and neither can I.

What cuts the cord of privileged information is the presence of that third person – the equivalent in professional relations of the situation in Sartre's "No Exit." What is lost in that intrusion of a third party into the relationship is privacy, and it is the loss of privacy that puts my capacity to speak freely at risk and so creates the epistemological problem the professional has and the harms to my interests that may result.

There are at least six different harms here:

- The loss of my capacity to speak freely without risking harm to my interests
- The risk to other interests such as creating a trusting relationship with my lawyer that the presence of that third party has now created
- The less than favorable epistemological situation the lawyer now is in that may harm the interests I had in getting advice
- The loss of innocence of the third party, who now may need to make a decision about what to do if privy to information that would normally be privileged and yet whose telling is important for preventing harm

- The inability now, with the third party present, of the lawyer to keep the information received privileged
- And the harm to my freedom of speech, a freedom now significantly less valuable as a result of the loss of my being able to speak freely

These losses are not peculiar to an intrusion into a lawyer/client relation. Similar harms will occur if a third party is with us in any professional relation. Suppose we are discussing a medical condition with our physician, and a third party, a stranger, is in the room. That third party changes the relation I have with my physician as much as a third party changes my relation with my lawyer. The physician will not know whether I have been completely honest in telling him what my symptoms are. Some symptoms I may think too embarrassing to reveal in front of another person, and so my interests in getting advice from my physician are harmed as well. In addition, that third party is now no longer innocent. The visitor has the burden of knowing what my medical condition is – or, at least, what I have told the physician about my medical condition while in the presence of that visitor. We will find replicated in each situation in which we have a third party present in a professional relation those six harms, or some subset of them, we have just listed.

These harms occur because a third party is present, but the situation does not change if a third party is not physically present, but we know that what we are saying may be open for others to hear. If I am talking to my lawyer over a phone, and there is risk that my phone line or my lawyer's is tapped, then I risk each of those six harms in the unlikely situation that the lawyer is willing to discuss confidential information in a phone call. The harms will not occur if the phone lines are not tapped, but we cannot know that they are not, and so, if we do not want to risk those harms, we must act as though there is a tap. Our capacity to speak freely is as constrained by the risk of a third party's being present as it is by a third party actually being present.

In such professional relations, my capacity to speak freely is sorely compromised. I am free not to say what I want to say. I can be circumspect or remain silent. I can carefully craft what I say, but I have no control over who is listening to what I do decide to say. It is that loss of control that impacts all the variables relevant to my capacity to speak freely – whether or not to speak, when to speak, what to say, how to modulate my voice, and whom to say it to. I am not denied freedom of speech in such a situation, but the conditions I must control to be able to speak freely and so have freedom of speech are themselves so conditioned by the circumstances that my freedom of speech is far less valuable than it could be.

3 How Privacy Enters In

An advantage of looking at professional relations to illustrate how our capacity for speaking freely fares when we lose control over who is hearing what we say is that we can see clearly how privacy relates to our capacity for speaking freely and thus to freedom of speech. For the right to privacy rather obviously enters into such

professional relations. When a third party enters into what was a professional relation between you and your physician, or lawyer, or whatever, intrusion occurs, and intrusion is one of the four privacy torts – intrusion, disclosure, false light, and appropriation.[6] My physician and I were engaged in a private consultation, and now we are not. A third party is there.

Among all the harms that occur from intruding on someone's privacy, the fundamental harm is that the intruder is a voyeur, treating the person as an object to be viewed in the way in which in "No Exit" there is always a third pair of eyes observing the relations between the other two individuals. Intrusion occurs when someone enters uninvited and chooses to remain despite a clear indication that they have intruded. The intruder ignores you as a subject having any say over the matter of whether the intruder should be there or not and so, in that way, compels you to do whatever it is that you are doing under the intruder's glaze.

We have all experienced intrusion. I was once in a toilet stall with a door that would not fasten properly. A man pushed against the door, saw that I was there, and proceeded to lean against the open door watching me as I then finished up, more than a little flustered. This was in France, but was not, I am sure, a French norm. I felt like an object of curiosity, if not an object of prey.

At the core of my discomfort, if I may us a mild word for what I felt, were two harms. First, as I said, I was being treated as an object, something to be viewed and, perhaps, assessed. I was certainly not being treated as a person and not with the respect an autonomous individual ought to command.

The second harm is that I was not free to determine for myself when, whether, and what to reveal to this person. Intrusion means disclosure. The very presence of another person means that you are revealing yourself to that person – how you look, how you handle yourself in this or that situation, and so on. You have no choice at all about revealing yourself. In this case, I had no control over how I presented myself to this person. I was not compelled to speak, and so the issue of speaking freely was not raised – despite the man having learned much about me that I would have preferred not to communicate.

We can now see how the concepts of privacy and speaking freely are connected. I no longer have the capacity to speak freely to my physician, or my lawyer, because my privacy has been denied. The intrusion of that third party takes away my control over who is to hear what I say, and that impacts my capacity to speak freely – if only because I now must be more careful in saying what I want to say. Having privacy in the relation with my lawyer, or my physician, is a necessary condition for my being able to speak freely, or, put another way, if I am to be able to speak freely, I must have privacy.

The same condition applies to relations we have with others in any relationship, professional or otherwise. Having privacy is a necessary condition for our being able to speak freely with our spouses, for instance, about many matters – money,

[6]For a relatively detailed account of these torts and their differences, see my "False Light," in *Liberty, Equality, and Plurality*, ed. Larry May, Jonathan Schonsheck, and Christine Sistare (Lawrence: University Press of Kansas, 1997), 171.

sex, the children: "You spent all the money?!", "So you're saying you prefer that sexual position?", "You think Eric is a real shit of a kid because he takes after me?" If my spouse or I are to be able to say such things, we must have privacy. We cannot subject ourselves on such matters to the gaze, and the judgments and possible interference, of third parties – the kids, our in-laws, our friends. The potential harms are too great.

4 Freedom of Speech and Privacy

We now know that the federal government has been wiretapping for some time at least some, if not all, phone conversations U.S. citizens have with those overseas. We now know that it has the capacity to wiretap any phone conversations at all, even those between citizens within the United States. Indeed, it would not surprise many to discover that the government has been wiretapping everyone's phones for some time, using software to pick out crucial words that may signal a threat to the United States and then listening to the conversations in full. We all know that we should treat our emails as publicly accessible. Records are generally kept of them so that should anyone wish to read them, they can be recovered. It should also surprise no one to discover that the government has the capacity to monitor, and even that it may be monitoring, all emails as they travel the information highway, going through servers over which individuals using email have no control. Were the government to deny it is monitoring, we would be in no different situation. The technology is available, and the supposed interest in national security is always available as a reason for anyone to claim the need – and as a reason for the government to lie when it claims, "We are not monitoring."

So just as intrusion into a professional relation by a third party changes the nature of the relationship, harming our capacity to speak freely, so the potential for intrusion into our phone calls, our mail, and our email harms the capacity we have for speaking freely. Since so much of our contact with others in this technologically rich world is dependent upon instruments of communication that are readily subject to interception, we are faced with a profound loss of our sense of ourselves as autonomous individuals because we are no longer able to decide for ourselves when, whether, how, and what to reveal to others. For that choice depends, rather obviously, on our choosing which others we reveal ourselves to.

It is the potential for revelation that inhibits us. I recently received an email from a student in Iran interested in the work of Michael Bayles and wondering if I could send him a copy of the book on his work that I had edited. I responded that I could, but realized as I was writing my note that it was going to be scrutinized and so thought much more carefully about what I wrote than I would have otherwise. "I'm delighted to help you in the common cause of scholarship" may have a very different ring to it than I intended to someone hunting for coded writing. For another example, a 13-year-old girl was both angry and embarrassed to discover that her 8-year-old brother had printed out the private diary she was keeping on the family

computer – despite promising never to do any such thing – and was reading it out loud to his friends. His parents admonished him and then, when that did not work, put software on the computer to limit his access. He broke through in about 28 min. Even if a new method "guaranteed" to keep him out of her diary were put on the computer, she is now going to be chary of what she writes. It is the potential for revelation that will inhibit her.

The problem permeates our social and civil lives. We reveal ourselves to others in many ways. I am always surprised, for instance, when addressed as "Sir, … " because I keep forgetting that I have gray hair and am, well, older. I look like someone who should be addressed as "Sir, … " by those significantly younger. I have some control over how I present myself to others, but much more control over whether I speak, how I speak, when I speak, what I say, and whom I say it to. I do not whisper sweet nothings to just anyone any more than I would say to just anyone, in any context, "Everyone knows your kind are lazy and dumb." I do not discuss my political views with just anyone any more than I tell my mother my lack of religious belief.

One crucial mechanism through which we create our social and civil lives are those five variables – whether we say anything, how we speak, when we speak, what we say and whom we say it to. We can imagine ourselves in the center of a circle where the closest to us are those with whom we are intimate in that we tell them what we would not reveal to any others. Next are our friends, next our acquaintances, next nodding acquaintances, some of our neighbors, for instance, and next all the rest. We moderate those circles of relations in large measure by controlling those variables of speaking. If I meet a nodding acquaintance and, without more ado, begin to whisper in a very low voice sweet nothings in her ear, she will be more than taken aback. I will have treated her as though she were in some special place in my intimate circle of relations when she is not – and presumably does not want to be. Just so for our civil relations. I reveal myself through my political beliefs as much as through anything else about me, and it is not everyone I tell what beliefs I hold.[7]

Nano-technology has now developed to the point where we can readily imagine nano-microphones.[8] These could be put in household paint, or in clothing, or eyeglasses, or light bulbs, or anything at all that would ensure that they would end up in our homes. They would pick up everything I and those in my household say – from bedroom noises to the toilet flushing to our discussions about our finances and our relatives to the ways in which we relate to our pets. The intimacies of our lives would be open to anyone with access to what we may call nano-phones, and though we might assume that those listening in on our lives would be interested only in some of what may go on in our homes, it would be hard not to constrain our lives in some ways at least. Someone once told me that his young son, six or so, asked if he could watch the man and his wife making love. "Why?" "I'm just curious."

[7]See in this regard Charles Fried, "Privacy: A Moral Analysis," *The Yale Law Journal,* Vol. 77 (1967–1968): 475–493.

[8]The military value of such devices is enormous. They could be planted along paths used by militants or in typical invasion routes to give an early warning to the movement of individuals, tanks, and so on. I would assume that such devices have been developed or are being developed.

The father said no, but also said that thereafter he and his wife always double-checked to see if their son was asleep, locked the bedroom door, and kept things quieter than before on the assumption that it was the noise of their love-making that provoked their son's interest. It was the potential for their son being a voyeur that constrained their relation.

It is easy to see how our relations with our intimates – with how we reveal ourselves to them through what we say, how we say it, and so on – would be affected were such nano-phones known to be commonplace. We would have lost the capacity for speaking freely within our own homes. It would be difficult to say, whatever the intent of those snooping, that our privacy had not been denied.

But if our privacy is being denied, and privacy is a necessary condition for speaking freely, then we have lost the capacity to speak freely when our privacy is denied, and if losing the capacity to speak freely means that the phrase "freedom of speech" becomes hollow, nothing more than a slogan with no Constitutional bite to it, then denying our privacy denies the Constitutional right to freedom of speech in those areas in which the government intrudes on our privacy.

Far from being a shadowy right without much Constitutional heft, the right to privacy is so important that without it we cannot have freedom of speech. Just as we lose the capacity to speak freely when some third party is an uninvited guest in our professional relation with our lawyer or our physician, so we lose the capacity to speak freely when the government is an uninvited snoop listening in on our conversations. It makes no difference if we only suspect, but do not know, that the government is snooping. That epistemological difference makes no difference to the loss of being able to speak freely. We are as constrained by the real possibility of eavesdropping as we are by the real presence of a third party.

The bottom line is the same. We must have an assurance of privacy in our conversations if we are to have freedom of speech, for we cannot speak freely if we cannot be assured of privacy. The privacy is that against intrusion. We should not think it a coincidence, therefore, that the original version of Justice Blackmun's majority decision in *Roe v. Wade* argued that the government had no right to intrude into the private relation between a physician and a patient and thus no right to ban abortion since the decision whether or not to have an abortion is a medical decision, one made by a physician after a private consultation with a patient.[9] Justice Blackmun was arguing that our freedom to choose what medical procedure, if any, to pursue depended upon the government's not intruding into the private relation between a physician and a patient. His original draft changed into what we now have as it worked its way through successive drafts so as to garner the votes necessary for the final decision, but the fundamental thrust of his original argument we find repeated here. Privacy, he argued, is a necessary condition for the right to choose. Just so, privacy is a necessary condition for freedom of speech. It is thus not a subordinate, but a dominant right.

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[9] See Nina Totenberg, "Blackmun Papers Detail Road to 'Roe'," NPR, 5 March 2004, (at http://www.npr.org/templates/story/story.php?storyId=1749005). See also Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon & Schuster, 2005), 198–228, 275–289.

Social Institutions, Transgendered Lives, and the Scope of Free Expression

Richard Nunan

Abstract In addition to their official functions, state-sponsored social institutions, such as prisons and civil marriage, serve a more covert function, fostering and sustaining largely unnoticed social ideology. Because such institutions are to some degree coercive, and because the ideology thus promoted is designed to constrain channels of free expression, First Amendment protection is implicated, and can legitimately be applied to the social institution as a whole (not just as it impacts particular individuals). This view is defended through an examination of the ideological implications of the legal landscape governing marriage, as it affects transgendered individuals.

Keywords Transgender • Transsexual marriage • Marriage and free expression • Institutions and ideology

1 Social Institutions and the Cultivation of Ideology

> Culture produces the illusion of normative reality. Social discourse tells us what's real, and our perception of reality depends as much on that discourse as it does on our senses. We're all peering at that world through a gauze, a haze, a filter – and that filter is ideology. We see not what's there, but what we're supposed to believe is there. Ideology makes some things invisible and makes some things that aren't there seem like they're visible. It's true not just of political discourse, but of everything… Ideology is why people in one era might think their clothes look normal and neutral, but 20 years later they're absurd. One minute striped jeans are cool, the next they're a joke.
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> Melford Kean[1]

[1] David Liss, *The Ethical Assassin* (New York: Ballentine Books, 2006), 89.

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Melford Kean, the title character in David Liss's philosophical novel, *The Ethical Assassin*, functions as an unacknowledged mouthpiece for Louis Althusser's analysis of social institutions as ideological apparatuses. But unlike Althusser, Kean regards even the repressive apparatuses of the state as nurturers of ideology. He draws no distinction between social institutions designed to cultivate/maintain beliefs conducive to social stability, thereby preserving the existing (presumably inequitable) system of property distribution,[2] and state institutions of violent repression, which, according to Althusser, are brought to bear whenever ideological indoctrination fails.[3] Our penal system, for example, which Althusser would regard as a response to the failure of ideology, Kean regards as functioning directly in the service of ideology, in two quite distinct ways.

One important ideological role of our penal system is to convince all of us of the social necessity of prisons as the natural solution to criminal activity, despite their failure to rehabilitate, and despite the fact that this failure is transparent precisely because prisons achieve just the opposite result. Presumably (although Kean does not explain this), we deal with the cognitive dissonance by telling ourselves that most criminals don't *want* to be rehabilitated. If our ideological training ultimately fails us with respect to the rehabilitative argument, we can resort to back-up ideology: retributivist arguments will serve instead.

The second ideological function of our penal system is revealed through a question which Kean poses to Lemuel Altick, the novel's young protagonist and narrator: if, instead of rehabilitating criminals, prisons "turn minor criminals into major ones, why do we have them? Why do we send our social outcasts to criminal academies?"[4] Altick's eventual answer explains how our penal system is as much concerned with the ideological education of criminals as it is with that of the general populace:

> We have prisons, not despite the fact that they turn criminals into more skillful criminals, but because of it… Criminals are people who, for the most part, come from the fringes of society, those who have the least to gain from our culture as it is. They have the most to gain from changing society or even destroying it and replacing it with a new order that favors them. Maybe a better order, maybe not…They go to prisons and learn how to break even more important laws. The next thing you know, these potential revolutionaries are now criminals. Society can absorb criminals fairly easily, revolutionaries less so.[5]

Thus, the second ideological function of our penal system is to transform criminals from potential social revolutionaries into violent psychopaths (or lesser malfeasants, but anarchically self-absorbed ones, not culturally unorthodox visionaries concerned about the welfare of others). The rest of us, meanwhile, have been trained, chiefly through our educational and political institutions, not to regard prisons in such a subversive light. We "choose" to discourage wide circulation of Melford Kean's second account of how this particular social institution cultivates ideology, lest the

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[2] See Louis Althusser, "Ideology and Ideological State Apparatuses," in *Lenin and Philosophy and Other Essays,* ed. Louis Althusser (New York & London: Monthly Review Press, 1971), 127–186.

[3] Althusser, 138, 142.

[4] Liss, 92.

[5] Ibid., 319.

example serve as a catalyst to transform those of us still outside the prison walls into social revolutionaries instead.

Kean's analysis of the transformative function of prisons suggests a conspiratorial self-awareness on the part of state actors foreign to Althusser's account of the essentially unreflective manner in which social institutions coalesce into vehicles for the dissemination and perpetuation of ideology. Kean's subversive picture also seems unlikely to match the historical self-understanding of the architects of penal systems. But Althusser's account of the ideological role of social institutions functions a bit like Adam Smith's invisible hand: we act, both individually and collectively, under color of one set of motives, to achieve an outcome congruent with a very different set of motives. Evolutionary accidents flourish because they prove unintentionally efficacious at increasing reproductive success. The stability of social institutions is similarly contingent on their ability to yield results which promote social stability generally, even when we fail to recognize the true nature of those results. We need no conspiracy of the cognoscenti to explain the flourishing of ideologically loaded social institutions.

Note that social institutions do not have to be state-sponsored to carry significant ideological impact. Ideological impact can be quite serious even when social institutions have virtually no connection with state agents. Fashion ideology, for example, does not confine itself to matters as innocuous as the fate of striped jeans. It has played a critical role in the maintenance of binary gender ideology (the thesis that there are two and only two genders).[6]

2 State-Sponsored Institutions, Ideology, and the First Amendment

An obvious question arises now concerning those social institutions that *do* rely on the coercive power of the state. If, as Althusser suggests, we all go through life wearing ideological blinders that are cultivated and sustained by the various social institutions to which and through which we are acculturated, is social stability worth the price we pay by thus constraining the possible range of ideas which we might otherwise entertain, express to others, and act on? When such policies are state-sponsored in particular, First Amendment free expression rights are implicated.

To some extent, the answer is that we can't help it. Rigorous enforcement of social institutions inevitably forecloses the possibility of seriously entertaining some ideas at all, but *some* core of settled social institutions is necessary for social stability. Thus, even if Melford Kean is right about the ideological training fostered by our penal system, traditionalists might reply that we still have to remove the criminals

[6] See, e.g., Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (New York: Vintage Books, 1995; originally publ., Routledge, 1994), 3, or some of Dean Spade's comments in the documentary film, *Boy I Am*, prod. Sam Feder, dir. Sam Feder & Julie Hollar, 72 min., Women Make Movies, 2006.

from the streets, in order to protect the law-abiding majority. That is what we mean by the 'clear and present danger'[7] and 'imminent lawless action'[8] standards for measuring constitutionally permissible constraints on free speech.

There are reasons to reject this line of reasoning. We might at least consider segregating prison populations much more than we do now, and creating environments more conducive to rehabilitation for all those segregated groups deemed capable of rehabilitation. We might also implement more strategies involving no incarceration at all. But skeptics might remain unconvinced that such measures would be sufficiently effective to justify the increased risk of social harm. It's not clear just how effective we would be at doing the segregating correctly, or at implementing effective rehabilitative measures. Skeptics might be dubious about undertaking such risks just for the sake of a rather abstract theoretical concern about ideology-mongering among the general public. And for social conservatives, there is the added consideration that ideology-mongering might be a good thing, since it operates always in service of preserving the *status quo*.

This last point of course begs the question: just how serious *are* we about First Amendment rights of free expression? Not very, perhaps. But the primary goal of the First Amendment generally, and of the right of free expression most especially, was to secure the deliberative freedom on which we profess this nation to be founded. Is this just pretence, because we don't really welcome social change through open public dialogue?

How fearful should we be? Not every free expression-motivated modification of state-sponsored social institutions need be as threateningly dramatic as the kind of prison reform just sketched. Modifying Althusserian 'institutions of repression' can be a hard sell. They are, after all, *supposed* to be repressive! But there are also state-sponsored social institutions that are, in Althusser's classification scheme, "merely" apparatuses for the fostering of ideology. Yet they too function coercively as epistemic barriers to the free expression of ideas. Here at least, if we take seriously the conceptual significance of free expression in the larger context of the First Amendment, the free expression clause may entail a level of protection that our courts and legislatures have never seriously countenanced. Viewing social institutions as ideologically freighted in Althusser's sense has the potential to radicalize our current understanding of the First Amendment right of free expression.

Consider, for example, the social institution of civil marriage, as applied to (and withheld from) transgendered individuals. In Althusser's classificatory scheme civil marriage would not count as part of the repressive apparatus of the state. But neither does it count as a social institution that falls mostly outside the parameters of state influence, like the gendered social conventions governing fashion. Civil marriage *does* rely on the coercive power of the state, which determines who may marry, and which confers specific economic rewards and legal rights on those who pass the test of eligibility. While that aspect undoubtedly renders the institu-

[7] *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

[8] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

tion somewhat repressive,[9] there are presumably some limits. The sort of 'imminent danger excuses' we might offer for constructing or retaining some robustly repressive social institutions (such as prisons) are not available to justify overtly repressive civil marriage policies. Therein lies the problem with recent judicial treatment of transgendered marriages.

There is one preliminary issue that must be addressed. Historically, free expression adjudication generally, and cases involving threats to the free expression of religion in particular, has brought scrutiny to bear on social institutions only when, and to the extent that, they directly constrain the free expression or free exercise rights of individual agents. There has been no systematic effort to evaluate the detrimental impact of any social institution taken as a whole, with respect to the chilling effect it may have on free expression because of the ideological freight which it delivers to all of us.

One might wonder, then, whether we even have the judicial machinery in place to address this broader issue of weighing the First Amendment significance of a state-sponsored social institution on its own merits. I believe the answer is that we do. The twentieth century history of establishment clause jurisprudence has been quite different from the jurisprudence of free expression and free exercise. One of the chief concerns implicit in that principle has been the fear that the creation of a particular class of state-sponsored social practices, especially in religiously-motivated curricular practices or in institutionalized devotional exercises in public schools) might have a chilling effect on the free expression rights of religious dissenters. Although this link between the establishment clause and the First Amendment rights of free exercise and free expression is not explicit in Supreme Court opinions, it is frequently implicit.[10]

Unlike the free expression and free exercise clauses, the primary focus of the establishment clause has always been on the boundary between licit and illicit state sponsorship of (or creation of) social institutions. And the concern has been

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[9] See, e.g., Claudia Card, "Against Marriage and Motherhood," *Hypatia,* Vol. 11, No. 3, (1996): 1–23.

[10] Thus, in *Abington v. Schempp*, 374 U.S 203, 212 (1963), an establishment clause case striking down mandatory morning Bible readings in Pennsylvania and Maryland public schools, the majority quotes – apparently with approval – the Maryland plaintiffs' characterization of the situation. As atheists, Madeleine and William Murray complained that the policy "threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of [the Murrays]".

Similarly, in *Lee v. Weisman*, 505 U.S. 577, 592–593 (1992), rejecting the constitutionality of a school-sponsored invocation at graduation, Anthony Kennedy observed for the majority that: "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools… Our decisions in Engel…and…Abington … recognize…that prayer exercises in public schools carry a particular risk of indirect coercion. The school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation".

directed precisely at the broad ideological effects such social institutions may induce among us. This adjudicative history can serve as a model for a much broader judicial scrutiny of the collective impact that a state-sponsored social institution may have on free expression. Given Althusser's analysis of the cognitive effects of social institutions generally, such concern should not be restricted to state involvement in recognizably religious social institutions and practices.

3 The Ideological Functions of Marriage

Turning now to our example, state-licensed marriage has of course always served to fulfill certain practical functions: stabilization of property distribution (between families, between spouses), transfer of property (inheritance by matrimonially legitimated heirs), a heightened level of confidence in paternity, and a state delegation of primary care-giving responsibilities to marriage partners and their offspring. Marriage functions also, however, as a tool in the service of fostering and maintaining ideological perspectives, including the notion that a large share of property distribution *should* be implemented in accordance with culturally normative marital property allocation.

The ideological function of marriage has certainly been in evidence in our own culture lately, as exhibited through the conservative backlash against same-sex marriage initiatives. The various state and federal Defense of Marriage Acts (DOMA initiatives) are attempts to perpetuate socially well-entrenched convictions concerning sex and gender: the hypotheses that only heterosexual copulation is morally legitimate, and then only for procreative purposes (although that particular thesis has been largely supplanted in western cultures by the conviction that sex for pleasure is also morally permissible, at least within the confines of serial heterosexual monogamy[11]), and the hypothesis that only monogamous heterosexual couples are fit to be parents – children need both a mommy and a daddy, preferably the same ones over time. With regard to parenting, marriage also helps reinforce sexist ideology about proper gender roles.

When divorce was still a socially marginal activity for which one repaired to Reno or Las Vegas, when sex outside marriage was officially discouraged (with at least *some* conviction), and when same-sex marriage was simply inconceivable, the social institution of marriage best fulfilled the ideological functions described in the previous paragraph. Like all ideological apparatuses, marriage was at its most effective in creating "an illusion of normative reality" when we didn't notice the ideological influences. But the advent of the Sixties counter-culture movement, with its professed commitment to sexual liberation, the coalescence of second-wave feminism, the growth of two-income families, the increasing prevalence of divorce

[11] See Jonathan Ned Katz, *The Invention of Heterosexuality* (Chicago: University of Chicago Press, 2007; originally publ. 1995).

and single-parent families, and the emergence of the gay rights movement, have all eroded civil marriage's ideological effectiveness, collectively transforming the ideology into a rear-guard action, while the institution itself is being gradually reconfigured in western cultures.

Nonetheless, in a relatively conservative culture like ours, the "old fashioned" view of marriage still carries significant weight. This has been perhaps most dramatically illustrated by the manner in which state courts have handled marriage disputes involving transsexuals. Collectively, these cases, which date back to the late 1960s, display not only a lack of humane empathy, but a record remarkable for its degree of judicial obtuseness, even from a socially conservative perspective.

4 Early Judicial History of Transsexual Marriage

The earliest cases concerned not marriage but birth certificates and name changes. Two early New York post-operative transsexuals' petitions for amending the sex on their birth certificates were denied on the ground that a transsexual's desire for "concealment of a change of sex…is outweighed by the public interest for protection against fraud."[12] The court does not specify just what fraud might be perpetrated, but the likeliest explanation was a fear that such modified birth certificates will function as tickets to the issuance of marriage licenses of dubious legitimacy.[13] To justify the refusal, the New York court appealed to a chromosomal standard of sexual identity in 1966, and again in a similar case 7 years later,[14] despite an intervening approval of a name change in a different New York court, which included commentary quite critical of the earlier birth certificate decision.[15]

Anonymous v. Anonymous, and *B. v. B.*, still more New York cases,[16] were the earliest domestic cases concerning transsexual marriages, specifically the dissolution of such marriages over charges of fraudulent deception by the defendant transsexuals. In *Anonymous*, the male to female (MtoF) transsexual partner was pre-operative, and failed to identify herself as such to the plaintiff husband prior to marriage. Upon discovery, the husband refused to have sex, and successfully petitioned to have the marriage declared void, even though his partner had subsequently undergone sex-change surgery. *B. v. B.* yielded a similar result for similar reasons, although the FtoM transsexual in that case had undergone a hysterectomy and double mastectomy prior to the marriage, but he had not had any genital surgery.

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[12] *Anonymous v. Weiner*, 50 Misc.2d 380, 270 N.Y.S.2d 319, 322 (NY Sup. Ct., 1966).

[13] Defrauding whom? The unwitting spouse? The general public? How, exactly?

[14] *Hartin v. Director of the Bureau of Records*, 75 Misc.2d 229, 347 N.Y.S.2d 515 (NY Sup. Ct. 1973).

[15] *In re Anonymous*, 57 Misc.2d 813, 293 N.Y.S.2d 834, 837 (Civ.Ct.1968).

[16] *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (NYC Civ. Ct. 1971); *B v. B*, 78 Misc.2d 112, 355 N.Y.S.2d 712 (NY Sup. Ct. 1974).

In addition to the issue of fraudulent misrepresentation at the time of marriage, the court reasoned that, in the absence of a penis, the defendant could not function sexually as a male, and declared the marriage void on both counts.

Two years later, in 1976, a New Jersey appellate court ruled on the first pure case concerning transsexual marriage. *M.T. v J.T.*[17] involved a spousal support claim by an MtoF post-operative transsexual, after her husband of 2 years had abandoned their home and ceased supporting her. But in this case M.T. had undergone surgery prior to the marriage, having her male sex organs replaced with a vagina. J.T. was well aware of the situation, having paid for the surgery (they already had a long-standing relationship prior to their marriage), and M.T. and J.T. had sex subsequent to their marriage. Unique among these cases, the New Jersey Superior Court ruled that the marriage was legitimate, and J.T. was obliged to pay spousal support.

This case seems remarkably enlightened, given the legal and cultural environment in which it was decided, particularly in light of the court's commentary on the insensitivity of previous judicial reliance on the chromosomal standard for establishing sexual identity from birth, once and for all:

> It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus side show? What harm has said person done to society?[18]

These sentiments certainly are laudable, but there is something else going on in this case besides an endorsement of basic rights for *some* transsexuals. For in the *M.T. v. J.T.* analysis, not just any transsexuals count as deserving the law's attention, only "properly" post-operative ones with appropriate sexual functionality. That is what is meant by the distinction which the court draws between this case and the *B. v. B.* precedent set just 2 years earlier in an adjacent state:

> For purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.[19]

The scope of the humane gesture in *M.T. v J.T.* is limited, for this case is also an attempt to maintain the binary gender ideology fostered and sustained by the traditional institution of marriage. As RuthAnn Robson has observed, by endorsing M.T.'s particular brand of transsexuality, and her pairing off with J.T., the court is "imposing a singular and dominant reality" whereby "nothing fundamental would be altered" by M.T.'s postoperative transformation, because "heterosexual normality" has been reaffirmed.[20] The New Jersey court is simply acknowledging that there are

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[17] *M.T. v. J.T.,* 140 N.J. 77, 355 A.2d 204, 205 (NJ Super. Ct. 1976).

[18] Ibid., 83.

[19] Ibid., 87.

[20] RuthAnn Robson, "A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage," *Hypatia*, Vol. 22, No. 1 (Winter, 2007): 58–70.

precisely two genders, and M.T. deserves to be rewarded because she has "adjusted" herself to fit the prevailing social construct about gender.

For the goal of maintaining the ideological function of the civil institution of marriage, *M.T. v J.T.* was a sensible strategy. Despite appearing to be a judicial milestone in sexual liberation, the decision was actually quite socially conservative. The "good" transsexual, as Kate Bornstein has pointed out, is the one who buys into the standard therapeutic model: the trick is to "pass" as the other sex, both before and after surgery, and never to admit to ones transsexual history or identity. "Transexuality is the only condition for which the therapy is to lie."[21] The reason for this, Bornstein explains later, is to reaffirm the gender binary: there are two, and only two, sexes.[22] To this we might add the following corollary: everything else is either an unhappy biological accident (transsexualism and intersexuality) or sexual perversion: pedophilia, homosexuality, bisexuality and, in an earlier age, an unseemly interest in nonprocreative sex (see Katz on this last point).

That this attitude is the product of deeply rooted culturally ideology is nicely illustrated by Bornstein's own experience:

> I'm called "gender dysphoric." That means I have a sickness: a limited understanding of gender. I don't think it's that. I like to look at it that I was gender dysphoric for my whole life before, and for some time after my gender change – blindly buying into the gender system. As soon as I came to some understanding about the constructed nature of gender, and my relationship to that system, I ceased being gender dysphoric…I had my genital surgery partially as a result of cultural pressure: I couldn't be a "real woman" as long as I had a penis.[23]

Bornstein's definition of gender dysphoria is nonstandard – a "sickness", yes, but the alleged psychological malady is normally defined so as to assume that the patient understands gender well enough, but feels herself (or himself) to be housed in the wrong body, with respect to physical gender presentation. Bornstein's point is to turn the definition on its head: the real psychological disability is understanding gender poorly, by embracing the largely unquestioned cultural conviction that one's sexual anatomy and gender disposition have to be congruent in one of two socially approved ways. That someone as deeply reflective about gender issues as Bornstein could be seduced by this perspective nicely illustrates Althusser's point about the power of socially constructed ideology. The *M.T. v J.T.* court endorses precisely this language of congruence: "for marital purposes, if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."[24]

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[21] Kate Bornstein. *Gender Outlaw: On Men, Women, and the Rest of Us*. (New York: Vintage Books, 1995; originally publ. by Routledge, 1994), 62.

[22] Ibid., 125–128.

[23] Ibid., 118–119.

[24] *M.T. v. J.T.*, 87.

5 Post-DOMA Judicial History of Transsexual Marriage

In contrast to *M.T. v J.T.*, more recent cases are unwittingly subversive with respect to the traditional ideological functions of marriage. There have been less than ten such cases since the same-sex marriage debate began to grip the nation. None of these are cases of fraudulent misrepresentation in which a transsexual spouse failed to notify her or his partner of her of his gender history prior to the wedding. But neither do they follow the lead of *M.T. v J.T.* Typically, the contemporary cases involve judicial repudiation of ostensibly heterosexual marriages by means of a chromosomal standard applied to a post-operative transsexual partner.

In *Littleton v. Prange*,[25] for example, Christine Littleton, the post-operative MtoF transsexual widow of Jonathon Mark Littleton, was denied standing to file a wrongful death suit against her husband's physician, Mark Prange. The court telegraphed its attitude at the outset of the case, posing the question: "can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[26] As in most contemporary cases, the court ultimately applied the authority of the local DOMA law, using a chromosomal standard of sexual identity:

> Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.
>
> We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is…to interpret the statutes of the state and prior judicial decisions. This mandate is deceptively simplistic in this case: Texas statutes do not allow same-sex marriages.[27]

With respect to the goal of sustaining the ideological function of marriage (preservation of the binary view of gender, and privileging procreative heterosexuality within that perspective), the chromosomal standard to which almost all post-*M.T. v. J.T* cases resort makes little sense. It entails that a pre-operative MtoF transsexual could secure a marriage license, provided that she has a penis, and her partner a vagina, even though both "present" as female. But if she abandons her lover at the altar, completes the MtoF surgery, and subsequently marries someone with a penis since birth, these courts would void her relatively conventional heterosexual marriage, because she still has male chromosomes.

Even worse with respect preservation of the gender binary ideology in a DOMA state like Texas, would be a case in which a lesbian post-operative MtoF transsexual (for example), now possessing a vagina of non-biological origin, applies for a marriage license with her lesbian partner (with a vagina from birth). Relying on

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[25] *Littleton v. Prange,* 9 S.W.3d 223 (Tex. App. 1999).

[26] Ibid., 224.

[27] Ibid., 231.

the judicial precedent set in *Littleton*, the Texas courts would be obliged to sanction this special class of same-sex marriages, on the principle that the transsexual litigants were still chromosomally of the opposite sex from their partners. Indeed, this happened in at least two cases the following year (2000) in San Antonio, where the Bexar County Marriage Clerk subsequently issued a public invitation to any other similarly-situated couple who wished to marry.[28]

Stranger still is the case of *In re Estate of Gardiner*,[29] because the Kansas Supreme Court ruled that J'Noel Gardiner was not really either a man or a woman, but a transsexual. As such, she could not inherit her intestate deceased husband's estate, because her marriage to him was void under Kansas's DOMA. In the Court's words:

> The words 'sex', 'male', and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist."[30]

In response to a lower court argument that the Kansas DOMA law was silent on the question of marriage eligibility of post-operative transsexuals, the Kansas Supreme Court added that "the legislative silence…indicate[d] that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so."[31]

Since the Kansas DOMA countenances marriage only between males and females, it would appear that, in Kansas at least, post-operative transsexuals may not marry *anyone*, rendering the Kansas DOMA in violation of a constitutionally recognized fundamental right to marry.[32]

Even this precedent is ambiguous, though. In one of the very last lines of the *Gardiner* opinion, the Kansas Supreme Court leaves an opening for future fudging:

> Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling,

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[28]For a discussion of these details and further citations, see Phyllis Randolph Frye and Alyson Dodi Meiselman, "Same-Sex Marriages have Existed Legally in the United States for a Long Time Now," *Albany Law Review,* Vol. 64 (2000–2001): 1031–1071. (My thanks to Jacob Hale for first drawing my attention to the post-*Littleton* cases in Texas.).

[29]*In re Estate of Gardiner,* 273 Kan. 191, 42 P.3d 120 (2002).

[30]Ibid., 213.

[31]Ibid., 214.

[32]See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) , in which marriage is categorized as "one of the basic civil rights of man" and a "basic liberty". As such, the right to marry is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment [due process clause], become[s] valid as against the states," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), (Cardozo, J., majority) This principle was reaffirmed in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Robson makes the same point more briefly (Robson, 62), crediting Julie A. Greenberg, "When Is a Man a Man, and When is a Woman a Woman?" *Florida Law Review*, Vol. 52 (2000): 762.

> and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under [Kansas law]."[33]

On the one hand, this passage suggests that the chromosomal standard is operational in Kansas, too, leaving that state open to judicial approval of the same subclass of same-sex marriages to which the recent chromosomal precedent has exposed Texas (and also Ohio[34] and Florida[35]). On the other hand, the phrase 'remains a transsexual' suggests that J'Noel was always a transsexual (which, of course, is generally true of transsexuals), in which case, by the Court's earlier reasoning, she *never* had a right to marry in Kansas.

That the Kansas Supreme Court has created such a judicial mess for itself and the lower Kansas courts is indicative of the general level of cultural confusion which has now overtaken the social institution of marriage. We have progressed from an era in which the *M.T. v. J.T.* court could devise a relatively humane solution to the 'transsexual conundrum' while simultaneously maintaining a traditional ideology of heteronormative privilege sustained by the social institution of marriage, to an era in which the *Gardiner* court unwittingly endorsed the existence of a third sex, and multiple judicial jurisdictions have created precedents for undermining the gender binary through legal recognition of a special subclass of same-sex marriages. Conceptually speaking, how is the Kansas Supreme Court's admission that J'Noel Gardiner was always a transsexual any less radical than Kate Bornstein's observation that we need to acknowledge the existence of "non-operative transsexuals"[36] as well as pre- and post-operative ones, people who think of themselves as transsexual without any need or desire for genital surgery, because they simply don't buy into the binary construction of gender in the first place?

We might reasonably ask how matters came to such a pass. Why didn't later courts simply endorse the reasoning in *M.T. v. J.T.*? I suspect the answer has to do with the emergence of varieties of transsexualism, the gradual recognition that erotic orientation and gender identity are orthogonal properties. Not all transsexuals are heterosexuals *manqué*, as the *M.T. v. J.T.* court apparently believed back in 1976. Perhaps there was always some suspicion that transsexuals and their intimate partners might harbor a "hidden gay agenda".[37] But the view that there could be non-heterosexual transsexuals was certainly not yet fully articulated in 1976, when there were as yet no public intellectuals arguing to the contrary, either positively

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[33] *Gardiner*, 215.

[34] *In re a Marriage License for Nash* (2003) not Reported in N.E.2d., WL 23097095, Ohio App. 11. See also the pre-DOMA denial of a name-change petition, *In re Ladrach*, 32 Ohio Misc.2d 6, 9, 513 N.E.2d 828 (Probate Ct. 1987), and a similar more recent case, *In re Maloney* (2001) not reported in N.E.2d, WL 908535, Ohio App. 12 Dist.

[35] *Kantaras v. Kantaras*, 884 So.2d 155, 29 (2nd Dist. Ct. App. 2004).

[36] Bornstein, 121.

[37] For a possible example of this reasoning at work, see the military discharge case, *Hoffburg v. Alexander*, 615 F.2d 633 (1980).

(e.g., Kate Bornstein (discussed earlier), Leslie Feinberg,[38] Alluquére [Sandy] Stone[39]) or negatively (e.g., Janice Raymond[40]). Once that view entered public discourse, the courts had to confront the worry that they might be abetting gay relationships if they authorized *any* transsexual marriages. But asserting that *no* transsexuals may marry, as the Kansas Supreme Court may now have done in *Gardiner*, is equally problematic. Hence the current mess.

6 Transgender Marriage and the Right of Free Expression

Returning now to the right of free expression, why should we still be waiting for this particular element of our culture's Althusserian ideological apparatus, the exclusively heteronormative institution of marriage, to finish its decomposition process? There are, I believe, only two reasons why we might refrain from questioning the maintenance of a particular state-sponsored social institution on free expression grounds.

There is the lesson of Holmes' aphorism[41] about falsely shouting fire in a crowded theater: not all forms of speech are protected, in particular not those which endanger others. Restrictive legislation is then constitutionally permissible. Perhaps we should concede that, even when a government-sponsored social institution curtails free expression to some degree, it might be possible that loosening the cultural bindings sustained by *that* particular institution would cause sufficiently great harm to outweigh the cost to free expression – if not through direct harm to particular individuals, perhaps through indirect harm fostered by the erosion of socially valuable ideology which that institution, taken as a whole, is designed to nurture. The prospect of both direct and indirect harms, I take it, are present in the arguments sketched earlier for retaining our prison system more or less as it is.

Then there is the simple failure to recognize the constraint on free expression, because the institution in question has fostered an ideology so pervasive that we don't ever notice its presence. If Althusser is to be believed, this happens quite a lot. It was once true, I think, about the heteronormative aspects of the institution of marriage, but that is an excuse we no longer have. Once the constraints on free expression are culturally accessible, it is appropriate to demand, concerning any state-sponsored social institution, a reasoned argument in defense of the violation of the First Amendment rights of "discrete and insular

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[38] Leslie Feinberg, *Stone Butch Blues* (San Francisco: Firebrand Books, 1993); *Trans Liberation: Beyond Pink and Blue* (Boston: Beacon Press, 1999).

[39] Alluquére Stone, "The Empire Strikes Back: A Posttranssexual Manifesto," *Camera Obscura,* Vol. 10, No. 2 (May 1992): 150–176.

[40] Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Boston: Beacon Press, 1980).

[41] *Schenck*, 52.

minorities"[42] who suffer the social opprobrium fostered by the institution in question. And in the current case, it is transparently obvious that the above implications of Holmes' aphorism do not apply, since the ideology to be preserved by traditional marriage laws is no longer socially compelling. As Judith Christley framed the issue in her dissent to an Ohio court decision to uphold the denial of a marriage license to an FtoM transsexual and his female partner:

> the majority holds that, in an effort to protect the institution of marriage, a transgender person may not marry someone belonging to that person's original gender classification. In doing so, it claims to be protecting the sanctity of marriage. My question to them is "What is the danger?" How is anything harmed by allowing those, who by accident of birth do not fit neatly into the category of male or female, from enjoying the same civil rights that "correct sex" citizens enjoy?[43]

No one should live in fear of the legal consequences of openly declaring themselves to be transgendered. On one natural reading of the *Gardiner* decision in particular, any transgendered Kansas citizens would be well advised to pass as whatever was reported on their birth certificates, and marry accordingly, if socially recognized long-term partnerships are part of their life plan. It is hard to envision a more profound violation of the right of free expression than that.

To frame the issue a slightly different way, think about the cultural practice of passing across racial lines. This practice is certainly not uncommon in our society, and when anti-misegenation laws and Jim Crow were in play, for those who *could* pass, and who wished to pursue certain life plans freely open to others, the practice was accompanied by much the same kind of legal compulsion that I'm attributing to the Kansas transsexual today. And yet today we would surely say that any legal requirement that one *must* self-identify as African-American if one has any African American ancestors, would be a gross violation of an individual's right of free expression.

The culturally-induced violations of free expression here contemplated are actually even more profound, in both cases. Anatole Broyard, the former *New York Times* book critic, with mixed-race Louisiana Creole ancestry, spent his entire adult life passing as white, most especially to his own children. He once argued in print that, to be an authentic individual, as a Negro, required "a stubborn adherence to one's essential self…his innate qualities and developed characteristics as an individual, as distinguished from his preponderantly defensive reactions as an embattled

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[42] *United States v. Carolene Products*, 304 U.S. 144, 153, n.4 (1938). While there is no formal policy of heightened scrutiny in First Amendment cases generally (unlike equal protection or due process cases), the Supreme Court effectively endorsed such a policy in cases with free exercise implications for three decades, starting with *Sherbert v. Verner*, 374 U.S. 398 (1963), until it abandoned the practice of requiring the government to provide "compelling" justifications for free exercise infringements in *Employment Div., Dep't. of Human Resources of Oregon v. Smith*, 494 US 872 (1990). That case, however, has been a subject of controversy, and it is not clear just how long it will serve as precedent. Compare, for example, Anthony Kennedy's remark that "there are heightened concerns with protecting freedom of conscience free expression cases," just 2 years later in *Lee v. Weisman* (discussed in note 7 above).

[43] *Nash*, 12.

minority."[44] Although one might reasonably ask whether Broyard isn't guilty of assuming the atomic individualism associated (disparagingly) with contemporary political liberalism, he is also expressing a noble aspiration: why should one be forced to occupy artificially contrived and invalid conceptual boxes not of one's own making? Yet it is not clear that, in the larger racially-charged culture in which Broyard found himself, his aspiration was even possible to achieve. One theme of Bliss Broyard's recent book about her father[45] is the question how one can be fully authentic in this individualist way, if one is simultaneously prepared to deny pieces of one's own history, for the sake of repudiating a culturally-imposed classification system in which one does not believe? African essentialism, like white European essentialism, is completely unwarranted. But in a racially polarized culture, racial family histories (in our culture, black and white ones in particular) inevitably inform our individual identities in various ways. To deny the existence of those influences, however culturally imposed, is to deny ourselves.

Similarly, how can one declare oneself a non-operative transsexual in a cultural setting in which transsexuality is still almost exclusively understood as a medically pathologized condition contingent on binary gender ideology? Sometimes, there simply are no judicial remedies for social constraints on morally legitimate forms of free expression. But sometimes there are. In the case of transgender, we can probably start talking seriously about what it means to be a 'non-operative transsexual', or what it means even to be transgendered, only after we shed the binary gender ideology. For that at least, there is a constitutional remedy in the First Amendment, if only we are prepared to take it seriously. To do that we must first acknowledge that that we have come to recognize the social institution of marriage as being ideologically oppressive, and then insist that the courts live up to the promise of the right of free expression by taking the social mechanics of ideological oppression seriously.

[44] Anatole Broyard, "Portrait of the Inauthentic Negro," *Commentary*, July 1950, 57.

[45] Bliss Broyard, *One Drop: My Father's Hidden Life – A Story of Race and Family Secrets* (New York: Little Brown, 2007). For an equally thought-provoking commentary from the other side of the passing divide, see Adrian Piper, "Passing for White, Passing for Black," *Transition,* No. 58 (1992): 4.

Bibliography

1. Adams, John. "The Report of a Constitution, or Form of Government, for the Commonwealth of Massachusetts." In *The Revolutionary Writings of John Adams*, ed. C. Bradley Thompson. Indianapolis: Liberty Fund, 2000.
2. Adsett, Margaret. "French and Canadian Approaches to Diversity as Reflections of Different Conceptions of Liberty, Equality, and Community." Department of Canadian Heritage: 2002, http://www.culturescope.ca/file_download.php/canfran_e.pdf?URL_ID=3472&filename=10812742681canfran_e.pdf&filetype=application%2Fpdf&filesize=140591&name=canfran_e.pdf&location=user-S/.
3. Alexander, Larry. "What Is Freedom of Association, and What Is Its Denial?" *Social Philosophy and Policy,* Vol. 25, No. 2, (Jul., 2008): 1–21.
4. Allen, Anita L. Review of *The Politics of the Veil*, by Joan Wallach Scott. *Berkeley Journal of Gender, Law & Justice,* Vol. 23 (Spring 2008): 208–224.
5. Allen, Anita L. "Disrobed: The Constitution of Modesty." Villanova Law Review, Vol. 51 (2006): 841–858.
6. Als, Hilton. "GWTW [Gone With The Wind]." In *Without Sanctuary: Lynching Photography in America,* eds. James Allen, Hilton Als, John Lewis, and Leon F. Litwack, 38–46. Santa Fe: Twin Palms Publishing, 2000.
7. Althusser, Louis. "Ideology and Ideological State Apparatuses." In *Lenin and Philosophy and Other Essays,* ed. Louis Althusser, 127–186. New York & London: Monthly Review Press, 1971.
8. Altman, Andrew. "Liberalism and Campus Hate Speech: A Philosophical Examination." *Ethics*, Vol. 103, No. 2 (Jan., 1993): 302–317.
9. Amar, Akhil Reed. *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale University Press, 1998.
10. Asim, Jabari. *The N Word: Who Can Say It, Who Shouldn't, and Why*. New York: Houghton Mifflin, 2007.
11. Baker, C. Edwin. "Hate Speech," Penn Law Public Law and Legal Theory Research Paper Series. http://papers.ssrn.com/abstratc=1105043, accessed July 2008.
12. Baker, C. Edwin. *Human liberty and freedom of speech.* Oxford University Press, 1992.
13. Baubérot, Jean. "Secularism and French Religious Liberty: A Sociological and Historical View." *Brigham University Law Review* (2003):451–464.
14. Baubérot, Jean. "The Secular Principle," Formerly accessible, as of 12/2/2008, at http://www.ambafrance-uk.org/Secular-principle-PM-s-Office.html.
15. Bell, David A. "The Unbearable Lightness of Being French: Law, Republicanism and National Identity at the: End of the Old Regime." *The American Historical Review,* Vol. 106, No. 4 (Oct., 2001): 1215–1235.
16. Blassingame, John W., ed. *Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies.* Baton Rouge: Louisiana State University Press, 1977.
17. Bolt, Robert. *A Man for All Seasons*. New York: Vintage Books, 1990.

18. Bornstein, Kate. *Gender Outlaw: On Men, Women, and the Rest of Us*. New York: Vintage Books, 1995; originally publ. by Routlege, 1994.
19. *Boy I Am.* Sam Feder and Julie Hollar, Producer/Directors, Women Make Movies, 2006.
20. Boy Scouts of America, *Boy Scout Handbook*. Irving, TX: Boy Scouts of America, 1990.
21. Bowen, John. *Why the French Don't Like Headscarves: Islam, the State, and Public Space*. Princeton: Princeton University Press, 2006.
22. Boxill, Bernard R. "Radical Implications of Locke's Moral Theory: The Views of Frederick Douglass." In *Subjugation and Bondage: Critical Essays on Slavery and Social*
23. *Philosophy*, ed. Tommy L. Lott, 29–48. Lanham: Rowman & Littlefield, 1998.
24. Broyard, Anatole. "Portrait of the Inauthentic Negro," *Commentary,* July 1950, 56–64.
25. Broyard, Bliss. *One Drop: My Father's Hidden Life—A Story of Race and Family Secrets*. New York: Little Brown, 2007.
26. Callahan, Joan C. "Speech That Harms: The Case of Lesbian Families." In *On Feminist Ethics and Politics*, ed. Claudia Card, 244–268. Lawrence: University Press of Kansas, 1999.
27. Card, Claudia. "Against Marriage and Motherhood." *Hypatia*, Vol. 11, No. 3, (1996): 1–23.
28. Chevannes, Barry. *Rastafari: Roots and Ideology.* Syracuse: Syracuse University Press, 1994.
29. Coase, Ronald. "The Market for Goods and the Market for Ideas," *The American Economic Review*, Vol. 64, No. 2 (May, 1974): 384–391.
30. Cohen, Joshua. "Freedom of Expression." *Philosophy and Public Affairs,* Vol. 22, No. 3 (Summer, 1993): 207–263.
31. Conte, Alba. *Sexual Harassment in the Workplace: Law and Practice,* 3rd ed., v. 1. New York: Panel Publishers, 2001.
32. Corlett, J. Angelo and Robert Francescotti. "Foundations of a Theory of Hate Speech." *Wayne Law Review* 48 (2002): 1071–1100.
33. Cudd, Ann E. *Analyzing Oppression*. New York: Oxford University Press, 2006.
34. Delgado, Richard. "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling." In *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, eds. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw, 89–111. Boulder: Westview Press, 1993.
35. Dent, N. J. H. *Rousseau: An Introduction to his Psychological, Political and Social Theory*. Oxford: Basil Blackwell, 1988.
36. Dimier, Veronique. "Unity in Diversity: Contending Conceptions of the French Nation and Republic." *West European Politics*, Vol. 27, No. 5 (2004): 836–853.
37. Dyson, Michael Eric. *Holler If You Hear Me: Searching for Tupac Shakur*. New York: Basic Civitas Books, 2001.
38. Epstein, Richard A. "Should Antidiscrimination Laws Limit Freedom of Association? The Dangerous Allure of Human Rights Legislation," *Social Philosophy and Policy*, Vol. 25, No. 2 (Jul., 2008): 123–156.
39. Feinberg, Joel. "The Concept of an Absolute Constitutional Right." In *Freedom of Expression*, ed. Fred R. Berger. Belmont, CA: Wadsworth, 1980.
40. Feinberg, Joel. *The Moral Limits of the Criminal Law*, 4 vols. New York: Oxford University Press, 1985, Oxford University Press Paperback, 1987.
41. Feinberg, Leslie. *Stone Butch Blues*. San Francisco: Firebrand Books, 1993.
42. Feinberg, Leslie. *Trans Liberation: Beyond Pink and Blue.* Boston: Beacon Press, 1999.
43. Fiss, Owen. "Why the State." In *Democracy and Mass Media: A Collection of Essays*, ed. Judith Lichtenberg, 136–154. New York: Cambridge University Press, 2008.
44. Ferguson, Gibson. *Language Planning and Education*. Edinburgh: Edinburgh University Press: 2006.
45. Fox, Justin. *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street.* New York: Harper Business, 2009.
46. Fried, Richard M. *Nightmare in Red*. New York: Oxford 1990.
47. Froese, Katrin. "Beyond Liberalism: The Moral Community of Rousseau's Social Contract." *Canadian Journal of Political Science,* Vol. 34, No. 33 (2001): 579–600.

48. Frye, Phyllis Randolph and Alyson Dodi Meiselman. *Same-Sex Marriages have Existed Legally in the United States for a Long Time Now.* 64 Alb. L. Rev. 1031 (2000–2001): 1031–1071.
49. Gedicks, Frederick Mark. "Religious Exemptions, Formal Neutrality, and Laïcité." Indiana Journal of Global Legal Studies, Vol. 13 (2006): 473–492.
50. Green, Donald P. and Andrew Rich. "White Supremacist Activity and Crossburnings in North Carolina." *Journal of Quantitative Criminology*, Vol. 14, No. 3 (September 1998): 263–283.
51. Greenberg, Julie A. *When Is a Man a Man, and When is a Woman a Woman*? 52 Fla. L. Rev. 745 (2000): 745–768.
52. Gordon, Jill. "John Stuart Mill and the 'Marketplace of Ideas.'" *Social Theory and Practice,* Vol. 23, No. 2 (Summer 1997): 235–249.
53. Gordon, Sarah Barringer. *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America.* Chapel Hill: University of North Carolina Press, 2002.
54. Gunn, Jeremy. "Religious Freedom and Laïcité: A Comparison of the United States and France." *Brigham Young University Law Review* (2004): 419–506.
55. Gunn, Jeremy. *French Secularism As Utopia And Myth*. 42 Hous. L. Rev. 81 (2005–2006): 81–102.
56. Gutmann, Amy. *Identity in Democracy*. Princeton, NJ: Princeton University Press, 2003.
57. Guyer, Paul. *Kant*. New York: Routledge, 2006.
58. Habermas, Jürgen. *Between Facts and Norms*. Cambridge: MIT Press, 1998.
59. Hamilton, Edith. *Mythology: Timeless tales of Gods and Heroes.* New York: The New American Library, 1942.
60. Hayek, Friedrich A. *The Constitution of Liberty*. Chicago: University of Chicago Press, 1960.
61. Held, Virginia. "Access, Enablement, and the First Amendment." In *Philosophical Dimensions of the Constitution*, edited by Diana .T Meyers & Kenneth Kipnis, 158–179. Boulder, CO & London: Westview Press, 1988.
62. Himma, Kenneth Einar. "On the Definition of Unconscionable Racial and Sexual Slurs." *Journal of Social Philosophy*, Vol. 33, No. 3 (Fall 2002): 512–522.
63. Höffe, Otfried. *Immanuel Kant*. Translated by Marshall Farrier. Albany, New York: SUNY Press, 1994.
64. Holtman, Sarah Williams. "Revolution, Contradiction, and Kantian Citizenship." In *Kant's Metaphysics of Morals*, ed. M. Timmons, 209–232. New York: Oxford University Press, 2002.
65. Hopkins, W. Wat. "The Supreme Court Defines the Marketplace of Ideas." *Journalism and Mass Communications Quarterly,* Vol. 73, No. 1 (Spring, 1996): 40–52.
66. Fried, Charles. "Privacy: A Moral Analysis." *The Yale Law Journal* 77 (1967–1968): 475–493.
67. Jones, Colin. *The Great Nation: France from Louis XV to Napoleon*. New York: Columbia University Press, 2002.
68. Kant, Immanuel. *Observations on the Feeling of the Beautiful and Sublime*, trans. John T. Goldthwait. Berkeley: University of California Press, 1960.
69. Kant, Immanuel. *The Metaphysics of Morals.* Translated by Mary Gregor. New York: Cambridge University Press, 1996.
70. Kant, Immanuel. "What is Enlightenment?" need full cite
71. Katz, Jonathan Ned. *The Invention of Heterosexuality*. Chicago: Chicago Univ. Press, 2007; originally publ. 1995.
72. Kelley, David and Roger Donway. "Liberalism and Free Speech." In *Democracy and the Mass Media*, ed. Judith Lichtenberg, 66–101. New York: Cambridge University Press, 1990.
73. Kennedy, Randall. *Nigger: The Strange Career of a Troublesome Word*. New York: Pantheon Books, 2002.
74. Kennedy, Randall L. "Who Can Say 'Nigger'? …and Other Considerations." *Journal of Blacks in Higher Education*, No. 26 (Winter, 1999/2000): 86–96.
75. Kersting, Wolfgang. "Kant's Concept of the State." In *Essays on Kant's Political Philosophy*, ed. H.L. Williams, 143–166. Chicago: University of Chicago Press, 1992.

76. Kersting, Wolfgang. “Politics, freedom, and order: Kant’s Political Philosophy.” In *The Cambridge Companion to Kant*, ed. Paul Guyer, 342–266. New York: Cambridge University Press, 1992.
77. Ketcham, Ralph. *James Madison: A Biography*. Charlottesville: University Press of Virginia, 1990.
78. Kirshenbaum, Andrea Meryl. *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?* 12 Tex. J. Women & L. 67 (2002–2003): 67–95.
79. Kukathas, Chandran. “Freedom of Association and Liberty of Conscience.” In *The Liberal Archipelago: A Theory of Diversity and Freedom*, 74–118. New York: Oxford University Press, 2003.
80. Landesman, Bruce. “Confessions of a Free Speech Near Absolutist.” Paper presented to the AMINTAPHIL Conference, Villanova University, September 25–28, 2008.
81. Lawrence, Charles R. 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*, eds. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw, 53–105. Boulder: Westview Press, 1993.
82. Lawrence, D.H. *Studies in Classic American Literature*. London: Penguin Classics, 1977.
83. Lieber, Francis. *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics.* Boston, M.A.: Charles C. Little & James Brown, 1839.
84. Liss, David. *The Ethical Assassin*. New York: Ballentine Books, 2006.
85. Litwack, Leon F. “Hellhounds.” In *Without Sanctuary: Lynching Photography in America,* eds. James Allen, Hilton Als, John Lewis, and Leon F. Litwack, 8–37. Santa Fe: Twin Palms Publishing, 2000.
86. Locke, John. *A Letter Concerning Toleration.* New York: Liberal Arts Press, 1950.
87. Locke, John. *Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press, 1988.
88. Lutz, Donald S., ed. *Colonial Origins of the American Constitution: A Documentary History*. Indianapolis: Liberty Fund, 1998.
89. MacLeod, Alistair M. “Equality of Opportunity.” In *Moral Issues*, ed. Jan Narveson, 370–378. Toronto and New York: Oxford University Press, 1983.
90. Madison, James. *Notes of Debates in the Federal Convention of 1787*. New York: W. W. Norton, 1987.
91. Matsuda, Mari J.“Public Response to Racist Speech: Considering the Victim’s Story.” In *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, eds. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw, 17–52. Boulder: Westview Press, 1993.
92. McClure, Kirstie. “Difference, Diversity, and the Limits of Toleration.” *Political Theory,* Vol. 18, No. 3 (Aug., 1990): 361–391.
93. McCullough, David. *John Adams*. New York: Simon & Schuster, 2001.
94. McDonald, Lawrence G. *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers.* New York: Crown Business, 2009.
95. McGary, Howard and Bill E. Lawson. *Between Slavery and Freedom: Philosophy and American Slavery.* Bloomington and Indianapolis: Indiana University Press, 1992.
96. McGowan, Mary Kate. “Oppressive Speech.” *Australasian Journal of Philosophy* 87 (2009): 389–407.
97. McMillan, Joseph, “The Arms of the USA – Blazon and Symbolism.” The American Heraldry Society, http://americanheraldry.org/pages/index.php?n=Official.National.
98. Meiklejohn, Alexander. *Free Speech and Its Relation to Self Government*. New York: Harper Brothers, 1948.
99. Meyers, Diana Tietjens. “Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech.” *Law and Philosophy*, Vol. 14, No. 2 (May, 1995): 203–243.
100. Mills, Charles W. “Whose Fourth of July? Frederick Douglass and ‘Original Intent.’” In *Frederick Douglass: A Critical Reader*, ed. Bill E. Lawson and Frank M. Kirkland, 100–145. Malden: Blackwell, 1999.

101. Mill, John Stuart. *The philosophy of John Stuart Mill*: ethical, political, and religious, ed. Marshall Cohen. New York: Modern Library, 1961.
102. Miller, William Ian. *Faking It*. Cambridge: Cambridge University Press, 2003.
103. Nicolet, Claude. *La République en France*. Paris: Seuil, 1992.
104. Peard, Thomas. "Regulating Racist Speech on Campus." In *Civility and Its Discontents: Civic Virtue, Toleration, and Cultural Fragmentation*, ed. Christine T. Sistare, 140–154. Lawrence, Kansas: University Press of Kansas, 2004.
105. Peterson, Jonathan. "Enlightenment and Freedom." *Journal of the History of Philosophy,* Vol. 46, No. 2 (April 2008): 223–244.
106. Pilgrim, David and Phillip Middleton. "Nigger and Caricatures." Ferris State University Jim Crow Museum of Racist Memorabilia, September 2001, http://www.ferris.edu/htmls/news/jimcrow/caricature/homepage.htm (accessed October 21, 2007).
107. Piper, Adrian. "Passing for White, Passing for Black," *Transition*, No. 58 (1992): 4–32.
108. Raymond, Janice. *The Transsexual Empire: The Making of the She-Male*. Boston: Beacon Press, 1980.
109. Roberts, Rodney C. "The American Value of Fear and the Indefinite Detention of Terrorist Suspects." *Public Affairs Quarterly,* Vol. 21, No. 4 (2007): 405–419.
110. Roberts, Rodney C. "Criminalization and Compensation." *Legal Theory,* Vol. 11, No. 2 (Jun., 2005): 143–163.
111. Robison, Wade. "False Light." In *Liberty, Equality, and Plurality*, ed. Larry May, Jonathan Schonsheck, and Christine Sistare, 171–190. Lawrence: University Press of Kansas, 1997.
112. Robson, RuthAnn. "A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage." *Hypatia*, Vol. 22, No. 1 (Winter, 2007), 58–70.
113. Rosen, Allen D. *Kant's Theory of Justice*. New York: Cornell University Press, 1993.
114. Rosenblum, Nancy L. *Membership and Morals: The Personal Uses of Pluralism in America*. Princeton, NJ: Princeton University Press, 1998.
115. Ross, Katherine. "Children And Religious Expression In School: A Comparative Treatment Of The Veil And Other Religious Symbols In Western Democracies." GWU Law School, Public Law Research Paper No. 408; Islamic Law and Law of the Muslim World Paper No. 08–31 (2008). Available at SSRN: http://ssrn.com/abstract=1136366.
116. Rousseau, Jean-Jacques. *The Social Contract or, Principles of Political Right*, trans. and ed., Charles Sherover. Publication Place: Harper & Row: 1984.
117. Rubel, Alan. "Privacy and the USA Patriot Act: Rights, the Value of Rights, and Autonomy." *Law and Philosophy* (2007) 26: 119–159.
118. Sagoff, Mark. "Values and Preferences." *Ethics,* Vol. 96, No. 2 (Jan., 1986): 301–316.
119. Scanlon, Thomas. "A Theory of Freedom of Expression." *Philosophy and Public Affairs,* Vol 1, No. 2 (Winter, 1972): 204–226.
120. Scanlon, T.M. Jr. "Freedom of Expression and Categories of Expression." *University of Pittsburgh Law Review*, Vol. 40 (1978–1979): 519–550.
121. Scanlon, Thomas. "Content Regulation Reconsidered." In *Democracy and the Mass Media*, ed. Judith Lichtenberg, 331–354. New York: Cambridge University Press, 1990.
122. Schnapper, Dominique. *La relation à l'Autre: Au coeur de la pensée sociologique.* Editions Gallimard, 1998.
123. Schauer, Frederick. *Free Speech: A Philosophical Enquiry*. Cambridge: Cambridge University Press, 1983.
124. Schauer, Frederick. "The Exceptional First Amendment." Harvard University Kennedy School of Government Faculty Research Working Papers Series No. RWP05-021, 2004. http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-021/$File/rwp_05_021_schauer_SSRN.pdf, accessed June 2008.
125. Schonsheck, Jonathan. "Tsunamis and Subprimes: Human Vices, not Natural Disasters." Paper presented at the American Society for Value Inquiry, meeting with the American Philosophical Association, Central Division, Chicago, IL, February 2009.
126. Scott, Joan Wallach. *The Politics of the Veil.* Princeton: Princeton University Press, 2007.

127. Seaman, Barbara, and Gideon Seaman. “Gone but not forgotten: The cervical cap.” In *Women and the Crisis in Sex Hormones*, ed. Barbara Seaman and Gideon Seaman, M.D, 231–238. New York: Rawson Associates, 1977.
128. Shurkin, Michael. “France and Anti-Semitism.” Zeek, November 2003, http://www.zeek.net/politics_0311.shtml.
129. Smitherman, Geneva. *Black Talk: Words and Phrases From the Hood to the Amen Corner.* New York: Houghton Mifflin, 1994.
130. Snyder, Jack and Karen Ballentine. “Nationalism and the Marketplace of Ideas.” *International Security*, Vol. 21, No. 2 (Autumn, 1996): 5–40.
131. Sprague, William B. *Annals of the American Pulpit; or Commemorative Notices of Distinguished American Clergymen of Various Denominations, From the Early Settlement of the Country to the Close of the Year Eighteen Hundred and Fifty-Five*, v. 5. New York: Robert Carter & Brothers, 1861.
132. Stein, Laura W. *Sexual Harassment in America: A Documentary History*. West Port, Conn.: Greenwood Press, 1999.
133. Stone, Alluquére. “The Empire Strikes Back: A Posttranssexual Manifesto.” *Camera Obscura*, Vol. 10, No. 2 (May 1992): 150–176.
134. Stone, Geoffrey, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlan, eds. *Cases and Materials on Constitutional Law,* 5th ed. New York: Aspen Publishers, 2002.
135. Sunstein, Cass. “Democracy and the problem of free speech.” *Publishing Research Quarterly* Vol. 11, No. 4 (Winter, 95/96): 58–73.
136. Sunstein, Cass. “The Future of Free Speech,” *The Little Magazine* Vol. 2, No. 2, 1–11.
137. Sunstein, Cass. “Free Speech Now.” *University of Chicago Law Review*, Vol. 59 (Winter, 1992): 255–316.
138. Taleb, Nassim Nicholas. *The Black Swan: The Impact of the Highly Improbable.* New York: Random House, 2007.
139. Totenberg, Nina. “Blackmun Papers Detail Road to ‘Roe’.” NPR, 5 March 2004, http://www.npr.org/templates/story/story.php?storyId=1749005.
140. Varden, Helga. “Kant’s Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature.” *Kantian Review*, Vol. 13, No. 2 (2008): 1–45.
141. Varden, Helga. “A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage and Prostitution.” *Social Philosophy Today*, Vol. 22 (2007): 199–218.
142. Varden, Helga. “Kant and Dependency Relations: Kant on the State’s Right to Redistribute Resources to Protect the Rights of Dependents.” *Dialogue* XLV (2006): 257–284.
143. Varden, Helga. “A Kantian, Feminist Conception of Abortion and Homosexuality.” In *Analytical Feminist Contributions to Traditional Philosophy*, eds. Anita M. Superson and Sharon Crasnow, (unpublished).
144. Varden, Helga. “Kant’s Non-Absolutist Conception of Political Legitimacy: How Public Right ‘Concludes’ Private Right in ‘The Doctrine of Right.’” *Kant Studien* (forthcoming).
145. Waldron, Jeremy. “Free Speech and the Menace of Hysteria.” *New York Review of Books*, Vol. 55, No. 9 (May, 2008): 40–44.
146. Waldron, Jeremy. “What to do About Hate Speech?” *New York Review of Books,* Vol. 55, No. 12 (July, 2008): 52.
147. Warren, Samuel D. and Louis D. Brandeis. “The Right to Privacy.” *Harvard Law Review*, Vol. 4 (1890–1891): 193–220.
148. Williams, Howard L. *Kant’s Political Philosophy*. New York: St. Martin’s Press, 1983.
149. Wolff, Robert Paul. *Kant’s Theory of Mental Activity.* Cambridge, M.A.: Harvard University Press, 1963.
150. Woodword, Bob and Scott Armstrong. *The Brethren: Inside the Supreme Court*. New York: Simon & Schuster, 2005.
151. Woodward, Lisa M. “Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?” *Capital University Law Review*, Vol. 27 (1998–1999): 683–684.

152. Wright, Sue. “Jacobins, Regionalists, and the Council of Europe’s Charter for Regional and Minority Languages.” *Journal of Multilingual and Multicultural Development,* Vol. 21, No. 25 (2000): 414–424.
153. Young, Stephen. “The Establishment “Claus”: A Selective Guide to the Supreme Court’s Christmas Cases.” LLRX: Law and technology resources for legal professionals, January 2003, http://www.llrx.com/features/christmas.htm.
154. Zeldin, Theodore. *A History of French Passions*. New York: Oxford University Press, 1993.
155. Zoller, Elizabeth. “Laïcité in the United States, or The Separation of Church and State in a Pluralist Society.” Indiana Journal of Global Legal Studies, Vol. 13 (2006): 561–594.
156. Zack, Naomi. *Philosophy of Science and Race*. New York and London: Routledge, 2002.

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