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## **Expression, Freedom of Speech and the State**

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### **1. Introduction**

Assume that the institutions of the state embody some coherent set of values; that its coercive system of law imposes a morally justifiable framework of rights and responsibilities on its citizens; and that state action is guided by those values. Assume further that those basic values have to do with democratic self-governance, that is, collective self-governance in which all citizens are treated as free and equal authors of the law. We might say that such a state is founded on certain key values: values of inclusivity, transparency, accountability, deliberation. These values, in the state we are imagining, underpin the institutional structure of the state, and the policies and actions it pursues. However, while these values structure a society in which many key decisions can be made by 'the people as a whole,' those values themselves, and the basic constitutional arrangements of the state that they inform, are not similarly up for grabs. Institutions of democracy enable the general will to rule; but the basic framework that says that the general will shall rule is as imposed as any other, since it does not countenance any fundamental questioning of whether collective self-rule, inclusivity, transparency, etc. should be the guiding values of the state. Now that might seem a direct contradiction of democracy's own basic values. At the very least it suggests that a tension exists in democracy's ideal of collective self-governance: on the one hand the ideal suggests a people freely ruling themselves; on the other hand, it seems that a coercive structure, the nature and justification of which may be determined independently of popular mandate,

needs to be imposed in order to ensure that this self-rule will be genuinely democratic. So democracy, it appears, has to have two sides: on the one hand, a space in which people collectively decide for themselves, a space which is enabled, on the other hand, by an institutional framework that is not itself subject to popular will.

Once there are these two sides, a question will arise: how far can the space of collective rule be expanded without threatening the institutional framework that underpins and guarantees democracy? One aspect of this question concerns freedom of speech and thought in a democratic society. If even a democratic state must be founded on certain values that are not themselves up for debate, if a democratic state must 'stand for' those values, and seek its own continuation and flourishing *as a* democratic state, what implications does this have for the freedom of citizens to make up their own minds? Democratic society should be happy to allow debate and free thinking, of course: this is its life-blood. But our line of thought suggests an important distinction between two categories of debate and thought: first of all, debate that is compatible with the democratic vision and the values that underpin it, and which operates within the space for self-rule enabled by democratic institutions; and secondly, thought and debate that questions or rejects the very values underpinning democratic institutions and procedures in the first place. Democratic values seem to pull in opposite directions at once: on the one hand towards maximally allowing free, inclusive deliberation; on the other, towards requiring conformity to and support of the basic democratic institutional structure. Democracy assumes that citizens' views matter, and matter equally; but how is that assumption to be sustained in the face of those who question that assumption itself?

Corey Brettschneider's book<sup>1</sup> takes as its starting point the aim of avoiding two dystopias when dealing with contra-democratic views: one in which the state is overly intrusive, and fails to treat agents as the free and equal citizens that the democratic vision takes them to be; and one in which the state is overly accommodating, failing to take action to prevent injustices in the 'private' sphere, and to halt the spread of contra-democratic views and practices. He argues that his account of 'value democracy' can provide a middle way. Brettschneider believes that the democratic state, treating citizens as free and equal authors of law, should indeed protect wide freedom of speech. It should adopt 'viewpoint neutrality' (pp. 73-84), according to which citizens have a right against the state and against their fellow citizens to express or put forward any viewpoint, regardless of content – and in particular, even should the content of the viewpoint contradict democratic values. But this does not mean that democratic states should not intervene against hateful views. No citizen should face sanction as a result of publicly expressing or defending anti-democratic or anti-inclusive views. (This is not because such expression takes place in a demarcated 'private sphere,' however, since Brettschneider rejects this spatial metaphor on the grounds that public values can be violated in 'private.' Rather, this 'viewpoint neutrality' is 'undergirded by a non-neutral conception of free and equal citizenship.') But in response to the tension here – respect for the 'hateful' on grounds of the freedom and equality of all citizens, even when they are actively engaged in rejecting such freedom and equality; the apparent violation of democratic values in either restricting freedom of speech *or* simply allowing hateful views to spread unopposed – Brettschneider's answer is that the state can take action against such views, not in its *coercive*, but in its *expressive* role:

'viewpoint neutrality as a doctrine of free speech can be complemented by the state's use of democratic persuasion in defense of free and equal citizenship. While value

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<sup>1</sup> C. Brettschneider, *When The State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Oxford: Princeton University Press, 2012). Page references in the text are to this book.

democracy's account of free expression strictly protects free speech for all viewpoints, it provides for a robust state role in promoting democratic values and criticizing hateful or discriminatory viewpoints.' (p. 75)

Thus although the state should not take coercive action against speech as such, some views fall into a category (the boundaries of which may, of course, be hard to delineate precisely, p. 90) that can rightly be targeted by official action of a persuasive, communicative, expressive sort. These views Brettscheider terms 'publicly relevant' – in that they run counter to values that underpin basic democratic rights (p. 26). The state should actively campaign against such views, and actively seek to persuade citizens of the truth of its basic values, in the belief that 'citizens should adopt the values of free and equal citizenship as their own' (p. 37). The state engages in such active persuasive campaigning in a number of ways: for instance by publicly declaring the reasons for rights in constitutional documents, Supreme Court decisions, education policy, etc.; by taking symbolic action that expresses support for such values, such as declaring Martin Luther King's birthday a national holiday; and by allocating state funding in ways that favour pro-inclusive democracy views and disfavor the 'hateful' (since although individuals should not be punished for having contra-democratic views, there is no requirement to ensure that such views are given an equal opportunity to flourish, pp. 79-80).

## **2. Expression and prevention in the justification of democratic persuasion**

My first concern is with how Brettschneider thinks of the reasons for state engagement in democratic persuasion. One obvious source of reasons, it might seem, is that democratic persuasion can be effective in reducing the incidence of anti-democratic belief and action. I say that this is obvious, since it is obvious, I suppose, why reducing the incidence of such belief and action would be viewed by Brettschneider's democratic state as desirable. And so democratic persuasion looks like a fair response to the thought that surely the state must do

*something* to combat the spread of pernicious ideologies, even if it ought to restrain itself from coercive intervention. However, it is not so obvious that we have grounds for thinking that democratic persuasion will be effective, and hence is a sensible measure to adopt. This is an empirical matter, and Brettschneider presents no evidence to back up this claim. State-sponsored attempts at persuasion – for instance, in the realm of messages about ‘healthy living’ – are notoriously blunt and even counter-productive, so it should not be taken as read that when the state speaks it is persuasive. (Many people might find themselves put off by the fact that it is the state that is trying to persuade them.) However, if prevention is the main purpose intended for democratic persuasion then Brettchneider’s silence on the question of why we should think that persuasion will be effective is puzzling.

By contrast, another reason for engaging in democratic persuasion is less tied to success-by-results: this is the idea that the state should express approval or disapproval in order not to be in a position of *condoning* groups or actions that it deems to be unacceptable.<sup>2</sup> On this view, the reason for the state to take action such as democratic persuasion against such groups is in order to dissociate itself from them, and not be complicit in their actions, a complicity it risks if it allows such groups to act with impunity. The success of such dissociation does not simply consist in the empirical matter whether those groups are dissuaded or not – rather the dissociation comes about if it is carried out sincerely and in the right way, normally by doing something that symbolically acknowledges the unacceptability of the views in question.

If he were adopting this line of argument there are some things Brettschneider would need to do to make it plausible. One thing he would need, for instance, would be some investigation of the key ideas involved: condoning; complicity; dissociation; acknowledgement; symbolic

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<sup>2</sup> Thus Brettschneider sees democratic persuasion as responding to a challenge ‘that liberal democracy’s commitment to rights makes it complicit in condoning or being silent towards views that attack the foundations of liberal democracy’ (p. 15). See also p. 17.

action. We would need a defence of the charge of complicity; an account of the need for dissociation, and some sense of how it can be brought about. This view is a deontological one: in dissociating oneself from wrong one fulfils an agent-relative duty not to engage oneself in proscribed action. So another thing he would need to do if he were adopting this line would be to combat the skeptical view that a concern with 'dissociation' from wrongdoing is nothing more than 'keeping one's hands clean'. And finally, he would need to explain why a state would risk becoming complicit in actions that it tolerates, not out of an endorsement of their moral content, but rather because it accepts a content-independent provision regarding free speech. The worry that the state is complicit in failing to take action against hateful views seems to arise only if the state is actively endorsing the content of those views, or if it has a duty to take action against those putting forward those views that it is failing to fulfil. However, if the state adopts viewpoint neutrality, neither approving nor disapproving any viewpoint, then it is not endorsing those views. And if there are good reasons for protecting freedom of speech that override or cancel any duty to take action against it then it seems that it is not complicit through any omission. So it is hard to see how some prior concern about complicity might give the state reason to engage in democratic persuasion.

These are not meant to be definitive arguments against the more purely expressivist rather than preventive reading of democratic persuasion. It is simply to say that, if this were Brettschneider's view, we would expect arguments of a characteristic sort, and these arguments are lacking. However, given that there are not arguments in favour of the efficacy of prevention either, it is not clear that Brettschneider has made a convincing case for the use of democratic persuasion.

### **3. Justifying freedom from coercion**

While we are on this topic, we can perhaps make a related point about the justification of protecting free speech, and the reasons for not using coercion. The distinction we have just drawn between expressive and preventive justifications of democratic persuasion can also be drawn between different justifications of coercion. Coercion can mean a number of different things: a) non-punitive measures taken to make it difficult or impossible for a person or group to engage in some targeted activity; b) punitive measures taken to make it difficult or impossible for a person or group to engage in some targeted activity (i.e. incapacitation or special deterrence); c) punitive measures taken against one person or group with the intention of dissuading others from engaging in some targeted activity (general deterrence); d) punitive measures taken on retributive grounds and with the intention of dissociating oneself (i.e. the state or those it represents) from the offence.<sup>3</sup> In terms of the distinction drawn above, aims a)-c) are broadly preventive, whereas d) is expressive. My point can be made initially by posing a question. Won't it be very likely that the justification for free speech protection will be different depending on how one sees the justification for coercion? In other words, one might think that a justification of free speech will have to start with some account of the legitimate state purposes of coercion and then show that those legitimate purposes do not extend as far as coercing opportunities for speech (whatever 'speech' turns out to consist in). In which case the justification for free speech is not independent of the justification of coercion but rather intimately bound up with it. However, if we allow that there may be a range of quite different justifications for coercion – falling, let us say, into two broad families, the expressive and the preventive – it might be unlikely that we can have just one justification for free speech.

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<sup>3</sup> Note that my gloss on d) involves a particular understanding of what is going on in retributive state action: my thought is that, insofar as the state has a duty to engage in retributive action at all, it is because the state has a duty to dissociate itself from those committing particular kinds of action, by expressing disapproval of it, and retributive action is the necessary form that this disapproval must take. See further my 'Penal Disenfranchisement,' *Criminal Law and Philosophy* (in press – available via online early view).

Let us apply this line of thought to some of what Brettschneider has to say about the justification of protections on free speech. He broadly supports the Supreme Court doctrine of viewpoint neutrality, which holds that: 'The state should be viewpoint neutral in protecting the right to express all opinions, regardless of their content, provided they are not direct threats' (p. 73). Brettschneider does not claim to be offering a new justification for such protections in this book – rather what he says in defence of viewpoint neutrality draws on a range of accounts put forward by thinkers such as Meiklejohn, Mill, Dworkin, Scanlon and Rawls (pp. 76-9). The approach seems to be simply to show that the case for neutrality is over-determined: that there are good reasons relating to such things as the conditions of free and comprehensive inquiry, the ability of each freely to make up her own mind on the merits of different viewpoints, and the legitimacy of the state in conditions of disagreement, to maintain viewpoint neutrality. However, although his view is in this sense pluralistic he doesn't provide a sufficiently detailed defence of free speech protections to deal with the thought I canvassed above, that we might need to tailor our justification to the nature and justification of coercion involved.

Now, as an aside, it doesn't seem obvious to me that what we might call epistemic defences of freedom of speech (including the Rawlsian appeal to respect for our exercise of the moral powers) can justify strict viewpoint neutrality – they could do so only if it were plausible to think that there are no views that cannot possibly be right. I think we have to recognize that there are such views. Therefore a better justification of freedom of speech probably appeals to constraints arising from considerations of authority and legitimacy. However, setting that aside, we can perhaps divide justifications of free speech into i) those that appeal to some interest of individuals in having free speech, an interest that outweighs or trumps the state interest in exercising coercion in support of some goal, and ii) those that appeal to limits on the scope of legitimate state authority that derive from considerations other than individual

interests – arising, for instance, from the need for the state authority to represent all citizens equally. My point is that for both of these types of justification, whether protections on free speech are justified will depend what the coercive measure in question consists in, and the reasons the state has for carrying it out; as a result, the justification for free speech protections will have to be more nuanced than that provided by Brettschneider.

Take a concrete example to help clarify these ideas. Say a criminal sanction is introduced regarding certain kinds of unacceptable speech – speech that, if the state is right to ground itself on democratic values, cannot represent a valid viewpoint (‘Keep our country for the whites! Blacks out!’). The criminal sanction is introduced on expressive, not preventive, grounds – not with the aim of deterring or preventing people from holding such views, but rather in order to avoid authoritatively condoning such views. The aim is therefore not to stamp such views out – it is compatible with the (purely backward-looking) use of such a sanction on expressive grounds that citizens are free to hold such views: no one is trying to stop them from doing so. It is rather that the collective seeks to make an authoritative condemnation of such views, expressed in the imposition of punishment. The sentence for this offence is, not imprisonment, but rather a brief period of community service overseen by a probation officer – coercively imposed, but not hugely disruptive to the life of the offender. I am not arguing at this point that such a criminal sanction would be justified. But the question whether this impedes important interests of citizens, or exceeds the bounds of legitimate state authority, is different from the question whether the state is justified in seeking to prevent such views being held or expressed. The lesson from this is that the justification of viewpoint neutrality is not as simple a matter as Brettschneider may be taking it to be.

While we are on the topic of criminalization and punishment, let me extend the discussion to a further issue. A recent debate in criminal sentencing theory has concerned the

appropriateness of treating ‘hate motivation’ as an aggravating factor at sentencing.<sup>4</sup> Now the best way to think of ‘motivation’ in this context is probably as something like the ‘attitude manifested in action.’ So the issue concerns whether the presence of this attitude is something that can appropriately be called on to justify punishing the offender more harshly than he would otherwise have been. My reason for raising this question here is that one can envisage an argument against the use of such aggravating factors that is grounded in the right to freedom of speech: what free speech means, it might be said, is that it is only citizens’ actions, and not their attitudes, that are the business of the state; therefore the state cannot legitimately appeal to the presence of those attitudes in determining how to treat the offender. Brettschneider’s approach to free speech suggests a more subtle way of dealing with this question, but there is reason to think that he will still emerge on the side of those who would disallow the aggravating factor of hate motivation – and I wonder whether he would be comfortable with that. So how would we expect his position on free speech to apply to this debate? The use of such features of attitudes as an aggravating factor would suggest that whether a citizen holds a hateful attitude is indeed the state’s business, and that is something that Brettschneider can accept: such attitudes are indeed ‘publicly relevant.’ However, Brettschneider denies that the presence of publicly relevant attitudes can affect the extent to which it is permissible for the state to coerce the citizen. And for this reason it might seem that adding to the offender’s sentence on the basis of the presence of such attitudes would be disallowed by freedom of speech protections. It would be interesting to know whether Brettschneider would accept this as an implication of his position, and if so, whether he is content with it. By contrast, on the ‘expressivist’ line considered above, and which I illustrated by the example of punishing some forms of hate speech with community service, there may be a rationale for extending punishment for crimes that are motivated by hateful attitudes.

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<sup>4</sup> H. Hurd, ‘Why Liberals Should Hate “Hate Crime” Legislation,’ *Law and Philosophy* 20 (2001), pp. 215-232.

#### **4. The effectiveness of democratic persuasion**

In the preceding sections, I traded on a distinction between expressive and preventive justifications for state action. However, let us assume, as seems likely, that Brettschneider's main justification for democratic persuasion is that it will prevent the spread of hateful views. This leads us on to a further concern. I think Brettschneider needs to pay more attention to how democratic persuasion is going to work, and that once he does so it will become clear that democratic persuasion has to walk a fine line to avoid being either toothless, or intrusive. To illustrate this, let us consider a case, discussed by Brettschneider, that was brought before a Manitoba court. In this case a child had been systematically brought up by its parents to believe a far-right hate ideology (p. 51). Brettschneider interprets this as a free speech case, arguing that coercive removal of the child from its parents would be an inappropriate violation of their rights of freedom of speech, but that the claim to privacy cannot go so far as to protect the parents from democratic persuasion.

Now first of all, this is not an entirely clean free speech case, since even though this might indeed be an issue that concerns the border between the state's duty to respect privacy and its duty to combat hate ideologies, the justification for parents' rights to privacy in deciding how to bring up their children might refer specifically to freedoms required for the specific task of bringing up children, grounded, perhaps, in the value of the relationship between parent and child.<sup>5</sup> However, setting that aside, and interpreting it as a free speech case, it raises an initial question how far we should be prepared to protect directly harmful free speech. In this case, the parents are not just holding or communicating views; they are forming a young mind. The child involved is not an ideal citizen-audience member who can scrutinize views presented to her on the basis of her own autonomous reasoning; rather the education she gets from her parents is a major factor in forming her abilities for autonomous

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<sup>5</sup> See for instance the considerations canvassed in H. Brighouse and A. Swift, 'Legitimate Parental Partiality,' *Philosophy and Public Affairs* 37 (2009), pp. 43-80.

reasoning. This suggests that an important sort of harm may be being done to this child, harm to her capacity to be a free and equal citizen. There is a question whether Brettschneider's neutralist state can recognize this as harm – can it publicly endorse the view that a child can be harmed when they are prevented from developing correct values? Brettschneider's state takes a stand on whether there are correct values, so perhaps he would agree that there can be such harm. But if that is so, one question is whether democratic persuasion is enough in this case, or whether the harm to the child overrides that right (after all, no one has a right of freedom of speech to shout 'fire' in a crowded and dark cinema).

Brettschneider's discussion of this case treats it as though there were two only two options available to the state: coercive intervention to remove the children; or democratic persuasion. However, this seems a false dichotomy: for instance, there might be coercive intervention short of actually removing the children. This might involve the parents being required to attend parenting or citizenship classes; being required to mix with members of the races they claim to despise; being required to give evidence of progress, or at any rate of engagement with the criticisms. Some sentences for criminal offences, rather than requiring imprisonment, involve such remedial interventions. Brettschneider does not want to criminalise the parents' actions. But should he accept that democratic persuasion could be coercively imposed in this way even in the absence of criminal conviction? He doesn't say very much about this middle option of coerced persuasion. He may regard it as too heavy-handed, because coercive. However, the problem might be that – assuming now that democratic persuasion seeks to prevent the influence of hateful attitudes – state expression that falls short of required engagement would be too easy for those who put forward hate ideologies to brush off. Hence while coercive persuasion may seem intrusive, mere expressions of disapproval might be toothless. Is coerced persuasion acceptable? Again we need to know in more detail what is problematic about coercion – after all, the intervention in question does

not involve coercing anyone into actually believing anything, or even coercing them into avowing some belief whether they hold it or not; it simply involves coercing them into attending to and considering the merits of a point of view that they seem to be dismissing without justification. Does the justification of free speech protections rule such coercion out?

A related question regarding the effectiveness of democratic persuasion is whether there is a tension between liberal neutrality and action of the state in engaging in democratic persuasion that is respectful and effective. Let me first of all state the broad source of the tension, and then go on to explore it in a bit more detail. On the one hand, Brettschneider wants to argue that democratic persuasion involves addressing a proper justification to citizens: “actually engaging citizens in reasoning or challenging them when they reject the democratic grounds for an entitlement to justification” (p. 43). This makes it sound as though democratic persuasion will involve detailed countering of argumentative moves rather than abstract and general pronouncements regarding values. It sounds, that is, as though the kinds of considerations deployed in democratic persuasion might be something like the considerations that the citizens themselves can raise in their own ‘reflective revision.’ On the other hand, though, Brettschneider stresses that reflective revision will have to take place individually for each citizen on the basis of their own comprehensive conception (eg. pp. 57-8): I take this to mean that each citizen will explain political values differently on the basis of their own comprehensive conception. But in that case how can the state be persuasive without broaching considerations that belong to comprehensive conceptions? It would appear that arguments can only be persuasive if they delve into the detail of the reasons why certain attitudes are unacceptable. The neutral state, though, is precisely constrained from operating at this level of detail.

Furthermore, this tension between neutrality and persuasiveness is a problem that will come up, not just in relation to the state arguing with citizens, but equally with the state engaging in more symbolic actions. We can distinguish two quite different things that might be meant by Brettschneider's reference to the state's 'expressive' role. First of all, expression might just mean rationally transparent communication, the giving of reasons in free argument - non-manipulative persuasion aimed at proper understanding. Secondly, expression can have a more symbolic aspect to it. Examples of these sorts of symbolic, expressive acts that are mentioned in Brettschneider's book include: making Martin Luther King's birthday a public holiday; or donating money to a Tuskegee centre for bioethics; and perhaps even the act of giving an apology itself. These acts are meant to communicate something: they are meant to be noticed and it is essential that they should be done publicly. But it is not clear that they are concerned with the giving of reasons and of rational persuasion. Their communicative force relies, not on their transparently communicating reasons, but rather on their being acts of acknowledgement or recognition - apt symbols of some attitude that is taken to be relevant to the situation. Thus for instance, making King's birthday a public holiday is an act of acknowledgement, symbolising admiration for the man and his achievements. The act of donating money to a bioethics centre symbolises regret, making amends and thereby acknowledging in action the failures that went before.

Now when we are choosing symbols for these acts of appropriate acknowledgement, we are dealing with criteria of 'aptness.' And this is where the tension between neutrality and effective communication raises its head again. If Brettschneider thinks that the state should engage in symbolic action, there is a question to what extent these standards of symbolic adequacy or aptness can be thought of as being part of 'public reason.' Can claims about symbolic adequacy be neutral as between cultures and conceptions of the good? My suspicion, by contrast, is that symbolic language in this sense - of the meaning of gestures, or perhaps

even of the very idea that gestures can embody meaning in the way we mean by 'symbolic' - is culturally local. If it is acceptable for a democracy to avail itself of such symbols then it will have to be because it is acceptable for it to act on the basis of culturally local norms. This is a concern not only for those who are interested in effective democratic persuasion; but insofar as Brettschneider is assuming that the justification of democratic persuasion stands or falls on its effectiveness, he is subject to this concern.

## **5. Conclusion**

In this piece I have raised a number of concerns with Brettschneider's justification for protecting speech from coercion and with his justification for democratic persuasion. I have distinguished two possible justifications for coercive or communicative state action – the preventive and the expressive – and raised the question whether these justifications are adequate or well-defended in Brettschneider's book. I have asked whether the preventive justification for democratic persuasion, which I assume is the one on which Brettschneider leans most heavily, is compatible with a) eschewing coercion, and b) maintaining strict liberal neutrality. Despite its problems, however, anyone who reads this book will benefit from doing so. The position that Brettschneider articulates is attractive and worth thinking hard about. I am grateful to him for giving us the opportunity to do so, and I look forward to his responses.