NEW DIRECTIONS IN THE ETHICS AND POLITICS OF SPEECH

Edited by J.P. Messina

New Directions in the Ethics and Politics of Speech

This book features new perspectives on the ethics and politics of free speech. Contributors draw on insights from philosophy, psychology, political theory, journalism, literature, and history to respond to pressing problems involving free speech in liberal societies.

Recent years have seen an explosion of academic interest in these topics. However, most recent work has focused on constitutional protections for free speech and on issues related to academic freedom and campus politics. The chapters in this volume set their sights more broadly on the non-state problems that we collectively face in attempting to realize a healthy environment for free discourse. The volume's contributors share the assumption that threats to free speech do not come exclusively from state sources or bad actors, but from ordinary strategic situations in which all may be acting in good faith. Contributors take seriously the idea that our current cultural moment provides plenty of reason to be concerned about our intellectual climate and offer new insights for how to make things better.

New Directions in the Ethics and Politics of Speech will be of interest to researchers and students working in ethics, political philosophy, social theory, and law.

J.P. Messina received his PhD in Philosophy from the University of California, San Diego, in 2018. He is currently Assistant Professor of Philosophy at Purdue University. His research investigates conceptions of freedom across philosophical contexts. His book, *Private Censorship*, is forthcoming with Oxford University Press.

Political Philosophy for the Real World
Edited by Jason F. Brennan, Georgetown University

For more information about this series, please visit: https://www.routledge.com/Political-Philosophy-for-the-Real-World/book-series/PPRW

New Directions in the Ethics and Politics of Speech

Edited by J.P. Messina

Contents

List of Contributors

Andrew I. Cohen is Professor of Philosophy at Georgia State University.

Andrew J. Cohen is Professor of Philosophy at Georgia State University.

Alice Dreger, a medical historian and journalist, is the author of the critically acclaimed *Galileo's Middle Finger.*

Hrishikesh Joshi is Assistant Professor of Philosophy at Bowling Green State University.

Kathryn L. Lynch is the Katharine Lee Bates and Sophie Chantal Hart Professor of English Literature at Wellesley College.

Ryan Muldoon is Associate Professor of Philosophy at SUNY Buffalo.

Luke Sheahan is Assistant Professor of Political Science at Duquesne University.

Chris W. Surprenant is Professor of Ethics, Strategy, and Public Policy at the University of New Orleans.

Justin Tosi is Assistant Professor of Philosophy at Texas Tech University.

Brandon Warmke is Associate Professor of Philosophy at Bowling Green State University.

Acknowledgments

1   New Directions

J.P. Messina[1]

If there is such a thing as the public imagination, it has been recently preoccupied with questions of free speech. Spirited disputes about the wisdom of social pressure campaigns designed to hold speakers accountable for bad or dangerous speech have become a prominent fixture of our public lives. Worries about the role of social media platforms in amplifying polarizing incivility and misinformation reached a fever-pitch during the recent COVID-19 pandemic. As the same platforms have rushed to more strictly moderate content in response, their efforts have raised concerns about corporate censorship afresh. Additionally questions about the rise of social media for the prospects of the brand of professional journalism integral to our epistemic environment are increasingly prevalent given the ways in which they upset traditional funding models for journalism. Recent legislative efforts to ban critical race theory in public schools (including public universities) have only fanned the flames, reraising questions about legislative control over curricula and state funding for educational institutions.

Far from having easy answers, these issues are as polarizing as any in public life. It is therefore encouraging that scholars across disciplines have spent decades investigating the nature of speech, the limits and foundations of speech rights, and the effects of speech. They have asked (and variously answered) questions like:

- Is the distinction between speech and action sustainable in the view of the many things that we do with words?[2]
- Supposing there is a meaningful category of speech, what makes that category special, such that we should protect it in our constitutions?[3]
- Is there a meaningful category of hate speech and is it wise to legislate against it?[4]
- What is the role of diversity in reaching the truth?[5]
- Do speech restrictions or *laissez-faire* result in a better epistemic environment?[6]
- What is distinctive about discriminatory speech, and in what ways can it frustrate its targets' ability to speak freely?[7]

- What are slurs and how are they distinct from other kinds of bad speech?[8]

More recently, a perceived shift in campus politics has brought with it an intense interest in whether and how free speech is central to higher learning. Scholars have offered treatises aimed at articulating the point and purpose of the university,[9] its constitutive norm of academic freedom and the various ways in which students and faculty activism either threaten or enact the same norm.[10]

These research programs have paid substantial dividends: we better understand not only the foundations of our commitment to free speech principles, but also the degree to which these foundations might license restrictions on speech not currently allowed by law. We better understand the long-term cultural dangers of allowing the loudest among us to determine what gets heard by who, especially on college campuses, the ostensible purpose of which is to advance our understanding of the truth. And if we have been long-committed to the importance of academic freedom, we now better understand its relationship to the kind of free speech that it is government's role to protect.[11]

Yet, despite these significant payoffs, there remains something of a gap between the issues that have recently come to interest the public and the orientation of the scholarship just summarized. To wit, the public's interest in the freedom of expression often centers on the ways private parties (including media conglomerates, individuals, and informal social norms) can restrict speech, how and whether tax dollars ought to be in the service of funding institutions perceived to violate liberal neutrality, and what makes for a healthy environment for free expression. Answers to questions of this sort are not immediately given by existing scholarship, and yet their urgency is moving legislatures and executives to act in a way that amounts largely to shooting in the dark.

The mismatch—not of course to be exaggerated[12]—between the public's renewed interest in free speech issues and the scholarly treatment of the same can leave one with the sense that there remains uncharted terrain. There are, in other words, further areas in which scholarly inquiry promises to shed light on matters important to the public and to our collective legal lives. Better charting this terrain means addressing more diffuse threats to our freedom as speakers and listeners than anything states do. It means more squarely addressing the ways in which those outside universities can experience constraints on their freedom of expression. And that in turn means squarely addressing the role new technologies, new social expectations, and public emergencies play in reshaping our duties as speakers and listeners.

It is the aim of this volume to contribute to the small but growing academic literature that explicitly takes on the issues that make free

speech a vexing issue to ordinary people living in regimes that, at least as a legal matter, bar political censorship and protect academic freedom. The call for papers was simple: contributors had to address issues of free speech, but could not take issues of constitutional law or campus firings and deplatformings as their main focus. Participants were to take the discussion of speech issues in a *new direction*. This volume is the catalogue of their responses. To showcase their achievements, I'll spend the rest of this introductory chapter explaining how each piece takes up the challenge, trying to give a sense of how they hang together.

Our first essay, "The Possibility and Defensibility of Non-State Censorship" asks three related questions. First, what is censorship? Second, who can act as a censor? Is it merely government agents in their legislative capacities? Or can private parties similarly censor speech? Finally, is censorship inevitably wrong? After offering a philosophical analysis of censorship, authors Andrew I. and Andrew J. Cohen argue that, private parties *can* censor. Not only that, but *much* content moderation by social media platforms is rightly thought to be censorial.

A major mistake in thinking about social media censorship, according to the authors, is to suppose that social media censorship is necessarily wrong. Instead, Cohen and Cohen argue that much censorship by intermediaries like Facebook and Twitter is permissible, even if it would be impermissible for governments to adopt the same kinds of restrictions. After all, private property owners generally have weighty rights to exclude undesired others from the use of their property, whereas governments lack similar rights. These rights to exclude are weighty— so weighty that they make non-state censorship permissible, except in emergency circumstances.

This piece sets the stage for the volume's broader themes: persons' rights need not be violated by the state for complaints about censorship to make sense. Sometimes, we will have to address our complaints to private parties that might well be acting within their rights. Scholars working on these issues can help structure existing public debates by clearing up conceptual, empirical, and normative confusion.

In the volume's second essay, political philosopher Ryan Muldoon revisits the famous "marketplace of ideas" model for free expression popularized by the late Supreme Court Justice Oliver Wendell Holmes. This model, he argues, can help make sense of the idea that free speech aids us in our search for truth, even when some of what participants bring to market is false or misleading. Still, even when things are going as well as can be imagined (and everyone is acting in good faith, attempting to get at the truth), a single marketplace tends to crowd out diverse minority voices. When so, we lose out on diversity's important benefits,

potentially missing out on important truths not uncovered by the main conversation.

Unfortunately, the most natural response—drawing on the freedom of association to foster several smaller minority marketplaces—can lead to polarization. Smaller communities are subject to *sorting pressures* that can result in a lopsided discussion in which only one side of a debate participates. As these communities hear and present evidence, normal processes whereby individuals update their credences in response can lead them to adopt positions that bear little relationship to normative and empirical reality. Suffice to say, this can lead their members farther from rather than closer to the truth. It can even lead members to cease regarding the broader society's disagreement with the group's conclusions as evidence against them, resulting in gridlock and compromising a shared background understanding necessary for adjudicating public disputes.

It can thus seem that we face an unfortunate choice. We can go in for a single marketplace model, in which case we tolerate minority voices losing out. Alternatively, we can go in for multiple marketplaces, in which case we tolerate polarization and the misinformation polarization brings with it. We can either enjoy freedom of speech and its benefits, or else we can enjoy freedom of association and its benefits. But we can't, it seems, realize all the values that we might antecedently have hoped to realize in a liberal order. By way of conclusion, Muldoon argues that there are two ways of enriching the multiple marketplaces model that promise to resolve this dilemma.

First, if we can encourage representative members of each group to return to the broader marketplace of ideas to share their findings and collect feedback, then polarization pressures will ease. More than that, the broader community can benefit from any ideas developed in smaller communities that complicate the received views at the time. Second, as long as individuals belong to many epistemic communities, rather than just one, they can bring outside perspectives into specialist communities. When they do so, they will reduce the polarization pressure from within. While not guaranteed to succeed, Muldoon's proposals offer a framework for thinking through ways of improving our speech environment in ways that embrace, rather than eschew, the twin freedoms of expression and association.

Muldoon's worries about our environment for discourse are compatible with the assumption that our norms are basically well-calibrated and that everyone acts in an appropriate manner. The volume's third essay, "Don't Block the Exits," by contrast, relaxes this assumption. In this piece, philosophers Brandon Warmke and Justin Tosi build on their important work on moral grandstanding.[13] As they understand it, grandstanding is the use of moral talk to secure status or reputational

goods, rather than to get at the bottom of matters of public significance. Such pursuit of status can come at the expense of our knowledge communities. One way in which this is so, Tosi and Warmke argue, is by encouraging us to enforce norms that "block the exits."

We block the exits any time we make it socially costly for others to change their views. And exit-blocking is widespread. We punish politicians for "flip-flopping;" the non-Emersonians among us often think it is worse to be inconsistent than wrong; political partisans deploy purity tests to determine who is entitled to social status within their groups; and so on. Not content merely to observe and categorize the phenomenon of blocking the exits, Tosi and Warmke draw on recent evidence from experimental psychology to explain it, and resources in moral and political philosophy to articulate what's so troubling about it.

Exit-blocking *occurs* because we are natural status-seekers subject to pressures from both in- and out-groups. We are often rewarded by in-groups for chastising outsiders when they finally come to see the light. Exit-blocking is *regrettable* because it makes it difficult for people to change their minds, even when they have been persuaded that they should do so by what they take to be the better arguments. Blocking the exits thereby makes it difficult for people to respond rationally to evidence. And it increases polarization by encouraging people to adopt ever-more extreme views to stay on the good side of their groups.

But the authors don't stop with a negative assessment. Instead, they point out various alternative norms that would improve our discursive environment. Not only should we refrain from blocking the exits (and instead embrace people who change their minds), but we should praise individuals who disagree with their communities on important issues. Encouraging such in-group disagreement is likely to reduce internal and external pressure to conform to a narrow set of acceptable beliefs and improve our ability to breathe the intellectual air surrounding us. "Don't Block the Exits" is the second of three essays centrally concerned with the ways in which our current speech environment threatens the realization of intellectual diversity.

Our fourth essay (and the third in this series) asks whether the state can permissibly fund epistemic institutions (like universities) when they are intellectually homogeneous. Drawing on results from experimental psychology, Hrishikesh Joshi argues that homogeneity can compromise an epistemic institution's reliability. The evidence suggests that diverse groups do better than homogeneous ones in solving complex social problems. The unreliability of homogeneous, partisan institutions explains, according to Joshi, why it would strike us as inappropriate to fund institutions like the Heritage Foundation with public monies. By analogy, insofar as state-funded epistemic institutions (e.g., educational institutions, public broadcasters, and so on) are ideologically homogeneous, there is a problem with using public monies to fund them.

After all, the goal of funding epistemic institutions is to help us uncover the truth, and homogeneous institutions are unsuited to this goal. Thus, unless such institutions commit to substantially diversifying their knowledge-seeking and producing teams, there is a *prima facie* case that they should be denied tax dollars to fund their operations, at least insofar as these operations are adjacent to issues of political moment.

Moving beyond narrow questions of deplatforming on college campuses and the limits of academic freedom, Joshi offers a provocative reason for rethinking how state-funded epistemic institutions ought to be structured in order to better realize those aspects of their missions that make them worthy of public support in the first place. The implications of his work go well-beyond the college campus and applies to knowledge-producing institutions more generally.

The previous three essays focusing on diversity are generally optimistic about initiatives aimed at broadening the conversational tent and including more voices in the conversation than might be naturally inclined to participate. We should undertake special efforts to ensure that the public conversation is not dominated by any particular ideological group (and that minority groups have space to flourish independently of the broader conversation), and we should lower the costs, so far as we can, of changing one's mind.

And yet the social position that one occupies can change what it means to responsibly exercise one's rights to speak. For ordinary citizens, the best norm might be one in which each person is encouraged to speak her mind without fear of sanctions or significant loss of reputation.[14] But for those in positions of power, such as celebrities, athletes, and politicians, more restraint is arguably called for. And yet there is also an uncontroversial Samaritan duty to aid others when one is well-positioned to do so. Once we notice, therefore, that those with relatively bigger platforms are often uniquely positioned to speak in an impactful way, it appears that celebrities may have special obligations to speak out on important issues.

In the volume's fifth essay, Chris Surprenant takes on these complex issues. For Surprenant, the question of when celebrities should speak out and when they should instead restrain themselves comes down to two questions.

First, is the celebrity sufficiently well-informed to avoid exacerbating the problems he or she is trying to alleviate? Second, are the strategic elements of the celebrity's speech well-calibrated to induce the desired effect in the world? When the answers to these questions are yes, celebrities have especially stringent duties to speak out. Because the answers might well be no, they have especially stringent duties to be cautious when speaking and to do their due diligence in assessing the effects of their speech.

The second essay that takes up issues of social standing (and the sixth in our volume) is offered by Literature Professor Kathryn Lynch. Lynch

grapples with her difficult (but enlightening) experience revisiting John Howard Griffin's once-celebrated *Black Like Me* 60 years on. Her essay both motivates and challenges the idea that speaking on certain topics is reserved for people with certain identities and blocked from others.

Whereas Griffin was lauded in his time for blackening his skin to give voice to the everyday indignities of being Black in America, his social experiment would be impossible today. Understanding our contemporary discomfort with Griffin's exercise reveals a tension between the negative freedom to be free from censorship and the positive freedom to have a voice. Lynch argues that working this tension out is crucial for coming to terms with recent debates over who is entitled to speak on which topics—questions which are central to the very enterprise of writing as an exercise in empathy.

Taking up more directly the theme of what it means to deliver on the positive freedom to speak, medical historian turned journalist Alice Dreger reflects on her experience organizing a local non-profit outlet for investigative journalism. In "Democracy without the Government," Dreger tells the story of how bringing hard-hitting, non-partisan news to her local community in East Lansing, Michigan, changed fundamentally the way citizens engaged with local government. This revitalized her faith in the watchdog function of journalism.

At the same time, her experience delivering journalism to her community—first on a volunteer basis, later on a small budget as a non-profit organization—has convinced her that the same technologies that threaten the old-guard institutions of journalism can, when properly wielded, empower ordinary people to take on some of their crucial work. Dreger's essay thus provides reason for being optimistic that technological change has not blocked us from but might in fact enable us to (re)discover the value of a healthy, diverse, and independent press.

Whereas many of the volume's earlier essays concern where we are (and where we've come from), political theorist Luke Sheahan is more centrally interested in where foundational issues on free speech might go in the future. Sheahan observes that, at least until recently recast by progressives as a "right-wing value," free speech has been traditionally defended as a *liberal* value. For their part, conservative theorists have had little good to say about the idea, concerned about the conditions under which free speech can threaten social stability and precipitate misguided social change. Recent right-wing attacks on free speech in schools (e.g., book banning and restrictions on the proliferation of critical race theory) seem to support the view that conservatives are often no friends of free speech.

But Sheahan believes that this is a mistake. Not only are there resources in the conservative tradition for grounding a robust commitment to free speech, but appealing explicitly to this tradition might motivate contemporary conservatives to see the value in free speech. In turn, this might make

reactionary assaults on the value of free speech less likely where they've historically enabled repression (and where they continue to do so to this day). Drawing on conservative theorists like Kirk, Burke, Oakeshott, and Nisbett, Sheahan explains these arguments and attends carefully to their limits. This essay suggests that those motivated by our earlier essays to be concerned about the way our free speech environment is currently constituted would do well to engage in a kind of coalition-building that crosses partisan lines. It is, for that reason, a good place to end.

***

Together, these essays paint a troubling picture for free speech in Western democracies—even those which strongly protect speech. Individuals acting within their rights and responding rationally to the incentives they face can act in ways that combine to make speaking openly more difficult. Insofar as speaking openly is important for realizing the benefits of a diverse public sphere, this is something we should care about, even if addressing it requires a different set of tools than we typically associate with the proper response to censorship.

For all of the worries that the volume raises about where we are, it also contains insights for moving in better directions going forward. To do so requires recognizing a truth long touted by critics of *laissez-faire* conceptions of free speech: by themselves, strong protections against state censorship are inadequate for realizing the kind of atmosphere for expression that is supportive of prized values like autonomy, sound decision-making, and diversity.

To do better, we need to more squarely recognize our own roles as enforcers of these norms and even as censors. Though we may be acting within our rights such that no one may permissibly stop us from exercising this kind of power over others' speech, rights come with responsibilities, and there remains work to be done in specifying our own responsibilities with respect to others' speech. The essays that follow are but a beginning in supplementing the excellent work already undertaken to uncover such responsibilities. But the hope is that they will inspire others to deepen the carving of new terrain.

With gratitude to each contributor, I present eight compelling essays pressing research on the ethics and politics of speech in new directions. I hope you enjoy them.

Notes

1 100 N. University Street, Rm. 7105 West Lafayette, IN 47907–2098.
2 E.g., Austin (1962), Schauer (2015), Simpson (2016), Jacobson (2001).
3 E.g., Schauer (1982), Emerson (1964), Cass (1987), Chemerinsky (1985), Fish (1994), Messina (2020).

4 E.g., Waldron (2014), Lambe (2004), Howard (2019), Fish (2019), Billingham (2019), Schulzke (2016).
5 E.g., Bruner (2015), Fricker (2011), Kitcher (1990), Muldoon, Borgida, and Cuffaro (2012), Muldoon (2017), Muldoon (2013), Muldoon (2018b), Bishop and Simpson (Forthcoming).
6 E.g., Howard (2021), Leiter (2014), Leiter (2022), Sunstein (2021).
7 E.g., Langton (1993), Jacobson (2001), Grünberg (2014), Maitra (2009), Maitra and McGowan (2012), McGowan (2009, 2014, 2019), McGowan et al. (2011).
8 E.g., Anderson and Lepore (2013), Ashwell (2016), Bolinger (2017), Liu (2021), Kirk-Giannini (2019), Popa-Wyatt and Wyatt (2018).
9 E.g., Whittington (2019).
10 10 E.g., Zimmerman (2016), Muldoon (2018a).
11 E.g., Downs and Surprenant (2018), Chemerinsky and Gillman (2018), Fish (2014), Simpson (2020).
12 After all, these are broad trends and there are exceptions. Psychologists are studying the effects of online social pressure campaigns and their relationship to polarization. See Bail (2021), Barberá (2015), and Boxell, Gentzkow, and Shapiro (2017). Legal scholars have addressed speech restrictions stemming from employers' powers over employees (e.g., Estlund 2021) and have written extensively about internet regulation and its relationship to free speech (e.g., Candeub 2020; Citron 2021; Kosseff 2019; Volokh 2014, 2021). Philosophers are beginning to offer comprehensive theories of social punishment and applying them to issues of speech (Radzik 2020; Norlock 2017; Aly and Sampson 2019). And there is a small but growing literature about how best to talk to those who believe conspiracy theories (McIntyre 2021) and how online platforms' activity can threaten or realize free speech values (Cobbe 2021; Whitney and Simpson 2019; Brison and Gelber 2019). These and other developments promise to help guide public debate and reduce the need for speculation in much the same spirit as this volume does.
13 Tosi and Warmke (2020).
14 Joshi (2021).

References

Aly, Waleed, and Robert Mark Sampson. 2019. "Political Correctness Gone Viral." In *Media Ethics, Free Speech, and the Requirements of Democracy*, edited by Carl Fox and Joe Saunders, 1st ed., 125–43. Routledge. https://doi.org/10.4324/9780203702444

Anderson, Luvell, and Ernie Lepore. 2013. "Slurring Words." *Noûs* 47 (1): 25–48. https://doi.org/10.1111/j.1468-0068.2010.00820.x

Ashwell, Lauren. 2016. "Gendered Slurs." *Social Theory and Practice* 42 (2): 228–39. https://doi.org/10.5840/soctheorpract201642213

Austin, J. L. 1962. *How To Do Things With Words*. Oxford: Clarendon Press.

Bail, Christopher A. 2021. *Breaking the Social Media Prism: How to Make Our Platforms Less Polarizing*. 1st ed. Princeton: Princeton University Press.

Barberá, Pablo. 2015. "How Social Media Reduces Mass Political Polarization. Evidence from Germany, Spain, and the U.S." *American Political Science Association Conference Paper*, 46.

Billingham, Paul. 2019. "State Speech as a Response to Hate Speech: Assessing 'Transformative Liberalism'." *Ethical Theory and Moral Practice* 22 (3): 639–55. https://doi.org/10.1007/s10677-019-10001-1

Bishop, Sebastien, and Robert Mark Simpson. Forthcoming. "Disagreement and Free Speech." In *Routledge Handbook of Philosophy of Disagreement*, 14. New York: Routledge.

Bolinger, Renée Jorgensen. 2017. "The Pragmatics of Slurs." *Noûs* 51 (3): 439–62. https://doi.org/10.1111/nous.12090

Boxell, Levi, Matthew Gentzkow, and Jesse M. Shapiro. 2017. "Greater Internet Use Is Not Associated with Faster Growth in Political Polarization Among US Demographic Groups." *Proceedings of the National Academy of Sciences* 114 (40): 10612–17. https://doi.org/10.1073/pnas.1706588114

Brison, Susan J., and Katharine Gelber, eds. 2019. *Free Speech in the Digital Age*. New York, NY: Oxford University Press.

Bruner, Justin P. 2015. "Diversity, Tolerance, and the Social Contract." *Politics, Philosophy & Economics* 14 (4): 429–48. https://doi.org/10.1177/1470594X14560763

Candeub, Adam. 2020. "Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230." *Yale Journal of Law and Technology* 22: 391–433.

Cass, Ronald A. 1987. "The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory Melville B. Nimmer Symposium." *UCLA Law Review* 34 (5–6): 1405–92.

Chemerinsky, Erwin. 1985. "Rethinking State Action." *Northwestern Law Review* 80 (3): 503–57.

Chemerinsky, Erwin, and Howard Gillman. 2018. *Free Speech on Campus*. Paperback ed. New Haven; London: Yale University Press.

Citron, Danielle Keats. 2018. "Extremist Speech, Compelled Conformity, and Censorship Creep." *Notre Dame Law Review* 93 (3): 1035–72.

Cobbe, Jennifer. 2021. "Algorithmic Censorship by Social Platforms: Power and Resistance." *Philosophy & Technology* 34 (4): 739–66. https://doi.org/10.1007/s13347-020-00429-0

Downs, Donald Alexander, and Chris W. Surprenant, eds. 2018. *The Value and Limits of Academic Free Speech: Philosophical, Political, and Legal Perspectives*. Routledge Studies in Contemporary Philosophy 109. New York: Routledge.

Emerson, Thomas I. 1964. "Freedom of Association and Freedom of Expression." *The Yale Law Journal* 74 (1): 1–35. https://doi.org/10.2307/794804

Estlund, Cynthia. 2021. "Freedom of Expression in the Workplace." *In The Oxford Handbook of Freedom of Speech*, edited by Adrienne Stone and Frederick F. Schauer, 410–30. Oxford, United Kingdom ; New York, NY: Oxford University Press.

Fish, Stanley. 1994. *There's No Such Thing as Free Speech: And It's a Good Thing, Too*. Oxford; New York: Oxford University Press.

———. 2014. *Versions of Academic Freedom: From Professionalism to Revolution*. Chicago, IL: The University of Chicago Press.

———. 2019. *The First: How to Think about Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump*. First Atria Books hardcover edition. New York: One Signal Publishers; Atria.

Fricker, Miranda. 2011. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press.

Grünberg, Angela. 2014. "Saying and Doing: Speech Actions, Speech Acts and Related Events." *European Journal of Philosophy* 22 (2): 173–99. https://doi.org/10.1111/j.1468-0378.2011.00481.x

Howard, Jeffrey W. 2019. "Free Speech and Hate Speech." *Annual Review of Political Science* 22 (1): 93–109. https://doi.org/10.1146/annurev-polisci-051517-012343

———. 2021. "Extreme Speech, Democratic Deliberation, and Social Media." In *The Oxford Handbook of Digital Ethics*, edited by Carissa Véliz, 1–22. Oxford University Press. https://doi.org/10.1093/oxfordhb/9780198857815.013.10

Jacobson, Daniel. 2001. "Speech and Action: Replies to Hornsby and Langton." *Legal Theory* 7 (2): 179–201. https://doi.org/10.1017/S1352325201072032

Joshi, Hrishikesh. 2021. *Why it's OK to Speak Your Mind*. New York: Routledge.

Kirk-Giannini, Cameron Domenico. 2019. "Slurs Are Directives." *Philosophers' Imprint* 19 (48): 1–28.

Kitcher, Philip. 1990. "The Division of Cognitive Labor." *The Journal of Philosophy* 87 (1): 5–22. https://doi.org/10.2307/2026796

Kosseff, Jeff. 2019. *The Twenty-Six Words That Created the Internet*. Ithaca: Cornell University Press.

Lambe, Jennifer L. 2004. "Who Wants to Censor Pornography and Hate Speech?" *Mass Communication and Society* 7 (3): 279–99. https://doi.org/10.1207/s15327825mcs0703_2

Langton, Rae. 1993. "Speech Acts and Unspeakable Acts." *Philosophy & Public Affairs* 22 (4): 293–330. https://www.jstor.org/stable/2265469

Leiter, Brian. 2014. "The Case Against Free Speech." *Sydney Law Review* 38 (4): 407–39. https://doi.org/10.2139/ssrn.2450866

———. 2022. "The Epistemology of the Internet and the Regulation of Speech in America." SSRN Scholarly Paper ID 3939948. Rochester, NY: Social Science Research Network. https://doi.org/10.2139/ssrn.3939948

Liu, Chang. 2021. "Slurs as Illocutionary Force Indicators." *Philosophia* 49 (3): 1051–65. https://doi.org/10.1007/s11406-020-00289-0

Maitra, Ishani. 2009. "Silencing Speech." *Canadian Journal of Philosophy* 39 (2): 309–38. https://doi.org/10.1353/cjp.0.0050

Maitra, Ishani, and Mary Kathryn McGowan, eds. 2012. *Speech and Harm: Controversies over Free Speech*. 1st ed. Oxford: Oxford University Press.

McGowan, Mary Kate. 2009. "Oppressive Speech." *Australasian Journal of Philosophy* 87 (3): 389–407. https://doi.org/10.1080/00048400802370334

———. 2014. "Sincerity Silencing." *Hypatia* 29 (2): 458–73. https://doi.org/10.1111/hypa.12034

McGowan, Mary Kate, Alexandra Adelman, Sara Helmers, and Jacqueline Stolzenberg. 2011. "A Partial Defense of Illocutionary Silencing." *Hypatia* 26 (1): 132–49. https://doi.org/10.1111/j.1527-2001.2010.01122.x

McGowan, Mary Kathryn. 2019. *Just Words: On Speech and Hidden Harm*. First ed. Oxford: Oxford University Press.

McIntyre, Lee C. 2021. *How to Talk to a Science Denier*. Cambridge: The MIT Press.

Messina, J.P. 2020. "Freedom of Expression and the Liberalism of Fear." *Philosophers' Imprint* 20 (34): 17.

Muldoon, Ryan. 2013. "Diversity and the Division of Cognitive Labor." *Philosophy Compass* 8 (2): 117–25. https://doi.org/10.1111/phc3.12000

———. 2017. "Exploring Tradeoffs in Accommodating Moral Diversity." *Philosophical Studies* 174 (7): 1871–83. https://doi.org/10.1007/s11098-016-0825-x

———. 2018a. "Campus Speech, Diverse Perspectives, and the Distribution of Burdens." In *The Value and Limits of Academic Speech*, edited by Chris W. Surprenant and Donald Downs, 285–99. Routledge.

———. 2018b. "The Paradox of Diversity." *Georgetown Journal of Law & Public Policy* 16 (Special Issue): 807–20. https://heinonline.org/HOL/P?h=hein.journals/geojlap16&i=824

Muldoon, Ryan, Michael Borgida, and Michael Cuffaro. 2012. "The Conditions of Tolerance." *Politics, Philosophy & Economics* 11 (3): 322–44. https://doi.org/10.1177/1470594X11417115

Norlock, Kathryn J. 2017. "Online Shaming." *Social Philosophy Today* 33: 187–97. https://doi.org/10.5840/socphiltoday201762343

Popa-Wyatt, Mihaela, and Jeremy L. Wyatt. 2018. "Slurs, Roles and Power." *Philosophical Studies* 175 (11): 2879–2906. https://doi.org/10.1007/s11098-017-0986-2

Radzik, Linda. 2020. *The Ethics of Social Punishment: The Enforcement of Morality in Everyday Life*. Cambridge; New York: Cambridge University Press.

Schauer, Frederick. 1982. *Free Speech: A Philosophical Enquiry*. Cambridge University Press.

———. 2015. "On the Distinction Between Speech and Action." *Emory Law Journal* 65: 427–54. https://doi.org/10.2139/ssrn.2514453

Schulzke, Marcus. 2016. "The Social Benefits of Protecting Hate Speech and Exposing Sources of Prejudice." *Res Publica* 22 (2): 225–42. https://doi.org/10.1007/s11158-015-9282-1

Simpson, Robert Mark. 2016. "Defining 'Speech': Subtraction, Addition, and Division." *Canadian Journal of Law & Jurisprudence* 29 (2): 457–94. https://doi.org/10.1017/cjlj.2016.20

———. 2020. "The Relation Between Academic Freedom and Free Speech." *Ethics* 130 (3): 287–319. https://doi.org/10.1086/707211

Sunstein, Cass R. 2021. *Liars: Falsehoods and Free Speech in an Age of Deception*. 1st edition. New York: Oxford University Press.

Tosi, Justin, and Brandon Warmke. 2020. *Grandstanding: The Use and Abuse of Moral Talk*. Oxford University Press.

Volokh, Eugene. 2012. "Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation." *Texas Review of Law and Politics* 16 (2): 42.

———. 2021. "What Cheap Speech Has Done: (Greater) Equality and Its Discontents." *UC Davis Law Review* 54: 2303–40.

Waldron, Jeremy. 2014. *The Harm in Hate Speech*. First Harvard University Press paperback edition. Cambridge: Harvard University Press.

Whitney, Heather M., and Robert Mark Simpson. 2019. "Search Engines and Free Speech Coverage." In *Free Speech in the Digital Age*, edited by Susan Brison and Katharine Gelber, 33–51. Oxford University Press. https://doi.org/10.1093/oso/9780190883591.003.0003

Whittington, Keith E. 2019. *Speak Freely: Why Universities must Defend Free Speech*. First paperback printing. New forum books. Princeton: Princeton University Press.

Zimmerman, Jonathan. 2016. *Campus Politics: What Everyone Needs to Know®*. 1st edition. Oxford University Press.

2 The Possibility and Defensibility of Nonstate "Censorship"

Andrew Cohen[1] and Andrew Cohen[2]

Whether social media companies (hereafter, SMCs) such as Twitter and Facebook limit speech is an empirical question. No one disputes that they do. Whether they "censor" speech is a conceptual question, the answer to which is a matter of dispute. Whether they *may* do so is a moral question, also a matter of dispute. We address both of these latter questions and illuminate whether it is morally permissible for SMCs to restrict speech on their platforms. This could be part of a larger argument, which we do not explicitly offer here, that states ought not to forbid SMCs from censoring. We do not focus on legal statutes or precedent. We argue that nonstate actors can (as a conceptual matter) and may (as a moral matter) impede the freedoms of others to express themselves. That is, barring rare emergencies, nonstate actors may censor individuals even when states may not.

We mainly defend our view indirectly. We approach our defense by tackling some important objections. Our targets are critics who deny that property rights in the means of communication confer extensive rights to exclude. As we shall note, however, arbitrary exercise of such rights leaves nonstate actors liable to nonstate punishment from boycotts, public shaming, disassociation, and the vagaries of consumer preferences.

We begin with an account of censorship in Section 2.1. After concluding that private entities, including SMCs, can (conceptually) censor speech, we go on in Section 2.2 to discuss arguments that it is impermissible for them to do so. We consider four such arguments, which appeal in turn to (1) private property serving as a town square, (2) a right to equal status and relational equality, (3) testimonial injustice, and (4) historical injustice. We show how the first three arguments are vulnerable to what we call the *substitution objection*: there are alternatives available that honor the relevant values in political morality and have fewer moral costs. Our response to the fourth argument is different, but nonetheless shows how the objection fails. We conclude the paper in Section 2.3 by considering when SMCs would not justifiably censor.

2.1 What Censorship Is

In this section, we set out our formal account of censorship. In our view, substantive considerations about the merits or permissibility of an action are separate from whether that action counts as an instance of censorship. Censorship is a constraint on a family of freedoms of expression. Accordingly, states, corporations, and individuals can and routinely do censor.

We take it to be *censorship* when one agent intentionally suppresses, denies, or withholds from a second agent some liberty to express themselves or otherwise communicate.[3] In our view, "censorship" is a success term—failed attempts at censoring another are just that: failed attempts. If Joe knocks Jim off the platform in order to stop him from speaking, but Jim holds on to the microphone, retains his balance, and continues speaking, he has not been censored though Joe *attempted to censor* him.

This formal account rules out the possibility of accidental censorship. If you inadvertently bump into a stranger who is speaking to someone, you restrict the stranger's liberties to speak—especially if you knock that person to the ground. We would not call this censorship. If your neighbor mows her lawn on some weekend afternoon and restricts your liberty to have casual conversation on your nearby back patio, she does not censor you. To censor is *intentionally* to constrain another's opportunities to speak or express themselves.

Our formal account of censorship pays no heed to moral considerations that govern whether (and when and where) one may permissibly impact others' liberties to speak or express themselves. This means that there will be cases of censorship that might not be noted as such because they are not morally problematic. We recognize that people sometimes take the term *censorship* to entail an impermissible or indefensible limit on another's opportunities to speak or express some view. In our view, that is a mistake that involves confusing conceptual with moral matters. We return to this point below.

There are clear cases of censorship by government authorities. Many of them will strike us as misguided or impermissible. Lenny Bruce was arrested for a bit in which he displayed and discussed nudes from *Playboy* magazine (Kirchner 2010, ch. 11). Eugene Debs was incarcerated for sedition when he publicly opposed World War I conscription (Newton-Matza 2017, ch. 4). Prior to the US Supreme Court ruling in 1965 in *Griswold v. Connecticut*, physicians in Connecticut were legally prohibited from advising married couples about methods of contraception. In these and many other such cases, state authorities once used or still use force to restrict, prohibit, or punish the expression of some ideas.

Some critics might challenge the claim that nonstate entities can censor. We caution against conflating conceptual and moral concerns. Speaking purely conceptually, nonstate entities *can* censor. Indeed, they

regularly do so. If they could not, then the term "government" is redundant as a qualifier for "censorship," and we would need another term for what nonstate agents do when they limit speech. Following common usage and in order that we may set out a concept that is sufficiently versatile for theoretical purposes, we hold that censorship is not the unique province of the state. It is a feature of how one party suppresses, constrains, or withholds liberties from another to express certain views in certain ways.

The term "government censorship" is, then, a specification of "censorship," as is "parental censorship," "school censorship," etc. "Social media censorship" would simply be censorship by a SMC.

There are many morally innocuous cases of censorship that often receive little notice except to philosophers analyzing the concept. Suppose a committee chair maintains a queue for discussion and denies someone the chance to interrupt out of turn. On our account, that is censorship. If you shush a person in the theater, you attempt to censor them. When you hang up on a telemarketer, you censor them. When parents make their children be quiet at bedtime, they censor them. When a journal editor desk rejects your manuscript, the editor has, on our account, censored you. Many of these are routine and permissible exercises of authority, privacy, and civility.[4] If we understand censorship as the deliberate refusal, withdrawal, or denial to someone of some liberty to speak or express themselves, then these and many other examples are censorship. States regularly do it. Corporations do it. Individuals also do it.

On this formal account, note that the constraint or suppression need not be complete for it to be censorship. X might censor Y by disallowing use of the mail while failing to stop Y from communicating Y's view in other ways. Some acts suppress or deny *more* liberties to communicate than others do. If X locks Y in a prison cell and denies Y all contact with the outside world, that is far more constraining of Y's liberty to speak than if X were simply to confiscate Y's computer. Locking Y in a prison cell is, *prima facie*, more censoring than confiscating Y's computer. Confiscating the computer is, *prima facie*, more censoring than shushing Y in the theatre. Among the factors that determine the extent to which one censors are: how many people's liberties one constrains, how effectively, in how many contexts, and for how long.

When Twitter banned former President Trump from its platform, it prevented him from speaking to a certain audience via a particular medium, thereby limiting his speech. It did not prevent him from speaking elsewhere; he had other available avenues of communication. Even when the government censors someone, they also will typically have other avenues of speech. Consider the Comstock Act of 1873, which made it illegal to send certain "lascivious" material through the mail. Those wishing to share or speak about those materials with others could still do so—for example, by physically handing them the materials.

It seems implausible that only governments can suppress expression or communication. Imagine a teacher in a contemporary private school or private college classroom who tells the female students to be quiet while the class learns about and discusses abortion because, the teacher says, they have nothing of value to contribute. Other things equal, this seems clearly impermissible, but what matters here is that it is a case of censorship that has nothing to do with the role of the government and everything to do with his excluding the female students from the discussion—i.e., his *suppression* of their communication. Some instances of private suppression of communication are permissible and some impermissible. Similarly, some instances of government suppression of communication are permissible (typically, those involving reasonable place, time, and manner restrictions) and some impermissible. Again, we see no conceptual reason to call one censorship and not the other.

Next, we consider common criticisms of the view that nonstate agents may suppress speech. We argue against the leading criticisms.

2.2   Arguments against Stringent Private Rights to Exclude

We begin this section by sketching an account of property that allows for rights over platforms for expression and speech, but which does not prejudge the stringency of such rights. While we do not guarantee our account is neutral among all substantive theories of rights, it is thick enough to allow that individuals, alone or together with others, may claim rights over means of communication but thin enough so as not to determine exhaustively the stringency of various rights claims purely on formal bases. After setting out the formal account, we consider what claims others might have to access such spaces against the owners' will.

On our account, property rights include a bundle of claims. We do not specify all elements in that bundle. We maintain, however, that one item in that bundle is typically a right to exclude others for any reason barring emergency (Schmidtz 2010; Honoré 2013; Alexander and Peñalver 2012, ch. 7).

Enjoying or exercising such property rights does not insulate property owners from the informal reprisals of civil society for unwise or pernicious exercises of that right. Second- or third-parties may, for instance, condemn such uses of rights, rally others to their cause, disassociate from the owners, or exclude owners from access to other resources or opportunities over which the second- or third-parties have rights. Moreover, such second- or third-parties are subject to scrutiny and reprisals over how they exercise their own rights when thus responding.

On our substantive account, this right to exclude ought nearly always to protect bearers from state action. (This is consistent with recognizing that the state ought to protect a right to exclude that is consistent

with others' similar rights.) In short, we hold that in a liberal political morality, there are important moral reasons for understanding rights to exclude as having priority over nearly all other rival claims. We call our substantive view *stringent private rights to exclude.*

According to this view, *nonstate* agents ought to enjoy immensely (but not infinitely) stringent rights to exclude others who seek access to their property, including for the purposes of expression or communication. We do not directly defend *stringent private rights to exclude.* Instead, we approach this issue indirectly by considering the shortfalls of common criticisms of the view. In this way, we hope to leave substantive positions such as ours on more solid footing.

We survey four compelling worries that private rights to exclude expression on, by, or with privately held resources are readily defeasible by non-emergency considerations. They are (a) the *town square* argument, (b) the argument from *equal status*, (c) the appeal to *testimonial injustice*, and (d) the appeal to *historic injustice*. We discuss each in turn.[5]

2.2.1 The Town Square Argument

One common argument subordinates property to free speech rights by appealing to the need for a public forum. We call this the *town square* argument. On this account, free speech uniquely serves crucial roles for the health of a political community. As some US federal and state courts have noted, shopping malls and other privately owned spaces often serve as a sort of town square or town forum (*Alderwood Assocs. v. Envtl. Council* 1981; *State v. Schmid* 1980; *New Jersey Coalition v. JMB* 1994; *Pruneyard Shopping Center v. Robins* 1980). Critics of stringent private rights to exclude might argue that such spaces are the main if not only spots where diverse people from the community mix peacefully. Such spaces, on this sort of view, now serve important *public* functions. Among those functions is being a site for the free exchange of information crucial for sustaining a free society. Thwarting such exchange and expression undermines the opportunity for a people to hold their public institutions accountable in a free, informed, and responsible fashion, and so owners' rights to exclude are thereby subject to constraint.

The town square argument holds that owners of spaces that serve public forum functions may not deny persons reasonable opportunities to exercise freedoms that are key to maintaining an accountable public order, such as those to petition, disseminate information peaceably, and assemble. Case law in the United States, though, holds that such freedoms are subject to time, place, and manner restrictions even in public spaces; the same restrictions used to preserve the commercial functions of the venue have also been imposed on those wishing to use privately held spaces (*Pruneyard* at 83). We need not settle what would count as

"reasonable opportunities" to exercise the relevant freedoms in order to explore this argument. We shall suppose that proponents of this argument would unpack it in a way that would allow at least some non-emergency cases as among such reasonable opportunities.

Since ours is an exercise of social philosophy and not legal theory, we also pass over details about applications of and limits to the state action doctrine (which limits the protection of speech freedoms to encroachments by state actors only), due process protections, and other important constitutional and legal considerations. We consider only whether the *town square* argument succeeds in light of what we call *the substitution objection*: the town square argument fails when there are alternative outlets for expression that can substitute for one's preferred venue to communicate.

Under *stringent private rights to exclude*, absent certain emergencies, one does not have any right to petition, speak, or express (which for simplicity we call *the right to speak*) using property over which one otherwise has no claim—especially without the owner's consent. If the sole reason for giving priority to the right to speak is that it is the *only* way to disseminate a message or exercise other important freedoms, opponents of stringent private rights to exclude must demonstrate that there is no substitution available to speaking via the putative private property. We argue, however, that there are substitutions routinely available. We do not deny that some such substitutions might be less effective or more expensive. We simply reject the view that there are no substitutes. For instance, those who wish to speak can stand on sidewalks, rent a billboard, buy radio airtime, write letters to the editor of a local newspaper, disseminate information in the park, speak with neighbors, and so on.

Of course, most proponents of town square arguments will object that the alternatives are unfairly more difficult to exercise and/or more expensive. This might be a regrettable feature of our civil society, but it is not, without further argument, a reason to deny stringent private rights to exclude. There are, after all, many circumstances and considerations that make other things more difficult or expensive to use—and which are not ordinarily taken to justify constraining property owners' rights. If you open a coffee shop near mine, your competition makes mine more expensive to operate, but we do not think competition should be prohibited. There are always gains and losses when living in society with others; a justificatory burden must be met before interfering with such.

The whole idea of a "town square" where people congregate and civically engage, discussing the political issues of the day, seems a quaint relic or myth. At best, it has been a very long time since communities had that, and many contemporary communities never had it.

Town square proponents might have in mind a model from the United States in which a nine block grid included a town hall, green space, and centrally located stores (Brady 2014). This was a location wherein all could engage in discussion about the issues of the day, whether political

in nature or not. Unsurprisingly, there are problems with this view. First, it is clear that the history of slavery and racism generally in this country limited the extent of general participation in any public discussion forum, *especially* those in public spaces. Granted, one might think this provides additional reason to want private spaces for public discourse (as minorities might be more likely to engage in the discussion therein). When these spaces are owned by others, though, justification is needed to limit the rights of those others.

There is a second problem with the idea of preserving or reconstructing a public forum that allows discussion for community decisions. Perhaps under some ideal town square model, individuals freely participate in robust discussion. What we actually see, historically, are not the "rugged" individuals of American myth but people committed to their local groups. As B.A. Shain says, "what made Americans so different from others in the Western world was the degree to which familial and local communal concerns were sanctioned and not overawed by those of higher levels of integration" (Shain 1996, 100; see also Butterfield 2015, 12). In short, then, whatever discussion that was present at the town square would have been limited by the local communal interests of the citizens—about which there would be considerable overlap, especially as slaves would be excluded.[6]

A more accurate historical understanding, then, is that it was never the case that everyone had a town square within which to speak. Some people, of course, simply lived too far from a town to engage in discourse within one. Others would have been prohibited from doing so. An honest appraisal of the town squares as they actually existed (where they did) would also have to recognize that many would be subject to significant racist and sexist norms that meant only some could even potentially engage in whatever civic discourse there was. Given all of this, the claim that any particular SMC or mall should be required to abide by policies making it a "town square" could not be a matter of reviving something that was once, but is no longer, present. Rather, it has to be recognized as a demand that property rights be limited so that others can have a place for public discourse where little or none had been before—indeed, where government authorities or local groups would have prevented such.

This historical argument is not decisive against a normative argument for a requirement on malls (or SMCs) that they serve as public fora, but it lays bare what the demand really is: a demand for something to be provided because some happen to think it a good thing. As with other cases where some wish to use government force to satisfy some group's preferences, further argument is needed to justify interfering with how individuals wish to make use of their property. Even if public discourse is important (and we agree that it is), that commitment alone is insufficient to justify limiting stringent private rights to exclude. Government could,

after all, supply what is desired through taxation, with all sharing the burden rather than imposing on particular property owners.

Presumably, defense of the *town square argument* will involve something about the value of democracy or being heard. We discuss such arguments in the next section. For now, we note that such arguments must satisfy two requirements. First, they must show there is a need for "town square"-like spaces—spaces where public discourse is allowed or encouraged. Second, they must show that these must be provided by private parties. That is, it is not enough to say there must be a space for public discourse, but we must also know why the state itself cannot provide such a space rather than forcing a group of property owners to do so.[7]

Some might be inclined to make some sort of efficiency argument for requiring Malls (or SMCs) to allow extensive use of their property for the purpose of enabling or encouraging speech. The space already exists, after all, so using it would obviate the need to create another space. But there are many spaces that exist. Critics seem to ignore how people can simply engage in public discourse on their neighborhood streets, in public parks, at bars, in bowling alleys with friends, etc. Even if it is true that open opportunities for public discourse serve important moral purposes—and we agree that without such, a community is morally impoverished—there is little reason to place the burden for such provision on specific owners.

We believe owners of malls or SMCS could reply to the claim that their property is the "town square" by noting that other venues can satisfy town square functions. Malls, for instance, compete for customers—with each other and with other sites, not all of which are commercial. Perhaps one mall wants to appeal to liberal customers while another wants the conservative customers. Mall owners might wish to provide customers with a certain atmosphere such as one that excludes certain political solicitations or only provides certain political solicitations. Proponents of limiting stringent private rights to exclude must then show that owners' rights to their spaces must yield to the demands of others to access such spaces against owners' wishes.

Our claim, to reiterate, is that to defeat *stringent private rights to exclude*, critics must show that the right to speak on/through/with some property takes precedence over the owner's right to exclude despite available substitute venues for speech. While an individual is and should be free to speak in their own home and in genuinely public spaces (those owned or controlled by the state), they are not usually so free in property owned by someone else.

We do not claim to have defeated the *Town Square* objection. We argue only that proponents must overcome the substitution objection. Since there are multiple alternative venues available for speech, there is no need to restrict stringent private rights to exclude. The Town Square objection at best highlights the importance of certain types of civic

participation. Without showing the unique significance of particular private spaces for speech, the town square objection is an incomplete challenge. We next turn to appeals to relational equality and equal status.

2.2.2 The Argument from Equal Status

A defense of stringent private rights to exclude need not hold that such rights are infinitely stringent. This opens the door to competing views about how to weigh the importance of rights to exclude against other considerations. In this section, we consider how one might appeal to the importance of public discourse as a way to challenge stringent private rights to exclude. We take it to be a cousin of the "town square" argument. It roots the significance of opportunities to speak not so much in providing political accountability but in securing equal status. After setting out this objection, we note how it also faces an important challenge from the substitution objection.

The allure of democracy is and has always been the idea that it provides a way that everyone living under a given regime can *have a say* in the way the regime is run. When everyone has such opportunities, that gives law legitimacy (Christiano 2002, 31–50). In a new paper, Teresa Bejan (Bejan 2021) considers the way people have a say by comparing the Ancient Greek notions of *parrhesia* and *isegoria*.

With the model of *parrhesia*, all members of the group get to have a say; with *isegoria,* by contrast, all members *with standing* must be allowed equal communicative contributions to the group. The change in emphasis here is no small affair. With *isegoria*, all *who are peers in the regime* must be *treated as equals* and have their statements heard (with "equal shares of speaking rights, turns, times, audience attention, and so forth" (Bejan 2021, 161)). What matters is that the citizens are equal, *qua* citizens. With *parrhesia*, everyone might get a say, but that means literally *everyone* with no discrimination of those qualified to contribute and those not; putting the point somewhat hyperbolically, this allows for cacophony with everyone having a right to speak, regardless of the value they contribute. By contrast, again, *isegoria* (at least in the ideal form Bejan supports) applies to all who are "peers in virtue of their epistemic dignity and independence" (Bejan 2021, 163). This allows that "deference might still be given to those with greater experience or knowledge" (Bejan 2021, 163), though "crucially, those who [are] epistemically privileged [do] not have any authority over their peers. All remained 'equal speakers' in this sense" (Bejan 2021, 163). With *isegoria*, in other words, "[o]ne's value as a speaker must be acknowledged by one's audience" if one is a peer (Bejan 2021, 164) whereas with *parrhesia*, there is no concern for the relations at all—instead, the emphasis is merely on letting all speak (again, regardless of the value contributed or expected).

In contrast to the way many in the classical liberal tradition have discussed the value of free speech—as recognizing that each person has a right to speak her mind—Bejan tells us that "the ideal of equal speech [*isegoria*] grounds its value instead in the claims, judgments, and arguments of those with epistemic dignity" (Bejan 2021, 164). Orderly discourse is preserved by the ideal of *isegoria*, not by *parrhesia*. As she puts it, the exclusion necessary to *isegoria* is "essential, not incidental" (Bejan 2021, 165). She is not suggesting that we should cease all exclusions, nor is she justifying *existing* exclusions. She is, instead, pressing us to recognize that any exclusions must be appropriate. Those who participate in the discourse must be valued in the same way (as equal citizens); those valued thusly must have the opportunity to be included in the discussion. We should not exclude anyone from participating in public discourse because of their race or sex, of course; we can exclude those who are simply not capable of the right sort of discussion or who are not, in the relevant sense, citizens. Hence, when we allow students into a "college seminar, in which those with differential expertise and ability nevertheless participate as equal speakers" (Bejan 2021, 168), they are all treated as peers, with valid claims to the "attention and consideration" (Bejan 2021, 155) of all of the seminarians—and those without the requisite abilities are not participants at all.

The requirement that all fully mature citizens must be recognized as valued speakers bears some resemblance to the *Town Square* argument. Here, however, the emphasis is on acknowledging and institutionalizing our status as equals to be heard. The relevant equality for Bejan is of our status as speakers. Recall that the basic claim in *Town Square* is that SMCs now, or malls in their heyday, serve public forum functions and so must permit everyone reasonable opportunities to exercise freedoms that are key to maintaining an accountable public order. Here we see a defense of robust opportunities to speak as a way of acknowledging our equal status as speakers. Each must be recognized as a valued speaker by the state.[8] The fora of such recognition, on this account, was once a literal square in the center of town, but at other times was the courtyard in the (privately held) mall or, as is supposedly the case now, on the platforms owned by SMCs.

The problem with the argument just made should be clear given what was said above. It is their co-citizens that must recognize each as a valued speaker, perhaps through the state (and/or its agents), not any private entity. The claim that the owner of a SMC or mall is so obligated could only succeed—if ever—if the SMC or mall were the only place in a territory where such discourse was possible. Put differently, the owner's right to exclude would take second place to a putative right to speak (or be heard as an equal) only if the resource were somehow uniquely suited as a site for *isegoria*, where each can be recognized as of equal value. That, though, is extremely unlikely to be the case. There are other

locations where such equal discourse is possible. We doubt it will ever be the case—as if individuals will completely cease speaking to their neighbors, writing and reading newspapers, magazines, blogs, books, etc. The substitution objection stands.

Perhaps it will be objected that those wishing to limit private rights to exclude need not show that the private property, whether mall or social media, is the only fora for civil discourse, but only that it is the *best*. Critics must then show that the resource is the best forum—and that entails not only showing that it is currently used as such in some way that makes it better than other fora but also showing that a government provided alternative would not be better still.

The argument from equal status—as persuasive as it is regarding the need for treating co-citizens as equal contributors to public discourse—fares no better than the town square argument for those attempting to override the right to exclude that property owners have in malls, SMCs, or other not-yet-invented property. We turn, then, to another argument meant to show that rights to exclude should be limited by rights to speak.

2.2.3 The Argument from Testimonial Injustice

Critics of *stringent private rights to exclude* might argue that denying persons access to a platform unduly marginalizes them. On this type of argument, exclusion is a form of *injustice* because it denies potential speakers an opportunity to engage robustly in a knowledge economy in which they have a significant stake. We construct one form of this argument by drawing on Miranda Fricker and others inspired by her work (Fricker 2007; Dotson 2014; Fricker 2017; Dotson 2016). As we argue, critics who constrain rights to exclude out of concerns with unjustly oppressing persons as knowers face challenges from the substitution objection.

Fricker draws our attention to *epistemic injustice*. There are many features to this idea, but for the purposes of this discussion, we need only focus on how exclusion from communication venues, media, and platforms, might fail to respect speakers *as knowers*. On Fricker's account, epistemic injustice is "a kind of injustice in which someone is wronged specifically in her capacity as a knower" (Fricker 2007, 27). One of the types of injustice Fricker identifies is "testimonial injustice." In cases of testimonial injustice, persons discount the credibility of a speaker, and often because of some identity-based prejudice (Fricker 2007, Sec 1.3; ch. 2). A clear case of such testimonial injustice would be denying that someone is able to know something or testify to something that others might need to know—and denying this *because of* the speaker's identity as part of some socially marginalized group.

Before taking this argument seriously, we note that some may suggest that only particular socially marginalized groups are candidates

for victimization by epistemic injustice. To make the argument stronger, then, we note that it can be recast to include as the relevant socially marginalized group those who are *politically marginalized* or persons who do not otherwise have access to a platform through which they can reach wide and diverse swaths of the populace.[9] Thus reformed, the argument can be used to defend a general right to speak that could limit a property owner's right to exclude. Indeed, proponents of arguments about epistemic injustice might think that persons who must *ask* for permission to speak are thereby in a subordinate social status with respect to the mall owner and with respect to the mall's customers (or the owners of SMCs).[10]

Imagine, then, a mall or SMC censors many by refusing access to any potential speakers to distribute information or solicit signatures on a petition. The reply is to note that it is but one mall or but one SMC. The substitution objection would, in such a situation, be decisive. It would be so even if *all malls* or *all SMCs* were to refuse such speakers, provided there were other venues for discourse.

Testimonial injustice is particularly pernicious when it is systemic. Suppose *no private venue* gives access to some prospective speaker. It might seem they then have no opportunity to reach an audience. They might then seem to be systematically deprived of voice. This might be a form of what Kristie Dotson calls "epistemic silencing" (Dotson 2017). Audiences have no chance to consider the testimony of the speaker, since they do not encounter the speaker's ideas or concerns.

We have two responses to the appeal to testimonial injustice. First, we deny that exercises of *stringent private rights to exclude* by owners of communications venues are necessarily epistemic injustices. Suppose a particular communications platform/venue denies to anyone, regardless of background, the opportunity to speak or petition on behalf of political causes.[11] This need not involve testimonial injustice even if it does involve censorship. If a mall or SMC censors all equally, it is hard to see how "someone is wronged specifically in her capacity as a knower."[12] Second, even in cases where the exercise of such a right seems to involve a testimonial injustice, we believe critics who would thereby constrain stringent private rights to exclude bear a significant argumentative burden. To see this, strengthen the case on behalf of critics of stringent private rights to exclude. Suppose *all* mall owners and all major SMCs routinely permitted peaceful political discussion or solicitation on their premises or platforms *except* if the persons advocated for rights for LGBTQ+ persons, or BLM causes, women's reproductive rights, or immigration reform, or …. (fill in the blank with any political cause that is sometimes linked with persons from traditionally socially marginalized categories). To make the case harder, let us also suppose the SMCs or mall owners *conspire* to keep out those groups. We are prepared to stipulate that the SMCs and mall owners thereby engage in the injustice of epistemic silencing against

the prospective speakers. They specifically target for exclusion certain persons because of their identities as members of socially, politically, and/or economically unprivileged categories. Even in this unseemly case, though, critics of stringent private rights to exclude bear an argumentative burden. They must show that the vice of such an epistemic injustice also justifies the particular reprisals that are available to state entities, namely, state sanctioned coercion to limit private rights to exclude.

Even if we think there is something deeply problematic about a system that leaves some without an enclosed space or major social media venue to speak, this would not be the fault of a single owner, nor even a collection of all the relevant owners. Those wishing to speak have venues other than malls and SMCs—they can speak to their neighbors in bars, in supermarkets, in editorials, in parks, etc. If there were no substitute venues available, state action might be warranted—perhaps through the state creation of such a venue (using taxes raised with a fair system).[13] We are, though, optimistic about uncoerced private provision of venues.

Importantly, there are forms of social punishment available against agents of testimonial injustice that do not involve state power and that seem more reasonable than restricting private rights to exclude. These include protests, boycotts, shaming, letter-writing, negative publicity, and so forth. Given that these options are typically available in reasonably free societies, and given that prospective speakers have venues in which to speak other than malls (or SMCs), the substitution objection seems once again an important obstacle to critics of a stringent right to exclude, even when the challenge is based on an appeal to epistemic injustice.

We do not claim to have undermined the significance of appeals to epistemic injustice. We only hope to have shown, once again, that the availability of substitutes for speech and outlets for peaceful protest increases the argumentative burdens on those who appeal to epistemic injustice for government actions of the relevant sorts. Critics who see a reason to constrain stringent private rights to exclude cannot simply note that mall or SMC owners behave (by hypothesis) with vice. They must show that the resulting injustice warrants crimping rights to exclude.

2.2.4 The Appeal to Historic Injustice

The final criticism of stringent rights to exclude that we consider is one based on unresolved historic injustice. On this account, inequitable access to platforms for disseminating ideas rests importantly on transgressions that were visited on ancestor generations and whose effects persist today. Appeals to such historic injustices might then be a reason to object to stringent private rights to exclude. We briefly sketch below how one such argument might proceed. As we argue, proponents of such an account must show how restricting any or all stringent rights to exclude is appropriate as a remedy for historic injustice.

We shall suppose without argument that there are significant historic injustices whose transgressors provided neither reparation nor compensation, and whose effects persist today. Centuries of chattel slavery and the Jim Crow era in the United States are prime examples, but we have no objections to stipulating to any others that critics might suggest as candidates, e.g., and in no particular order, Chinese exclusion acts, marginalization of Jews, slaughter and depredations against Native Americans, discrimination against LGBTQ+ persons, and so on.

Persons who appeal to historic injustice might first stipulate that property owners enjoy *ex ante* stringent private rights to exclude, but then insist that uncorrected historic injustice is a reason to restrict the stringency of those otherwise justified rights. In this way, appeals to historic injustice can justify constraining stringent private rights to exclude as a way of making reparation for the past injustice. We admit that *if* property owners themselves owe reparation to a person or members of a group, their right to exclude might be constrained by obligations to provide reparation, perhaps including a limitation on the right to exclude. We do not, though, think that this is the most plausible version of an argument based on reparations.

The burdens for such an argument to succeed seem quite steep. First, one must show that the owners whose rights to exclude are thereby curtailed are indeed transgressors in some relevant fashion. Owners of SMCs, for instance, many of whom are significant numbers of stockholders, might have little if anything to do with any identifiable uncorrected historic transgression. Of course, critics might point to their complicity in persisting structural injustice, but they must show that the *owners* (and not simply any random privileged persons) are appropriately understood as transgressors. Supposing critics can show owners are transgressors, they must, second, show that the persons seeking not to be excluded are either the victims of the property owners' transgressions in some relevant respect, or they are proper beneficiaries of the performance of duties of reparation that the property owners owe to absent or deceased transgressed parties. James Dale, the gay plaintiff who sought judicial relief when the Boy Scouts of America expelled him, *might be* an appropriate claimant of some redress (*Boy Scouts of America et al. v. Dale* 2000). Whether he has some claims to redress against SMCs or shopping malls is another matter. This is not the start of an objection to appeals to historic injustice. It merely notes the limits of such arguments for constraining otherwise stringent private rights to exclude. To succeed in limiting stringent private rights to exclude, appeals to historic injustice must show in such history the bases for the relevant claims and duties. Finally, even if we were to show that prospective speakers and property owners are indeed parties to some uncorrected historic injustice, to constrain owners' rights to exclude, we must show that denying or curtailing rights to exclude is *the* (or, at least, *an*) appropriate form of

reparation. This is not obvious. If you negligently break our toes, we do not then automatically get to issue, as a binding demand for reparation, a claim to your kidney, your pocket protector, or a weekend in your time-share in Pensacola. There must be an argument for why some particular form of reparation, whatever it is, is appropriate as a remedy to the transgression. Other forms of redress might be (more) appropriate, such as memorialization, commemoration, or a public apology by owners (A.I. Cohen 2020). Figuring out what form of moral repair is fitting is not easy. Critics who point to historic injustice as a basis for restricting stringent private rights to exclude must do that hard work in making their case.

We think it important to note that in significant cases of historical injustice, it is likely that either governments or entire societies are to blame for the injustice. It may be, for example, that the US Federal Government is the main aggressor that ought to make reparation to African Americans for historical injustices against them (Boonin 2011, chs. 2–3). For the US government to make such reparations, of course, would require taxation—just as a government paying any debt requires taxation. The burden would be justly shared in the same way that any tax burden would be shared. This would not be a means of forcing tax-payers to pay reparations, but a means of collecting the revenues the government needs to pay its debts. This seems to us entirely appropriate.

Allowing the possibility of some justified reparations is not a concession that there are no substitutions available for the desired communicative functions for which some private property might serve as a platform. Here we only note that if such reparation were made, there might be resolution to the problems that worry critics of stringent rights to exclude. The reparations might include the provision of (the funds for) creating the property on or through which the desired communicative functions take place. As should be clear, the argument from historical injustice—as persuasive as it is with regard to the conclusion that some remedy is required—is either incomplete or insufficient for rejecting stringent private rights to exclude.

2.3 Conclusion: Emergencies

We have not provided a positive argument for stringent rights to exclude. What we have argued is that the arguments against such rights either founder on a substitution objection or gain little traction in light of alternative remedies. Insofar as limiting stringent rights to exclude is a response to historic injustice, we must show it is *a* (let alone *the*) fitting response to such unresolved depredations.

We freely admit that stringent rights to exclude are not infinitely stringent. We admit there are exceptions, though they are exceedingly rare. Suppose you are skiing on a mountain and had no reason to expect extreme weather but are suddenly faced with an avalanche. The only

shelter you can find is a locked cabin. On many political moralities, you may enter the cabin without the owner's permission (Feinberg 1978, 102). We take this to be as it should be—in extreme emergencies, the right to exclude may well need to be set aside.[14] Your life (and your impending doom without shelter) takes precedence over an owner's right to exclude. You have no other option for shelter. Something similar may be true when discussing the right to speak.

Just as a mall owner may not exclude ambulance workers from entering the mall to save Harry's life if he has a heart attack within, perhaps Facebook should divulge certain information to the FBI if doing so would prevent a high-fatality bombing. In the case of *the right to speak*, however, the substitution objection provides a significant burden to any argument that the right to exclude be limited. That is, emergencies requiring that the mall (or SMC platform) owners' right to exclude be set aside so that Jack or Jill may speak within or on the property are pretty rare.

We are prepared to admit there might be possible emergencies of the sort that would permit setting aside the right to exclude. Two examples come to mind. In the first, perhaps the world must be alerted to the fact that an alien race from another galaxy has invaded and is destroying city after city. In the second, perhaps our neighbors must all be warned that (as in *Birdbox* 2018) people must not look at the zombies now walking around on pain of death. In these cases, the right to exclude should be set aside. In each case, SMCs must provide adequate opportunities to avoid "catastrophic moral horror" (Nozick 1974, 29 at *). Again, in these circumstances, the owners' right to exclude is set aside. We do not think there are many such circumstances.

Some might argue that, e.g., the climate crisis is *so urgent* that owners cannot exclude people who wish to get the word out. Critics must show that the mall, SMC platform, or whatever property they are attempting to use, is uniquely suited to get the word out. We note, though, that there are many things that seem urgent to some people and not others. Some think we must up our recycling game immediately, others think we must stop using gasoline powered automobiles immediately, etc. Our view is that substitutions are possible in all such cases and that this undermines the arguments in favor of limiting rights to exclude in nearly all cases.

Given that there are almost always substitutions available—some of which have not yet been invented—we think the right to exclude will nearly always remain relevant and that rights to speak on someone else's property will fail.[15]

Notes

1　Andrew I. Cohen Box 3994, Jean Beer Blumenfeld Center for Ethics, Department of Philosophy, Georgia State University, Atlanta, GA 30302-3994.
2　Andrew J. Cohen Box 3994, Department of Philosophy, Georgia State University, Atlanta, GA 30302-3994.

3 See a related discussion of censorship as restricting freedom in Horton (2011, at 94).

4 Some will think this account is over-inclusive. We believe, though, that it is theoretically adequate insofar as it captures all of the relevant cases. We mean this to be a morally neutral account of the phenomena. On this account, shushing someone in a theater, posting theater rules against talking, enacting state prohibitions against speaking in theaters, and gagging a person, are each likely intended acts of censorship though the options will vary in effectiveness.

5 Theorists who prefer to dwell on what a full specification of rights would entail are welcome to construe the discussion with the formally equivalent language under specificationism. For related discussion, see, for instance Shafer-Landau (1995), Oberdiek (2008), and Rainbolt (2006, ch. 6).

6 Indeed, if we move from the mostly mythical fora of American history to current conditions, we are struck by recent cases such as the crackdowns on protests witnessed in the summer of 2021. That is, the governing authorities did not seem disposed to treat the public forum for discussion as of significant importance. Perhaps, our interlocutor will reply, this is a problem, but not a problem for them: they, after all, want a protected forum for discussion. We likely agree, but do not see this as a decisive argument against stringent private rights to exclude.

7 A full defense of stringent rights to exclude might condition the stringency of such rights on how much if at all bearers of the right benefited from public subsidies, tax rebates, and other forms of state support. We pass over such details here, but are certainly open to having requirements that property owners who benefited from such discharge that debt by providing a public forum.

8 Bejan's arguments would really be about co-citizens, but it is a quick step from them to the state. See also Ceva (2011).

9 There might be significant overlaps between those platformless persons and other historically marginalized groups, but we pass over those linkages here. For a discussion about the possibility of testimonial injustice against political minorities, see Spencer Case (2021).

10 If critics insist that only particular socially marginalized groups can be victims of testimonial injustice, we will not press the point. Those unconvinced by our application of this term to prospective speakers might then show how those otherwise unable to speak are not thus epistemically marginalized—especially when they advocate non-yet-popular causes.

11 This was the case for owners of the Pruneyard shopping center, which had "a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy [had] been strictly enforced in a nondiscriminatory fashion" (*Pruneyard* 1980, 77).

12 As we note in §2.1, not all silencing is unjust. For related discussion, see A.J. Cohen (2021). We admit, however, that discriminatory censoring of groups by a mall owner may count as testimonial injustice.

13 Indeed, we are tempted by the thought that the state has already created such a venue: the internet itself. That is, we take the internet *in toto* to be a public square, not any particular SMC. Just as local coffee shops or Starbucks shops are *on* the physical town square but not themselves the town square, we think individual SMCs—Facebook, Twitter, etc.—are *on* the digital town square, not themselves the town square. We take this point from Tarnell Brown (in conversation on social media!).

14 We remain agnostic on whether the right to exclude is, in these rare cases, overridden, outweighed, merely diminished, or defeated.

15 For comments and conversation on earlier versions, we thank Thomas Cushman, Alice Dreger, Hrishikesh Joshi, Paul Lombardo, S.M. Love, Kathryn Lynch, Timothy Lytton, Molly Brigid McGrath, JP Messina, Ryan Muldoon, Luke Sheahan, Susan Smelcer, Justin Tosi, Jeffrey Vagle, Brandon Warmke, and Robert Weber. Andrew Cohen would also like to thank Andrew Cohen for helpful remarks.

References

Alderwood Assocs. v. Envtl. Council, No. 635 (96 Wash. P.2d October 15, 1981).

Alexander, Gregory S. and Eduardo M. Peñalver. 2012. *An Introduction to Property Theory*. Cambridge: Cambridge University Press.

Bejan, Teresa M. 2021. "Free Expression or Equal Speech." *Social Philosophy and Policy* (37), no. 2: 153–169.

Birdbox. 2018. Susanne Bier, dir. Bluegrass Films.

Boonin, David. 2011. *Should Race Matter: Unusual Answers to the Usual Questions*. Cambridge: Cambridge University Press.

Boy Scouts of America et al. v. Dale, 530 U.S. 640 (2000).

Brady, Maureen. "The Failure of America's First City Plan." *The Urban Lawyer* (46), no. 3, Summer 2014: 507–68.

Butterfield, Kevin. 2015. *The Making of Toqueville's America*. Chicago: University of Chicago Press.

Case, Spencer. 2021. "Political Conviction and Epistemic Injustice." *Philosophia* (49): 197–216.

Ceva, Emanuela. 2011. "Self-legislation, Respect and the Reconciliation of Minority Claims." *Journal of Applied Philosophy* (28), no. 1: 14–28.

Christiano, Thomas. 2002. "Democracy as Equality" In *Democracy*, edited by David Estlund, 31–50. London: Wiley.

Cohen, Andrew I. 2020. *Apologies and Moral Repair: Rights, Duties, and Corrective Justice*. London: Routledge.

Cohen, Andrew J. 2021. "The Harms of Silence: From Pierre Bayle to De-Platforming." *Social Philosophy and Policy* (37), no. 2: 114–131.

Dotson, Kristie. 2014. "Conceptualizing Epistemic Oppression." *Social Epistemology* (28): 115–38.

Dotson, Kristie. 2016. "Between Rocks and Hard Places." *Black Scholar* (46), no. 2: 46–56.

Dotson, Kristie. 2017. "Tracking Epistemic Violence, Tracking Practices of Silencing." *Hypatia* (26), no. 2: 236–57.

Feinberg, Joel. 1978. "Voluntary Euthanasia and the Inalienable Right to Life." *Philosophy & Public Affairs* (7), no. 2: 93–123.

Fricker, Miranda. 2007. *Epistemic Injustice*. Oxford: University Press.

Fricker, Miranda. 2017. "Evolving Concepts of Epistemic Injustice." In *The Routledge Handbook of Epistemic Injustice*, edited by J. Kidd, J. Medina, & G. Pohlhaus, 53–60. New York: Routledge.

Honoré, A.M. 2013. "Ownership." In *Readings in the Philosophy of Law*, edited by Jules Coleman, 557–97. New York: Routledge.

Horton, John. 2011. "Self Censorship," *Res Publica*. (17):91–106.

Kirchner, Steven E. 2010. *Rebel with a Cause*. Chicago: University of Chicago Press.

Newton-Matza, Mitchell. 2017. *The Espionage and Sedition Acts: World War I.* New York: Routledge.

New Jersey Coalition v. JMB, 650 A.2d 757 (N.J. 1994).

Nozick, Robert. 1974. *Anarchy, State, & Utopia*. New York: Basic Books.

Oberdiek, J. 2008. "Specifying Rights Out of Necessity." *Oxford Journal of Legal Studies* (28): 127–46.

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

Rainbolt, George. 2006. *The Concept of Rights*. Dordrecht: Springer.

Schmidtz, David. 2010. "Property and Justice." *Social Philosophy and Policy* (27), no. 1: 79–100.

Shafer-Landau, Russ. 1995. "Specifying Absolute Rights." *Arizona Law Review* (37): 209–24.

Shain, Barry Alan. 1996. *The Myth of American Individualism*. Princeton: Princeton University Press.

State v. Schmid 84 N.J. 535 (1980) 423 A.2d 615.

3 Speech, Sorting, and Discovery

Ryan Muldoon[1]

3.1 Introduction

Perhaps the most prominent way of conceiving of, and defending, a robust and expansive right to free speech is the marketplace of ideas. Its core insight—that speech can spur counter-speech, and this contest will sharpen our capacities for a reason while also allowing better arguments to win out over worse ones—is quite compelling. It gives us reason to accommodate false, unpleasant, or misleading speech by showing that a more permissive speech environment will be more effective at having better ideas win the day. Rather than suppressing harmful speech, a marketplace of ideas will ultimately show that this speech is wrong, and the reasons that seemed to be in support of it were mistaken. While this approach to speech will find moments in time where bad arguments supporting false conclusions will be more prevalent than good arguments supporting true conclusions, its strength relies on the long-run dynamics. The speech environment improves both because of the ultimate victory of good arguments over bad and because the participants become increasingly sophisticated evaluators of arguments.

In previous work (Muldoon 2018), I argued that the marketplace of ideas model assumed a relatively fixed population, even though, in practice, the content of speech can lead people to enter or exit the conversation. That paper suggested that maximizing one's exercise of free speech in any particular instance might shrink the overall pool of participants in such a way as to ultimately inhibit speech rather than invite it. So, some attention to the distribution of burdens of speech, and attendant norms for managing those burdens could foster a larger, healthier speech environment. While that work was sensitive to the issue of who is in the conversation and not just what was being said, it still focused on the idea of a single broad discussion. Here I would like to focus on what happens to a marketplace of ideas model when there is no longer a single market.

Multiple simultaneous speech markets, which we might conceive of as features of distinct epistemic communities, have a variety of interesting properties that we may wish to consider in contrast to a single broad

discussion. Most notably, multiple epistemic communities create the room for a far more encompassing range of discussions. In a single epistemic community, it may well be that the common locus of conversation is centered on whatever is of median interest. This has a number of moderating effects, as we would expect this to operate close to what Mill envisioned for a speech environment—many potential arguments from different perspectives could be brought to bear on a common question, and this churn of speech can help identify better arguments and truer beliefs. However, I wish to argue that this comes at the cost of inadvertently stifling a great deal of potentially salutary speech because that speech is on niche topics. That speech is lost in a single market not because it is formally suppressed, but simply because it is crowded out by more popular issues. If an epistemic community faces scarcity in terms of time and attention, then it makes sense to focus on the ideas and arguments that are most important to the most people. However, if we instead assume multiple epistemic communities, there can be multiple conversational agendas, and as such, significantly more room for exploring a greater variety of topics and argumentative approaches. The scarcity issue can be addressed by creating more parallel communities (or platforms) for speech. This is an incredible boon to the realization of people's speech rights. It can likewise be tremendously useful for nurturing new ideas.

However, there is a tension latent in this idea. The very thing that can make multiple conversational communities so valuable—the ability for niche communities to vigorously engage in the issues that most interest them, freed from having to find ways of working them into a broader conversation—can also lead to dysfunction in the mechanisms that Mill relies on to generate the benefits of free speech. As we will explore in more detail, this is because as agents sort themselves into different epistemic communities, we may find that at least some of these communities are ill-suited to fostering a truth-conducive speech environment. Indeed, more insular communities might well develop views that are generally hostile to the views of non-members.[2]

The striking feature in this analysis is that two core liberal rights—free speech and free association—can combine to make speech less effective at allowing better arguments to surface. If we assume that people exercise their associational rights by sorting themselves amongst groups at least partially based on the content of their speech, we have reason to suspect that counter-speech may serve to polarize rather than moderate. This is troubling both because it potentially undermines the Millian argument in favor of free speech, and because it suggests a nontrivial fragility in liberal institutional arrangements. So, it is worth looking at this in greater detail. We want to make sure there is a mechanism for learning from each other, even if we are quite different.[3]

This chapter will proceed by first briefly sketching the canonical marketplace of ideas model. We will see the core mechanism of speech and

counter-speech but suggest that a single large market has a few draw-backs. We can then consider a novel multiple markets model. The multiple markets model overcomes some of the challenges of the single market model, but those solutions introduce new problems in the form of polarization dynamics. These polarized communities, we will see, can rely on the same mechanisms as well-functioning speech environments, but suffer from biased inputs. Lastly, we will consider potential approaches for recovering the benefits of a robust speech environment, even when it is split across multiple epistemic communities.

3.2 Mill's (Single) Marketplace of Ideas

Let us briefly consider Mill's core model of the marketplace of ideas. Mill argued that we should embrace a great deal of wide-ranging speech, even speech that people find offensive or wrong. The argument he employs to defend objectionable speech takes the form of a two-horned dilemma. On one horn, we suppose that the objectionable speech is true, and on the other horn, we suppose that the objectionable speech is false. In the first horn of the dilemma, we have a straightforward argument: perhaps the Catholic Church was upset with Galileo for saying that the Sun was at the center of the solar system, but since Galileo was right, we gain much from being able to build our science on top of true things rather than false things. Sometimes the truth is unpleasant, but it is better to know the truth than to believe a falsehood. So, any losses we experience from this speech are overwhelmed by the value of having true beliefs and our capacity to generate new knowledge with a more secure foundation. The second horn of the dilemma is more challenging, as the speech is both false and objectionable. In this case, we might want to say that these two features of speech would give us reason to suppress it. After all, we want to know true things, not believe false things, and it literally adds insult to injury when the false things are also offensive or otherwise objectionable. So why would we still want to allow for robust protections in favor of false, objectionable speech? A seemingly natural speech policy would be to say that we value truths, not falsehoods, and so false speech ought not to receive the same kind of protections that true speech does.

Mill argues that this sort of view is mistaken because the value of speech ought not to be calculated by the utterance itself but by how it shifts the speech of others. The core idea is that speech of all kinds invites other speech in reply. When we consider the value of speech, we need to consider the broader give and take of different positions. Every argument that someone disagrees with can prompt them to evaluate it carefully, and develop new arguments to try and persuade the original speaker and any third parties that the original argument was incorrect. Just as in the first instance, these new arguments will prompt replies, and so on until better arguments carry the day. Notably, it might be the case

that at the end of this process, the majority may well have not changed their minds at all—they may have started with true beliefs. However, Mill argues that they will benefit from the process because they'll better understand the nature of their beliefs and the arguments that help demonstrate why they are true. Through this process, we enhance our own abilities to create and evaluate arguments. The core value of this defense of speech is that one can agree that any particular *instance* of speech is seemingly of little value, and still appreciate that the *process of contestation* is something that we wish to preserve.[4] The process is valuable because it encourages two kinds of improvements: first, improvements in the quality of arguments themselves, as they have to survive the crucible of debate and discussion and disagreement, and second, improvements in our capacity to develop and evaluate arguments.

I think there is a great deal to be gained from examining the process of contestation, especially its capacity to spur the creation of novel arguments. To help fix ideas for what's to come, I'm going to offer a very simple model of deliberation. Imagine that agents are interested in some matter of fact and are debating amongst themselves in an attempt to gain a true belief about this matter of fact. We'll represent this as agents taking independent draws from a normal distribution with an unknown mean. Each draw from the distribution is an argument that they present to each other. As each agent is exposed to more arguments, she updates her beliefs about where the mean is. As we draw more times, we should expect the modal draw to be the mean of the distribution, and we should also expect that individuals have come to learn the mean value from updates on evidence they see from others. Given enough time, we'll come to understand the issue.

While this is an imperfect and overly simple model, we are able to represent the idea that this process of convergence works both because some people present the right view and because the social process of responding to what others present helps individuals improve their own views through time. We can note that even well-intentioned people can end up making quite mistaken arguments—they might find themselves in the tails of the distribution—but those arguments still help us situate where the mean is, given enough other argumentation. We should note, however, that this mechanism works broadly because everyone is updating on evidence relevant to a common issue. This points to a potential limitation of a common market kind of approach: namely, there is only enough room for a limited number of conversations. While people can easily occupy the tails of the distribution—that is, make reasonably strained arguments—everyone is ultimately discussing the same thing.

If we consider how a common speech market might practically work, we might think that this means that the speech is presented through some common venues, whether they be newspapers, TV news, a literal agora, or internet fora. When we are literally talking to each other, clearly there

are limits to how many conversations we can have at once. Likewise, newspapers and TV news have obvious space constraints. Even a common forum on the internet is going to suffer from attention constraints for robust exchange. Even when we are not under strict material scarcity (of space in a newspaper, or time in a broadcast), a post on an internet forum that few people read, and no one replies to, is not too far off from talking to yourself. People will read and reply to arguments that they find important, even if they think the arguments are wrongheaded. A core feature of the Millian justification for speech is that speech spurs on more speech. If some speech is just left to the side, it's not part of that process of contestation. Insofar as we have a *right* to free speech, one's capacity to speak may have intrinsic value even if no examines it or replies, but any beneficial consequences of this speech stem from having a conversation with yourself.

So, what do we expect will happen under these circumstances of attentional scarcity? We should expect to see that these various venues for speech will operate similarly to vendors in a Hotelling model. That is, if those venues take themselves to have a mandate to make as robust of a speech environment as they can manage, they will adopt a policy of highlighting or focusing on median views or topics.

So, let's remind ourselves what a Hotelling model is. The canonical description is two ice cream vendors on a beach, where each is looking to maximize their sales. Customers are evenly spread out on the beach, and will go to the vendor that's the closest to them, as the vendors are selling the same ice cream. The vendors, following their rational interests, will situate themselves next to each other in the middle of the beach. This basic model was later the basis for the median voter theorem in political science, which argued that politicians facing a competitive election would adopt a platform that best satisfies the median voter's interests. Now we'll apply this basic insight to a speech environment. If we imagine that venues have an interest in creating a robust speech environment, and attracting more speakers to their venue, then they will pursue the same strategy as ice cream vendors or politicians facing an election.

It's important to note two things about this: first, it is not from an effort to stifle speech, but rather be maximally inclusive. Indeed, if there were only a single venue facing no competition at all, the single venue would still place themselves in at the median. We can imagine here that the venue's incentives are *entirely aligned* with speech promotion. Second, having this incentive in this context has the effect of dramatically narrowing what kinds of conversations take place, which is only made even more stark if we assume that people's speech interests aren't uniformly distributed. The Hotelling result of focusing on a median conversation falls out of the attempt to minimize the average "distance" from any given person's interests and the conversational focus—that is to say, find the issues that are closest to people's interest or concerns. But

to satisfy this legitimate interest, it's necessarily the case that the people with more niche concerns or interests are far from the conversational center, and won't be able to air their concerns.

Mill himself was extremely concerned with a dynamic such as this, most notably in On Liberty Chapter 3. Common culture works to constrain freedom of thought and action. This stultifies our capacities, and threatens to ossify our understanding of what's most important to consider. Mill himself focused on the role that oppressive social norms drive this outcome, but a Hotelling kind of approach suggests that one mechanism by which this happens is that non-mainstream views are just crowded out. So even if norms are loosened, there could still be a mechanism that constrains freedom of thought.

In a more diverse society, there are going to be many different kinds of niches that a common marketplace of ideas will fail to serve. There are simply too many different dimensions upon which we can have divergent views and different interests. In a scenario where venues for speech are meant to be truly shared by all, they will, via innocuous processes, end up catering to the majority and shutting down minority issues. There are important scarcities (of space, time and attention) that will force venues for shared speech to reduce their scope. Having one big speech environment—even one that is maximally fair—is necessarily restrictive. This should give us very strong reasons to look for alternatives.

So, while a single marketplace of ideas has the very nice property that what is discussed has a truth-finding tendency at least in the long run, it also homogenizes conversation in a way that is counter to its primary goals. The "center" of conversation becomes at best very slow to shift, and minority views and disputes don't get much if any consideration, even if the minority view might have real claim to being central if given consideration. The problem of attentional scarcity makes this unavoidable within a single epistemic community.

A possible way out of this conundrum is to avoid the bite of the Hotelling process by creating multiple epistemic communities. This helps to solve the issue of attentional scarcity. In the next section, we consider what might happen as we add additional marketplaces of ideas.

3.3 A Model of Multiple Marketplaces of Ideas

As we saw, even if we assume everyone is acting ideally, and we've dealt with Mill's concerns of oppressive social norms that limit thought and action, we still face a problem with free speech. In a diverse population, a single marketplace of ideas, due to basic scarcities, will likely constrain conversation in a way that fails to serve Millian goals. This is largely because a single epistemic community will fail to ever seriously address or engage minority concerns. This doesn't have to be driven by any ill will, but instead can just be because there's not enough awareness in the

majority to be willing to entertain minority issues. It could even be the case that minorities raise these issues in the common speech environment, but they simply don't get picked up by others. The majority can just (without malice) favor discussing the issues that it finds most pressing. A straightforward way to try and address this problem is to simply alleviate the scarcities in a way that fosters minority voice. We can do this by creating multiple competing marketplaces of ideas, where each is free to focus on particular areas of interest.

As a simple presentation of the idea, we might imagine that instead of modeling this as a single "vendor" in a Hotelling model, we shift to a model of a number of vendors, each of which defines a new speech venue. We will suppose that there are N venues vying for speakers in an M-dimensional space of issues or values. What does this mean? We can now picture ourselves having some variable number (N) of speech venues, where they are seeking to draw the largest audience they can. When attempting to work out their potential pool of speakers, the venues assess people's interests or concerns from some list of M issues or values. They can then try and position themselves as a place for a certain domain of speech. We can suppose that all of these speech venues are motivated by best serving the speech interests of the underlying population. They are in competition with each other only in the sense of trying to be as appealing as they can as a speech environment, with the goal of drawing people in for robust discussion.[5]

The most natural way of representing this would be with an M-dimensional Voronoi diagram with N neighborhoods, where each neighborhood represents the total "draw" of a given venue. Notably, the positioning of each venue, and the size of each neighborhood, is responsive to the interests of the participants. This just means that venues will position themselves as places to discuss particular topics in a way that responds to the actual speech interests of the underlying population. Different distributions of interests on those M issues in the population will generate a different division of epistemic communities, with each venue focusing on different speech.

There are several interesting features of this model. First, this does a nice job of capturing a notion of a "market of markets." That is, this helps us discuss a marketplace of ideas in which there are multiple sub-marketplaces of ideas, each focusing on some particular sort of speech. Especially if we were to make this a model that allowed for entry and exit of our "vendors," we get a nice approach to carving up the full range of a population's views into a sufficient number of more focused markets that ensures that there is a place for just about everyone to air their views and engage in vigorous debate. The number of these markets is driven by the range of views and size of the population. Bigger, more diverse societies will have more specialized venues for speech. This is, broadly speaking, exactly what we would want: a mechanism by which

everyone can be heard, and have their views scrutinized by others. Unlike the single market approach, this approach does a vastly better job at ensuring that minority concerns get real consideration, and enables everyone to be engaged in the conversations that they find most valuable.

Unfortunately, while a multiple-markets model vastly increases the range of conversations, and better satisfies people's diverse interests, it can potentially run into trouble with our goals of procedurally getting closer to the truth, and developing our capacities for judgment. This is, sadly, going to be a direct consequence of better satisfying diverse interests. To see why this is, consider how a multiple markets model is meant to work. Markets capture people whose interests are broadly shared, which becomes increasingly true as the number of markets goes up. The more specialized venues for speech, the greater the sorting we are implicitly or explicitly engaged in. A Voronoi neighborhood, while otherwise a generalization of a Hotelling model into more dimensions, does not share its equilibrium of situating a "vendor" at the median. This is just a consequence of adding multiple dimensions—as we add dimensionality (which we should remember here just means allowing people to have a variety of interests or values which they would like to discuss) the symmetries in people's interests needed to pull venues to the median are nearly impossible to occur. This means that we'll have a variety of niche epistemic communities, alongside some larger more generalist ones. It is important that we reason through the effects of this sorting into different epistemic communities.

Sometimes, this will work out just fine—World War II buffs may well have a whole variety of reasons for most valuing conversations about the war's history, and can engage in fruitful and rigorous debate, such that we'd expect a truth-conducive process of evaluating arguments and evidence. Likewise, while people's *specialized* capacities might be most improved, we ought to expect that their general capacity for reason would be enhanced by engaging in what might become a debate amongst experts. Debates about WWII strategy or the history of events and their causal influence on its outcome may be a narrow domain of discussion, but the kinds of skills that one would develop in such an environment would apply across domains, even if the subject-matter knowledge would be different.

However, at the other end of the spectrum, we might suppose that a group whose interest is primarily around determining whether the Holocaust really occurred at all may well run afoul of a truth-conducive process. Importantly, it's not because any such conversations on the subject are bad, but rather because if we've sorted ourselves by interests, and it's those people whose primary interests lie in assessing the evidence for whether the Holocaust ever happened who are engaging each other in conversation, we are going to have a lopsided process of debate. This is primarily because there is only one side of this "debate"—the denier

side—that would have any real substantive interest in such conversations. Because the facts of this are so obviously overwhelming on the side of the real history of an evil of horrendous scale, there is little interest, or perhaps more accurately, stomach, for engaging in the question unless one was interested in a conspiracy theory. So, insofar as people are choosing to talk about this, it is largely because they are interested in various arguments for denial.

Recall the very simple model of agents drawing from a normal distribution and updating their beliefs on what they see from others to determine the mean. Now, instead suppose that all of the agents are two standard deviations out on one tail, but are continuing to follow the standard procedure of comparing notes with each other, and updating based on the evidence they find. This will push them farther down the tail. The epistemic community in this instance will ultimately settle in on a set of beliefs that is way off from the truth, but will have done so relying on a process that under unbiased circumstances is truth-conducive.

Note that while Holocaust deniers might be best modeled as being two standard deviations out into one tail, we don't need such a strong assumption more generally. If we just suppose that everyone in the community is just in one half of the distribution—say, the left half—as they update on new evidence, their beliefs about the true mean of the distribution will shift left. This creates a ratchet effect—without something to rebalance the discussion, they will keep pulling each other more and more to the left.[6]

If we reason as if we are a member of that epistemic community, which has settled in on a set of extremal and false beliefs via group deliberation and eventual consensus, what might we conclude? It would appear that others, who have not specialized in weighing the evidence, rigorously considering arguments, and consulted other specialists, are simply deeply mistaken. They did not put in the work to understand the issue, and there is reason to expect the rest of the public to defer to expert judgment. Depending on one's confidence in the success of group deliberations, one might have reason to discount the judgments of the wider public on this issue, and perhaps other issues as well, given that this perceived failure provides evidence for other failures as well.[7]

So, this gives us some reason to pause. Notably, in this model, we should expect different epistemic communities to lay on a spectrum, from fully truth conducive (as we imagine the WWII history society might be), and polarized around a fringe falsehood (as a group of Holocaust deniers would be) at the other end. Much of the interesting action lies on the interior of this range. While it might be straightforward to call out trivially falsifiable and abhorrent views like Holocaust denial, many other beliefs can be harder to determine. Indeed, we are living through a period where there are any number of epistemic communities organized around manifestly false beliefs: that vaccines cause or promote autism,

that the Biden campaign committed massive election fraud, that the ACA contained "death panels" that determined who lived and died, or that there was a broad conspiracy that led to the assassination of JFK. As I write this, crowds of hundreds have been gathering at the "grassy knoll" near Delaney Plaza in Dallas, Texas waiting for JFK Jr to reveal he is still alive (despite dying in a plane crash in 1999), so that he can be installed as President, by first becoming Donald Trump's Vice President.

What we might note here is that there are plenty of people who believe in one of these false stories, but is otherwise epistemically responsible. Even more notable, it is going to be extraordinarily difficult, from within an epistemic community, to be able to determine where along the spectrum of truth-conducive to not one might be. Is it the Black Lives Matter group, or the Blue Lives Matter group, which broadly advocates for opposite policies, that is making an error? Or perhaps both are subject to different sets of epistemic risks?

An important piece of this story appears to be the sorting mechanism that determines what kind of epistemic community one finds oneself in. Some communities are going to host a wide variety of views, while others will be narrower. But interest in a particular topic itself might be sufficient to tip the scales in a certain direction. Neighborhood discussion boards, for instance, tend to favor "Not in my backyard" discussions, in part because it's only current members of a given community that participate in those discussions. So, we should expect that the interests of existing homeowners to be the primary anchor of discussion, and this can shape discussion such that the interests of possible future members are left unconsidered at best. That could be true even while there is a great deal of discussion about what aspect of neighborhood character ought to be preserved. People in these discussions may not even take themselves to be exclusive or even notably biased. This sort of dynamic could take place in either a very liberal or very conservative place and have similar kinds of outcomes.

In these kinds of circumstances, it seems clear that while the outcomes may not be as horrendous as in truly fringe conspiracy theories, the false sense of confidence in the outcome may be even more resistant to challenge. After all, a number of seemingly normal epistemic agents engaged in vigorous disagreements, considered arguments, and arrived at conclusions that drew from diverse arguments. It's just difficult to notice that all of these arguments may have shared a set of hidden premises that skewed the debate.

What's more, it is quite reasonable for epistemic communities to want to keep some people out. Jewish groups are unlikely to wish to have Holocaust deniers show up and argue that their relatives weren't really murdered in the name of the freedom of speech. Even philosophers, who quite enjoy arguing on the whole, are going to at least have their patience tried by people who come to tell them all about "what their philosophy

is," or people who want to argue about why philosophy is a waste of time. It is entirely fair for groups—even groups who are dedicated to argumentation and the search for knowledge—to want to exclude people who they think might derail the discussions that they find valuable.

Indeed, while we have so far spent some time examining the ways that sorted groups can go wrong, it is important to note how they can help things go right. People can organize themselves into associations dedicated to things they most care about, which allows them to function a bit like how Kuhn describes "normal scientists"—they can make more significant progress of on questions of interest if they don't have to constantly revisit their basic assumptions or choice of methods. By working with common tools, language, and assumptions, they can more efficiently work on problems of shared interest. This is undeniably valuable. It might just be that, at least sometimes, those same groups who want to be left alone to work on problems of shared interest, end up polarizing themselves as they go.

We find this quite commonly in social and political movements, especially those that are particularly inward-facing. Shared assumptions and methods can quickly devolve into complex jargon that signals membership as much as expertise. As a group works out a "pure" vision, it is easy to get into a polarization dynamic for reasons described above. Evidence of external disagreement with a group's views is no longer evidence that the group's conclusion was mistaken, but becomes evidence of the epistemic failure of everyone else. Even if these groups have valuable perspectives to bring to an overarching conversation, they can polarize themselves into near-irrelevance.

So, we find that the mechanism by which we solve the diversity problem—increase the number and scope of epistemic communities—gives rise to a quality and capacity problem. Sorting across marketplaces is going to occur by individual interest, which will create a variable level of bias across epistemic groups. Further, we have reason to think that these epistemic communities have important associational elements that would be illegitimate to ignore, and so this problem of bias can't be overcome easily. We can't just insist that Blue Lives Matter enthusiasts participate in Black Lives Matter planning sessions (or vice versa). That violates those individuals' rights of association. Communities can be meaningful and a source of value outside of their epistemic function. Focusing only on epistemic goals may serve to undermine other kinds of social value. Finally, we can see that it is quite hard to determine whether any given community has polarized, or if they have, to what degree, just by looking at the procedures they follow, or the view they have converged on. They could all follow the *same* procedure and end up with quite different levels of bias in their outcomes. Likewise, it could be that a discussion amongst relative experts generates outcomes that seem wrong to a lay population, but is in fact well supported by evidence.

Our core challenge here is that we lack an independent, known-unbiased position from which we can evaluate these issues in the moment. Our only recourse is trying to recover the long-run benefits of a single-marketplace model.

Thus far we have seen that the single marketplace model and the multiple-marketplace model are flawed strategies. Single markets suppress diversity. Minority views can end up stifled and important values and ideas can be left undiscussed and undeveloped. A switch to multiple markets can free minority views up so that they can get a real hearing, but cause a diverse range of groups to polarize. What we need instead is some way of allowing diversity to flourish, while bringing back some level of shared engagement.

3.4 Stitching the Marketplaces Together

Normal markets in products or services function despite having many different clearinghouses, product categories, and industries because there is, across all of them, a common price system. The price of steel adjusts the price of nails just like it adjusts the price of cars or appliances. Most importantly, it doesn't merely adjust the price of goods that use steel, it adjusts how much steel gets used, which means that it adjusts the price of substitutes and complements alongside the adjustment to steel, and in turn effects future steel production. Indeed, this mechanism adjusts prices across the whole market in response to, say, an industrial accident or a production improvement. This is likewise true of a marketplace of ideas. The theory of Darwinian evolution didn't merely reshape biology, it reshaped archaeology, anthropology, sociology, economics, philosophy, and theology, amongst other areas of study. It gave rise to social movements. The ideas and methods introduced made other ideas (like the great chain of being) obsolete, it required new arguments for (as an example) Christian theologians to stay more or less in the same place, and it gave rise to powerful new tools and ideas that wouldn't have been possible before. It was fruitfully combined with other ideas—Mendelian genetics in one instance, the economic model of rationality in another—to do even more things.

While most ideas and arguments do not have quite as large of an impact as Darwinian evolution, a crucial feature of our intellectual environment is that ideas and arguments can start in one place, and have an impact somewhere else entirely. While it may seem crass to compare the importance of an idea or an argument to price shifts amongst consumer goods and services, there's something analogous in those two cases that is worth trying to reason through. Some concepts enable the study of others. Sometimes new arguments reveal why previously-accepted arguments were weak. As we develop new tools for reasoning, some problems become easier to think about, or new avenues for approaching the

problem become apparent. Sometimes we develop these new tools, or find a new application for them, to advance our side of a dispute. That we do this with some frequency in our actual social epistemic practice suggests that something akin to a price system is at work with our ideas as well. "Prices" may just not be monetary, but instead capture something about the perceived epistemic value of certain lines of argument or ideas. Of course, these relative valuations shift as we learn more about the world.[8]

A price system, or its analogues, is useful to us because it is a way of stitching together seemingly-disparate epistemic communities. A fully common epistemic market is undesirable. It limits what can be discussed, and (without intending to) can shape or seriously limit who participates. This can be true even without any malice or bias—this just falls out of the fact that our attention is a scarce resource, paired with the fact that we (quite reasonably!) care about more things than we could all pay attention to at once. That said, fully separate silos of belief are equally untenable. If epistemic communities cut themselves off from each other, we will end up with deeply dysfunctional speech environments, even when each community is following good procedures, aside from the (unnoticed) bias of the participants. So, we can try and reflect on what might work to respect agent diversity and associational rights while allowing our broader epistemic procedures to be more truth-conducive.

Here, we will consider two complementary approaches of ensuring information flows across epistemic communities. We can treat each one as an extension of our multiple-market model. As we've seen, the single marketplace approach just can't account for a diverse populace. So, we must find ways to prevent polarization across multiple groups. The first extension is a kind of hierarchical model of multiple levels of epistemic groups, with each level getting more generalist. Here we will conceive of epistemic groups working out their ideas amongst themselves, then the groups acting as group agents to promote their ideas with the wider world. That is, we'll conceive of each epistemic group as a kind of community of interest, on the model of an academic discipline or a political party. The members of a particular group may share some latent assumptions, and they work to arrive at a group consensus on some issue. They then present their best arguments to the broader citizenry.

Where our first extension focuses on the outputs of each group, the second extension considers ways of de-biasing the internal deliberations of each epistemic community. Crucially, here we imagine that individuals themselves can work to de-bias discussion because individuals have rich mental lives. So, instead of assuming that each individual is a member of a single speech community, we will model individuals as having memberships in a broad range of epistemic communities, on a variety of issues. Alice doesn't only care about WWII history, she's in a book club,

and she is a serious homebrewer who participates in a local club. Bob has gotten interested in QAnon, but he also enjoys spending time at the local Rotary Club, and is treasurer of a Taylor Swift Fanclub. These cross-cutting membership patterns facilitate the spread of ideas across groups.

Our first approach, which focuses on having opportunities for direct interaction across groups, aims to create some additional communication structure on top of various niche communities, by re-establishing more generalist venues for exchange. Depending on the extent of the market and the number of local-level epistemic communities, this might be a hierarchy of venues several layers thick. The core idea behind this is to put the various conclusions and methods developed within epistemic communities in contest with each other. We do this by creating more inclusive generalist speech venues that are for those various communities to advance their best ideas to the broader public. In essence, it re-creates the generalist marketplace of ideas using representatives of diverse epistemic communities. Each presents their arguments and gets inevitable pushback from others. This process generates new information for the various epistemic groups, who can take those challenges back to their more cloistered setting and try and develop something new in light of the pushback they get from outside groups. What emerges at these more generalist layers can keep flowing upward, or across other more generalist venues.

To get a sense of how this might work, consider an academic analogue. Research groups might focus on internal arguments as they work out a view. They then present their findings at a conference, where other groups are doing the same. All of the presentations get significant pushback from the audience, and people come away with new ideas. They return to their research groups, refine their arguments in light of the criticism, and then publish in journals. Some of those arguments get picked up by other academics, and sometimes those arguments get presented in popular-audience pieces. Each of these moves expands the spread of those ideas, and the original groups get exposed to a great deal of criticism, which they can then use to help their future deliberation.

This follows a roughly "normal science" approach, but with cross-group engagement. What is interesting about this method is that niche views that do in fact have important ramifications have a means to spread, and have other theories respond in light of them. This can happen because those niche views had the time and space to develop within a particular epistemic community, and then survive in a broader crucible of opposing ideas. This respects associational boundaries while making sure that associations, in a desire for broader influence, are exposed to challenge and disagreement.

We can imagine a similar story playing out for social/political ideas as well, as filtered through local organizations, political contests, and news media. While much of our real epistemic environment is structured in

hierarchies of this sort, we can use this model to think more carefully about where existing epistemic groups remain outside of this structure, and how we might be able to draw them in.

The second approach focuses on the idea that individuals have a diverse range of interests, and their epistemic lives aren't defined by a single idea, method, or subject. Our ideal case is that an individual's interests are broadly independent of one another, and she participates in a number of different epistemic communities, separately catering to these diverse interests. Now, in each group, she can inject what she's learned in other communities. Each seemingly-narrow community might in fact be rather internally diverse, with each member being exposed to a much wider range of ideas and challenges than it might look like if we just focused on a single group. Even in those groups that focus on abhorrent conspiracy theories, their members can have more mundane interests which put them into contact with people who have more sensible views. This puts them in a position to hear counter-evidence, or see that others who act like responsible epistemic agents in unrelated contexts have sincerely held views that are counter to the conspiracy.

This approach highlights the ways that individual members of various communities themselves can help protect those communities from bias. The cross-cutting interests of individual speakers help to spread ideas and debias groups. The challenge, however, is whether individuals do in fact end up fostering a number of independent interests, or if those interests are correlated with each other. Imagine that Bob is interested in composting, making his own yogurt, and listening to classical music. These are likely reasonably well correlated with each other, along with listening to NPR, voting for democrats, and perhaps being a vegetarian. Bob might actively participate in discussion groups on each subject, and then find that his interlocutors across all of these disparate areas all seem to converge on a core set of values. This can lead him to think that people who aren't converging on these values are clearly mistaken. After all, it seems like he is being incredibly epistemically responsible by getting feedback from multiple sources. However, the more someone's interests are correlated, the more it might *feel* like the individual is getting a broad range of ideas, and putting them in dialogue with each other, while in fact remaining in a fairly siloed environment. But the closer someone is to having a variety of independent interests, the vasty better their epistemic position is, and the more useful they are to each of their epistemic communities.

We are better off epistemically if we cultivate interests that are seemingly random. But this is hard to do in practice. Bob might have learned about yogurt making from one of his composting friends, and only composted because he wanted to have a garden to cater to his vegetarian diet. And so on. However, even in this instance, where Bob's epistemic environments are related to each other in various ways, we're still better

off than if he only had one. The potential danger is that if the various epistemic environments heavily overlap in bias but not in people, it may be that Bob gets more locked in to biased views. Then we would need to rely on institutional mechanisms of injecting more criticism and new arguments into the discussions that Bob participates in.

As we just saw, it may well be the case that our two distinct extensions—institutional space for more generalist engagement with the output of various epistemic communities, and individual-level diversification of interests—can work well together. Higher-level generalist engagement may help spark new interests for people who may have not come across those ideas before. Group members with a wider variety of interests will be better at thinking through what kind of arguments will attract wider attention in more generalist settings. Each mechanism helps foster the spread of ideas through the broader community. Together, this helps us approximate something like a price system to ensure that ideas spread, and arguments can respond to each other.

3.5 Discussion

I've argued that a single marketplace of ideas does have very nice epistemic features—it should work to track the truth in the long run, and work to enhance participants' epistemic capacities. But these features are not realizable by all, as attentional scarcities mean that minority viewpoints, and minority issues most of all, are crowded out. A single marketplace seriously inhibits diversity.

A solution to this diversity problem is to more directly cater to diverse epistemic interests by creating many more sub-marketplaces of ideas. I've treated these as distinct epistemic communities. But while this balkanization straightforwardly deals with the diversity challenge, it can only do so at the cost of undermining the symmetry assumptions that help drive the epistemic benefits of the single marketplace of ideas. Any given epistemic community might be biased in its composition, and so even when agents follow procedures identical to the original case, the bias in group composition will lead to biased outcomes.

At first pass, then, responding to diversity comes at the cost of epistemic hygiene. We may create the space to engage in a wider variety of conversations, but each of those conversations is more likely to be led astray from lack of varied interlocutors. We find that neither simple model is appealing for a complex, diverse liberal order.

To rectify this, and to try and leverage the virtues of each model, I have suggested that we need to re-introduce mechanisms for the spread of ideas across distinct communities. This is done with two complementary mechanisms: an institutional solution in which we intentionally create new fora for cross-group discussion, and an individual diffusion approach in which individuals are members of multiple epistemic

groups, and serve to spread ideas across the groups of which they are members. Each of these has desirable epistemic properties, and both likely add to the realism of the model. But neither of these extensions alone, or even jointly, guarantees that the overall system will always both track truth in the long run and sufficiently caters to diversity. I do think that this approach offers a framework for thinking about how we could improve our epistemic environment in a way that respects people's rights to free speech and their rights to free association. One question for future work is looking at how much correlated interests serve to weaken effective deliberation. I have assumed here that they are worrisome, but the dynamics are unclear. It would be worth studying this more carefully.

Notes

1 Department of Philosophy, SUNY Buffalo, 135 Park Hall, North Campus, Buffalo NY 14260-4150.
2 For a discussion of the political costs of this kind of epistemic malfunction, see Muldoon (2018) "Diversity isn't what divides us. Division is what divides us."
3 For a more detailed discussion of this point see Muldoon, "Free Speech and Learning from Difference" *Society* 54 (4), 331–336.
4 In support of Mill's argument see, Muldoon, "The Paradox of Diversity" *Georgetown Journal of Law and Public Policy* 16, 807–820.
5 Note here that we can interpret a model such as this as one driven by self-interested competition amongst venues for prestige, money, or some other good. Or we could model it as a niche formation model where each venue is looking to occupy a niche not taken by others, where they jointly have an interest in broader coverage. Motives aren't really relevant to the dynamics of the model.
6 For a more detailed discussion, see Cass R. Sunstein, "The Law of Group Polarization" (John M. Olin Program in Law and Economics Working Paper No. 91, 1999).
7 A related discussion can be found in Nguyen, "Echo Chambers and Epistemic Bubbles" *Episteme* 17 (2), 141–161 (2020).
8 For a detailed exposition, see Hayek, "The Use of Knowledge in Society" *The American Economic Review* 35 (4), 519–530.

References

Hayek, "The Use of Knowledge in Society" *The American Economic Review* 35 (4), 519–530.

Muldoon, Ryan (2018) "Campus Speech, Diverse Perspectives, and the Distribution of Burdens" in *The Value and Limits of Academic Speech*, D. Downs and C. Surprenant (eds.) Routledge.

Muldoon, Ryan (2018) "Diversity Isn't What Divides Us. Division Is What Divides Us." Knight Foundation.

Muldoon, Ryan (2017) "Free Speech and Learning from Difference" *Society* 54 (4), 331–336.

Muldoon, Ryan (2018) "The Paradox of Diversity" *Georgetown Journal of Law and Public Policy* 16, 807–820.

Nguyen, "Echo Chambers and Epistemic Bubbles" *Episteme* 17 (2),141–161 (2020).

Sunstein, "The Law of Group Polarization" (John M. Olin Program in Law and Economics Working Paper No. 91, 1999).

4 Don't Block the Exits

Justin Tosi[1] and Brandon Warmke[2]

John Stuart Mill famously argued in *On Liberty* that freedom could be threatened not only by the state, but by society in general. Mill was especially concerned about the effects of social coercion on free expression. For even if the state is legally constrained from interfering with individual expression, that is little consolation to those who are fired from their jobs or ostracized by their communities for expressing their beliefs.

We share Mill's concern, which is sadly only becoming more pressing. According to one recent survey, 62 percent of Americans are afraid to share some of their beliefs because of the current political climate.[3]

Evidently, our purportedly liberal society has not embraced Mill's warnings about social coercion. Americans enjoy robust First Amendment protections against state interference with free expression. Yet most of us feel highly vulnerable to interference from everyone else.

What would a society look like that more closely realized Mill's vision for a free liberal order? Such a society, we think, would have very different social norms about matters of free expression than we currently have. Some of these more liberal norms are easy to imagine. For instance, a truly liberal society would have a norm against trying to get someone fired just because you disagree with her political views. But other norms would likely be less straightforward, as some problems of social coercion arise because of complex considerations of incentives and human psychology.

This essay considers the phenomenon of what we call *exit-blocking*. Roughly speaking, someone engages in exit-blocking when she imposes a social cost on another person for changing her mind. We'll explain this phenomenon and consider some likely motivations that drive people to behave this way. We'll then argue that exit-blocking is both a moral and epistemic problem. Finally, we discuss some norms against exit-blocking that a society might adopt to discourage it and thereby enhance the freedom of its members.

4.1 What Is Exit Blocking?

In a society characterized by ideal liberal freedom, people would be free to form their beliefs solely on the basis of epistemic considerations and not because of social pressure. The same would be true of deciding whether to speak their minds in public.

Our own society does not live up to this ideal. One of the reasons it falls short is that some people apply social pressure in ways that discourage others from changing their minds about moral or political matters. Or at least, some people apply social pressure in ways that discourage people from *talking in public* about changing their minds. In other words, some people block the exits and thus make others less free to form their beliefs solely on the basis of reasons and evidence.

Of course, not everything you might do to influence another's beliefs or public statements will count as exit-blocking. Disappointed to see that someone you thought of as a fellow progressive has changed her mind about an important issue, you might present her with objections or counterarguments. Or you might show her social scientific evidence that the causal claims her reasoning relies on are implausible. Your interventions might sway her to revise or abandon her new position. Alternatively, she might regard your second-guessing as tiresome or annoying. In any case, your behavior as described exerts influence of a permissible kind, because it consists solely of epistemic pressure. Even if a person doesn't want to confront possible flaws in their beliefs, pointing them out doesn't impose the kind of cost we're concerned with.

When a person blocks the exits, he does so by imposing a social cost on another person for changing her mind. By social cost, loosely speaking, we mean some social result of changing your mind that you might dread. Paradigmatic examples include humiliation in front of your community, loss of relationships, or, in the most extreme case, ostracism.[4] A social cost is, in other words, a negative impact on your social world—your reputation, relationships, associations, and so on.

Not all instances of the phenomenon are highly costly for the target. Publicly issuing personal insults can be a form of exit-blocking, for example. Although most people are not deeply bothered by such responses, it isn't pleasant to be on the receiving end of them, and so the threat of being insulted can deter rational people from speaking up.

Our attention will mainly be devoted to forms of exit-blocking that are less costly, since it is harder to see what is so troubling about them for their own sake, and so easier to focus on the broader dynamics we are concerned about. We will also talk mostly about exit-blocking in public discourse, though it could, in principle, also happen in private exchanges.

Now some sensitive souls might insist that being subjected to *any* public rebuttals of their claims should be treated alongside these cases as

social costs. And to be fair, it can indeed be embarrassing for someone to give an objection to your view that you can't answer, and not everyone enjoys arguing about ideas. So we agree that being called to defend your views is a kind of cost, but it is not the kind we are concerned about here.

The kinds of social costs we have in mind are those that result from what Linda Radzik calls "informal social punishment" (Radzik 2020). Informal social punishment intentionally imposes a harm on someone for allegedly violating a norm. Examples of such informal social punishment include: calling someone a fascist in front of her colleagues, emailing her boss to try to get her fired, posting her email address online to incite harassment, and so on. Unlike *formal* social punishments—like getting disinvited from a conference, getting fired, or getting banned from Twitter—informal punishments are not mediated by institutions or institutional procedures.

Exit-blockers therefore try to impose a harm—understood in terms of a social cost—on those who change their minds about moral and political issues, which the exit blocker considers a norm violation. However, simply providing an objection or rebuttal to someone who has changed her mind will not typically be a form of informal social punishment, even if the person changing her mind bears some social cost, such as being embarrassed for having her views challenged in public.

People block the exits for many different reasons, and their behavior takes diverse forms. There is no single motivation behind exit blocking. And there's no single kind of exit-blocking behavior. A helpful starting point for mapping the conceptual terrain is to consider the group dynamics of this phenomenon. Here is one simple way of thinking about the group dynamics of exit-blocking: upon publicly changing your mind, you can be challenged either by members of your in-group or out-group. In-group exit-blocking happens when members of your in-group impose social costs on you for changing your mind. Out-group exit bocking happens when your out-group imposes social costs on you for changing your mind.

In-groups and out-groups will typically have different incentives to challenge reported changes of mind, and their exit-blocking behavior will often look different. Yet both in-group and out-group exit blocking comes to the same thing: discouraging others from changing their beliefs.

From one standpoint, it might seem like members of an out-group should regard it as a welcome event when someone changes his mind to agree with them. But sometimes out-group members do not meet such conversions with approval. Instead, they attack these newly like-minded people, and so block their exit. In such cases, out-group members will say things like, "this change of heart is too little too late." Often, they criticize the convert's timing or the slow pace he took to arrive at the right view, saying, for example, "if you couldn't see that this is a deadly

disease until now, you're an idiot, and you should really sit this one out." Or, "where were you four years ago when we could have actually used your help to keep a fascist out of the White House? Sorry, not buying it." Also common are baseless accusations that newcomers to the cause are changing their minds now only because it is convenient to do so, or because they finally want to be on the right side of history. Sometimes people mock in advance those who might be tempted to change their minds, predicting that history's losers will come crawling to the enlightened group once they realize their children despise them, and we should never let them forget their mistakes. Out-groups block the exits from the outside.

In contrast, in-group members block the exits from the inside, imposing social costs on apostates who publicly disavow their previously shared beliefs. One common approach is to use the target's *other beliefs* to accuse them of being inconsistent, or more to the point, of standing for nothing on principle. Someone blocking an exit from the inside might say, "How could you now think this election was legitimate when you've been railing against these cheaters for years like the rest of us?" We can easily imagine someone saying this as a request for clarification or to reconcile two beliefs that are apparently in tension. But the intention of the exit-blocker in cases like this is to attack the moral purity or integrity of the apostate. She thinks this person has betrayed the cause, and wants to plant the idea in others' heads that the person is insincere or hasn't really thought the matter through, because he is corrupt or not even trying to get it right.

As we have said, exit-blocking can take many forms. In-group and out-group members can say similar things to block the exits, and they can even literally make the same statements or ask the same questions. Still, exit-blocking statements by the in-group and out-group are distinguished by the position they put the target in relative to that group. The in-group accuses the target of never truly believing in the first place or of being corrupted. The out-group insists he doesn't truly believe now or has changed his views for the wrong reasons. Both faces of exit-blocking are often reducible to purity tests. What they have in common even more fundamentally is the imposition of a cost on the target, and a deterrent effect on those who might follow suit.

Why does anyone engage in exit-blocking? Some cases can probably be attributed to straightforward malice. Some exit blockers probably just want to harm others and see an opportunity to do so.

But we think there are additional explanations for the phenomenon. One is that when a person changes his mind about some issue of interest to a group, it creates an opportunity for members of that in-group and its related out-groups either to seek more social status, or to project and solidify their status in their group. Psychologists have identified two forms of status that people seek, prestige and dominance. Prestige status

is conferred to a person because of her admirable qualities, skills, or achievements. Dominance status is earned by being seen as someone with control over things people care about, or by being intimidating or threatening (Cheng et al. 2010).

We suspect that a lot of exit-blocking is a form of moral grandstanding (Tosi and Warmke 2016, 2020). When people grandstand, they use public moral discourse to seek social status. Grandstanding members of a target's in-group might see her apostasy as an opportunity to make a morally flattering contrast with themselves. They capitalize on this opportunity by seeking prestige status. Whereas the apostate doubts or rejects the correct moral views, we have much purer beliefs. She is abandoning the right side of history while we remain firmly on it, as always.

Grandstanding out-group members, on the other hand, might see recent converts as a threat to their status. Why should this person be praised for finally waking up when we have been right all along? The correct views have always been obvious to us, and this dunce has only just now figured it out. Or, she may have gotten this one right, but she's still wrong about everything else, so we can't trust her. Grandstanders from both groups see that their moral qualities can be favorably compared to people who have recently changed their minds, so they do so in order to gain or maintain prestige.

Those who change their beliefs are also ripe targets for grandstanding to seek dominance status. When you change your mind publicly, you weaken the incentive for those in your in-group to defend you, or to be seen associating with you. Even if you convert entirely to the beliefs of what was previously an out-group, the members of that group might not trust you or value your association with them yet. Thus, by changing your mind, you present aggressive people with a chance to exercise their will to power. They can lash out at you to demonstrate their capacity for aggression without fear of reprisal from your tribe.[5]

Another way of understanding exit-blocking is to see it as an expression of what psychologists call the black sheep effect (Marques et al. 1988; Pinto et al. 2010). The black sheep effect is the phenomenon of deviant or weak members of a group being evaluated more harshly than similar members of out-groups. Weak members of a group are less committed to the norms and beliefs of the group than strong members. They are thus viewed as unreliable, or untrustworthy. Those who announce that they have changed their mind about something important to their in-group are, in a sense, willingly becoming marginal members of their group. The stronger members downgrade their evaluation as a result, and they may respond by announcing their disappointment.

A useful extension of this paradigm is that it helps explain the appeal of exit-blocking as a strategy for deterring further defection from the group. The individual apostate is the occasion for the exit-blocking, but others in the group who may be teetering on the edge of changing their

own minds can see the response and recognize the incentive not to do so. Nobody wants to be the black sheep.

4.2 Moral and Epistemic Criticisms of Exit-Blocking

From what we have said so far, it should be clear that people typically don't enjoy being on the receiving end of exit-blocking. But exit-blocking isn't just a distasteful experience. It is a bad social practice, for both moral and epistemic reasons. It makes us less free, and it interferes with truth-seeking.

Exit-blocking is morally bad because it interferes with freedom of expression. Many people are understandably reluctant to air their beliefs in public when they run counter to the orthodoxy within their community. This reluctance will only be stronger when a community engages in exit-blocking, as it raises the cost of changing your mind. People in such communities must worry not only about the silent judgment of their peers, but also about public campaigns expressing that disapproval when they stray from the flock.

Mill understood that informal social pressure could interfere with our freedom just as state coercion does. In fact, tyranny by an informal collective is, Mill says, "more formidable than many kinds of political oppression, since... it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself" (1989, 8). Informal communities are not bound by legal rules and procedures in the way state actors are. Any group member can simply smear an apostate for being morally or politically impure because of her public comments, and it becomes a liability for anyone else in the group to be seen associating with that person. The community might not be able to imprison or put to death its apostates, but it can make their lives miserable in ways states cannot. It can deny them personal relationships, willing trading partners, or any of the other benefits of social life, just by discouraging others from associating with them lest they suffer the same fate.

A prudent person would thus try to avoid the costs of social disapproval for changing her mind in matters that might draw exit-blocking responses. If she is not so cautious, the penalties could be severe. Members of their in-group will be wary of them, since the exit-blockers have marked her as impure, not to be trusted. Out-group members will also see her as impure, since she has been suspiciously slow to come around to the right view. The result is that freedom is limited to picking a team quickly and restricting one's public statements to claims that cohere with the group's views.

Mill argued that freedom of expression is "practically inseparable" from freedom of conscience (1989, 15). To limit expression is therefore to impinge upon the most intimate region of human liberty. If a society

regards it as normal and acceptable behavior to impose social costs on those who change their minds, then it encourages its members either to maintain a private conscience that does not leak into the public sphere, or to extinguish their heterodox thoughts before they might lead to public apostasy. Many will find it too mentally taxing to do the former, so they will instead bring their private mental life into line with the views acceptable within their group. Their freedom is thus limited.

But we should not restrict our evaluation of exit-blocking to its moral costs. Exit-blocking exerts a pernicious influence not just over what people are free to say, but what they believe. The incentives established by exit-blocking motivate us to change the way we think about the topics our groups care deeply about. As a result, people are discouraged from changing their minds, even privately.

In a world of ideally free inquiry, the social cost of changing one's mind would be low. People would be able to consider arguments and evidence without being pressured to come to a particular conclusion. Thus, they would be free to believe for epistemic reasons alone. Exit-blocking interferes with free inquiry. When social costs for changing one's mind are imposed, people are disincentivized to take opposing views seriously, seek out countervailing evidence, or even to find out what the opposition thinks. If you are already attached to some view, and your social or professional relationships would be damaged should you abandon that view, then you have strong incentives not to entertain doubts about it. Exit-blocking is thus an invitation to engage in motivated reasoning. Knowing that you will face some social cost for changing your mind, you might quite understandably look for ways to avoid doing so, even if only subconsciously. You might be more easily swayed by prima facie plausible but fallacious arguments for your view, or by strawman characterizations of opposing views, for example.

It might be objected that our concern about people being worse at even private reasoning in the face of increased social costs is overblown. Surely we can still evaluate views on their merits when we are just thinking about them on our own, and not report our conclusions to others if we think they won't like what they hear. It is true, of course, that most of us don't report our every thought publicly, and that among the thoughts we are most likely to keep to ourselves are the ones that will draw social blowback. But our point is not that people can't reason privately and safely become heterodox thinkers that way. Rather, it is that, at the margins, fewer people will do so. It is unpleasant to live an intellectual double life, always worried that you will accidentally say something that doesn't fit with the web of socially acceptable beliefs. In addition, people do not want to think themselves cowardly. But if you develop a set of beliefs that you cannot reveal to others without paying a high social penalty, it is hard not to realize that you *are* afraid to stand up for what you believe in. Instead of landing in such an unpalatable position, many

people will find some way to retain socially acceptable beliefs and just not think about them too much.

Exit-blocking also influences our private beliefs by limiting the arguments and evidence that people hear in public discourse. Hrishikesh Joshi has helpfully analyzed this dynamic as a collective action problem (2021, 67–85). It is important that people be exposed to evidence they are not aware of, or else we will collectively suffer from significant blind spots. We can alleviate those blind spots by sharing our evidence, and thereby exposing people to considerations that they would not have discovered on their own. But it is also risky for any individual to speak her mind and present evidence that might not please the crowd. If the risks of speaking one's mind are great enough, we might all quite rationally decide that it isn't worth it to speak up.

When groups engage in exit-blocking, they raise the risk—and thus the cost—of speaking your mind. Rational actors see that there is little to gain by expressing beliefs that their in-group might not approve of. Their own social network will label them traitors, and out-groups will refuse to offer them safe harbor. And worst of all, even if they did accept the cost of speaking out, their individual sacrifice would probably produce little overall benefit. The rational thing to do, then, is to hope other people discover the same thoughts as you, and are less risk-averse about sharing them. But the greater the risk, the fewer such people there will be.

The result of this collective action problem is that people are left without the social resources that might help them reason their way out of false beliefs. This might be good for group cohesion, but it is bad for free inquiry. Where exit-blocking is prevalent, loyalty is valued more than truth-tracking.

4.3 Toward an Environment Safe for Free Inquiry

Having described the phenomenon of exit-blocking and explained why it is bad for both moral and epistemic reasons, we'll now present a vision of a society that doesn't suffer from this problem. We will describe some potential norms that we could adopt to ensure greater overall freedom than we currently enjoy in our present society of exit-blocking enthusiasts.

We will follow Cristina Bicchieri in using "social norm" to refer to "a rule of behavior such that individuals prefer to conform to it on condition that they believe that (a) most people in their reference network conform to it (empirical expectation), and (b) that most people in their reference network believe they ought to conform to it (normative expectation)" (2016, 35). An individual's reference network is the group of people whose behavior and attitudes are relevant to them for social purposes. In the case of these norms, a person's reference network will likely include members of both their in-group and out-groups. The in-group

is relevant because these are the people we rely on most for our important social relationships, and we want to remain in good standing with them by following their norms. Out-groups are relevant primarily out of considerations of reciprocity: if they are not following these norms, then other groups may feel less bound by them.

The most obvious norm that should be adopted is against exit-blocking itself. We should not criticize people or impose other social costs on them simply for changing their minds. Again, this does not mean we should refrain from criticizing their justifications for doing so. But shaming people as traitors or apostates, or for not seeing the light sooner, is a bad practice.

A related and supporting norm is that we should not reward exit-blocking behavior. People respond to incentives, and if they can gain status for insulting insufficiently pure participants in public discourse, they will be more likely to do so. Anyone who pays even casual attention to social media will recognize that we are far from having an established norm along these lines. Current practices are quite the opposite, in fact, as people who are seen as black sheep to some political team are regularly pummeled for their impurities.

There are also norms that could encourage the fruitful expression of changes in view. We could, for example, praise people who express disagreement with much of the rest of their in-group about some issue or event. Or better still, we could adopt more widely the practice of some debating societies of holding in especially high esteem those who can provide clear and compelling explanations about why certain arguments moved them to change their minds. The idea behind these norms is that the independent-minded can serve as helpful models for others to reexamine their own beliefs, even if they don't end up changing their minds along with them.

To this vision of a society of unblocked exits, it might be objected that there is such a thing as too much intellectual independence, and we should be mindful of excess in that direction. We agree that there is something to this worry, but it arises mainly because people confuse being independent-minded with other less admirable traits. To some, the mark of an independent mind is that a person apparently has no firm beliefs, or is always ready to provide a surprising take that bucks all conventional wisdom. If we reward people for these traits, we can expect a profusion of shallow and poorly thought out contributions to public discourse. To be clear, this is not our ideal of a free thinker. Being determined to surprise people or to frustrate expectations is just one more way of letting other people determine the content of your beliefs. A free thinker worthy of the name follows the arguments wherever they lead, and only because they lead there. That is our ideal.

Here's another objection. We have argued that exit blockers err. People shouldn't impose social costs on those who change their minds.

But perhaps we have overstated the case. Communities and associations organized around shared goals, values, and lifestyles are valuable. People find meaning, status, and purpose in these social networks, and presumably because they are sources of value, they should be preserved. One way to hold communities together is to impose some social costs for defection. People *should* feel the sting of turning their backs on the beliefs and values of their communities. Indeed, this may be one resource that communities possess to prevent people from changing their beliefs for bad reasons (such as following some moral fad). Exit-blocking may also be a way to prevent people from changing their minds prematurely—say, after coming across a single smart person arguing for the other side. Furthermore, there may be important accumulated but latent knowledge within the received tradition of a social group, and individuals should be reluctant to turn their backs on their moral and epistemic communities. Social pressure in the form of in-group exit-blocking can be a justified and valuable practice to preserve those communities.

One reply to this objection is simply to deny that such exit-blocking is ever permissible or morally valuable. People should not impose social costs for changing your mind, even for these apparently noble reasons. Only purely individualist epistemic considerations are at issue, and it's morally wrong to sanction people who defect or to try to deter others from defecting. That's one kind of response. A second, and to our minds, more plausible reply to this objection is to note that sometimes social pressure can be a permissible way to preserve a community, but that it matters how and why this pressure is applied and what costs are imposed.

For example, if group members block the exits in order to preen and parade their alleged moral purity, this not only would be morally bad in its own right (as an instance of grandstanding), but also an epistemically unreliable way to preserve the latent knowledge in a moral community, privileging as it does status-seeking over truth-seeking. But if modest, appropriately motivated social costs could be imposed on defectors, there may be some countervailing moral value in preserving social cohesion and a tradition. The challenge, then, would be to articulate the contexts in which such exit blocking is permissible, and what equilibrium exists between the norms against exit-blocking and those in its favor. This is a task we identify but won't pursue here.

4.4 Conclusion

As people pursue ever more avenues for public discourse about morality and politics, more opportunities arise to have productive conversations. More opportunities also arise to abuse the public square for personal gain. Exit-blockers, we've argued, illegitimately impose social costs on others simply for changing their minds, often because they want to show

off their moral purity, or to feel powerful as they dominate those who publicly admit they've been wrong. This is a bad practice, and its collective effect is to create a less free, more cruel, and epistemically stunted society.

Notes

1 Box 43092, Texas Tech University, Lubbock, TX 79409-3092.
2 311 Shatzel Hall, Bowling Green State University, Bowling Green, OH 43403.
3 This fear is more common among conservatives, but a majority of liberals and moderates also report sharing it. Notably, the 62 percent figure is up 10 percent from just three years ago. https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share [accessed January 21, 2021]
4 We don't think that every cost resulting from public speech must be a social cost. Social costs are just a subset of all the costs someone might suffer.
5 We say more about the problems grandstanding causes for free expression in (Tosi and Warmke 2021).

References

Bicchieri, Cristina. 2016. *Norms in the Wild: How to Diagnose, Measure, and Change Social Norms*. New York: Oxford University Press.

Cheng, Joey T., Jessica L. Tracy, and Joseph Henrich. 2010. "Pride, Personality, and the Evolutionary Foundations of Human Social Status." *Evolution and Human Behavior* 31 (5): 334–47. https://doi.org/10.1016/j.evolhumbehav.2010.02.004

Joshi, Hrishikesh. 2021. *Why It's OK to Speak Your Mind*. New York: Routledge.

Marques, José M., Vincent Y. Yzerbyt, and Jacques-Philippe Leyens. 1988. "The 'Black Sheep Effect': Extremity of Judgments towards Ingroup Members as a Function of Group Identification." *European Journal of Social Psychology* 18 (1): 1–16. https://doi.org/10.1002/ejsp.2420180102

Mill, John Stuart. 1989. *On Liberty and Other Writings*. Cambridge: Cambridge University Press.

Pinto, Isabel R., José M. Marques, John M. Levine, and Dominic Abrams. 2010. "Membership Status and Subjective Group Dynamics: Who Triggers the Black Sheep Effect?" *Journal of Personality and Social Psychology* 99 (1): 107–19.

Radzik, Linda. 2020. *The Ethics of Social Punishment: The Enforcement of Morality in Everyday Life*. Cambridge, United Kingdom: Cambridge University Press.

Tosi, Justin, and Brandon Warmke. 2016. "Moral Grandstanding." *Philosophy and Public Affairs* 44 (3): 197–217.

———. 2020. *Grandstanding: The Use and Abuse of Moral Talk*. New York: Oxford University Press.

———. 2021. "Moral Grandstanding as a Threat to Free Expression." *Social Philosophy and Policy* 37 (2): 170–89. https://doi.org/10.1017/S0265052521000108

5 Taxation, Ideology, and Higher Education

Hrishikesh Joshi[1]

5.1 Public Funding and Diversity

Modern states fund a range of epistemic agencies—that is, institutions responsible for the production and dissemination of knowledge and the cultivation of intellectual virtue. Thus, governments around the world operate or subsidize radio stations, TV channels, universities, and public schools. They do so because there is a legitimate public interest in discovering the truth within a range of domains—in making scientific and technological discoveries, for example. The public also has an interest in being informed on important matters and being able to access reliable sources for such information. However, in order to merit *public*—as opposed to merely *private*—funding, such institutions must meet important desiderata. For example, it is widely accepted that such institutions cannot be explicitly partisan. Thus, a radio station whose explicit mission was to operate as an advocate of the positions of a particular political party, for example, would not be suitable for public funding within a liberal democracy.

This point raises further questions. Even if an institution is not explicitly partisan, it can operate in a way that is ideologically restrictive. The Heritage Foundation, a conservative think tank in Washington D.C., is perhaps a good example. While it is not explicitly an arm of the Republican party, it seeks to conduct and promote research that is in line with a range of conservative positions. To put it another way: it does not meet an important *diversity* constraint. We might also think that because of this, it cannot be considered an *objective* institution.[2] And for an epistemic agency to merit public funding, it must exhibit objectivity. We see this ideal embodied in the legal system, as it incorporates juries of our peers and (ideally) unbiased judges. A legal system structured so as to promote specific sectarian interests, for example, would not meet even the most minimal standards of public justification within a liberal democracy.

This essay examines the implications of these ideals for the modern university system. The university is an epistemic agency, and a very important—if not the most important—one at that. Furthermore, across

the world's liberal democracies, universities receive significant public funding in various forms. The question then arises: How must universities be structured, and what kinds of diversity should they incorporate to be genuinely objective in a way that justifies public funding? The focus here will be on universities in the United States in particular, but the underlying issue is perfectly general.

5.2 Free Speech and the University

There is much contemporary discussion, in both popular and scholarly circles, on the issue of free speech within the context of the modern university system.[3] To a large extent, the discourse has focused on specific events—notably, disinvitations of speakers—which seem, on their face, incompatible with the ethos of free expression of ideas. According to some authors, such an ethos is central to the proper mission of the university.[4]

However, there is a natural tension between standard academic practice and free-wheeling discussion of ideas. Standard academic practice by its nature excludes certain discussions. Filtering out claims and arguments that are either methodologically untenable or sufficiently uninteresting to scholarship at large is fundamental to the process of peer review, for example. In light of this feature of academic practice, some have suggested that universities, while they can appropriately exclude certain discussions in a range of contexts—classrooms, journals, etc.—they must nonetheless allow for a robust *free speech zone*, wherein all and any ideas can be discussed.[5] Speaker disinvitations of many kinds are thought to be incompatible with this requirement. Recently, some have questioned whether such a free speech zone is really a requirement entailed by the mission of the university—that is, it's not obvious why the principles of standard academic practice as they apply to the classroom, say, should not apply to the university campus writ large.[6]

While these are interesting debates worth having, they threaten to mask a deeper problem that might underlie increasing public criticism of the modern university system. Even supposing a satisfying equilibrium could be found on the issue of disinvitations, for example, it would do little to assuage concerns about the underlying issue.

One way to get at that issue is the following. Universities, because of how they are funded and the role they play in shaping (especially political) culture, ought to meet fairly demanding criteria of justification to the broader public within which they are situated. The question then becomes: what might these criteria be? And more practically, do modern universities (in the United States, say) meet these burdens of justification?

Let me say a bit more about the two aforementioned reasons why universities must meet a high burden of justification to the demos. First, universities receive substantial direct and indirect financial support from

government sources, ultimately via taxation. In the case of state universities in the United States, the home state funds significant portions of their budgets directly. Even in the case of non-state universities however, tax dollars subsidize these institutions indirectly via student grants and low-interest loans. Government agencies also directly fund research conducted in private university settings.

Second, universities play a huge role in shaping future political culture. Individuals who have the most power to shape political, economic, and cultural institutions—senators, CEOs, legal professionals, journalists, financiers—disproportionately (if not almost exclusively) are college graduates (and typically have more than just a bachelor's degree). And plausibly, universities play a crucial role in shaping the ideals, worldviews, and cultural outlooks of their students. This is because universities have great influence over the sorts of arguments, evidence, and ways of thinking and making sense of the world that students are exposed to during their formative years. Further, some of these students go on to become schoolteachers (all of whom are required to have received higher education in some form) and in turn help to educate future citizens, nearly all of whom, in the modern context, receive some form of schooling external to their households. Universities, then, have enormous power to shape the demos in the long run. Plausibly, this means they must be accountable and responsive to the demos in a meaningful way in order to be democratically legitimate.

In what follows, I suggest some reasons to worry whether universities in their present form can meet these burdens of justification. I then propose some ways forward.

5.3 The Heritage Foundation

The Heritage Foundation is a conservative think tank based in Washington D.C. Its mission statement reads: "The mission of The Heritage Foundation is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."[7] Heritage hires conservative scholars to defend and promulgate ideas and arguments friendly to traditional conservative principles. A scholar or writer who works on defenses of high minimum wages or publicly owned utilities is not likely to find employment at Heritage. Neither are scholars who argue for cuts in military spending or a pro-choice stance on abortion.

What should we think about Heritage? Well of course, many will disagree with its aims, principles, and conclusions. In the end, such people may be right. Perhaps Heritage gets things wrong more often than not. Perhaps the policies it endorses would be counterproductive to justice and general welfare.

Be that as it may—should Heritage be *allowed to exist*? All but the most totalitarian would say yes. Sure, Heritage may be wrong, but in a free society, we are allowed to be wrong. A politically liberal society allows for a variety of opinions to be voiced. It also allows for different people to follow what John Rawls called their varying "conceptions of the good," that is, "an ordered family of final ends and aims which specifies a person's conception of what is of value in human life." According to Rawls, such ends are typically organized via "comprehensive religious, philosophical, or moral doctrines."[8]

In this way, we can make sense of robust freedom of religion. An atheist thinks the Christian is wrong about the world and the good life. Moreover, from the atheist's perspective these are not trivial or inconsequential mistakes. The disputes between the atheist and the Christian are not akin to disputes about Albert Einstein's birthday or whether chocolate tastes better than vanilla. They are fundamental disputes about what makes life worth living, what happens after we die, and what the purpose of the universe is. From the Christian's perspective, the atheist is rejecting the love of God, who created the world and sacrificed himself for humanity. The atheist is thereby faced with eternal damnation. From the atheist's perspective, the Christian rejects the scientific worldview and orders his life around the supposed will of an imaginary being. The disputes *between* different religions are just as fundamental—Muslims, Buddhists, Sikhs, and Hindus all have widely varying ideas about the nature and will of God, the good life, proper social norms and roles, and the like. Nonetheless, despite these deep disagreements, a liberal society guarantees freedom of religion—it guarantees the freedom of some to implement and express views about the world that others fundamentally disagree with. The same plausibly goes for Heritage. Even if, from the point of view of those on the left side of the political spectrum, Heritage is wrong, nonetheless a liberal society must allow for its existence.

Now, as it turns out, Heritage does not receive any government funding. Its funders are all private individuals, foundations, and corporations. But what if Heritage did receive government funding? Then it seems plausible that many of us would have a complaint. Government funding ultimately comes from taxation. And taxation involves coercion—you don't have a choice as to whether or not to pay your taxes. Coercive taxation to fund Heritage would not be justifiable to those on the left and center of the political spectrum. We can imagine someone saying, "I don't want my money going to support an ideology I deeply disagree with." And they would be right to be indignant in this way. We can imagine similar complaints on behalf of atheists or Muslims or Hindus if the state used taxes to fund Christian church activities. Freedom to express and promulgate ideas is one thing; the right to coercively extract resources to serve in such promulgation is quite another.

Moreover, Heritage does not have a structure that allows for multiple sides of an argument to be represented in a way that would calm the worries rehearsed above. That is, the fact that Heritage promotes conservative ideas is neither an accident nor the natural result of some ideas winning out in a fair competition. Rather, non-conservative ideas are systematically *screened out*: if you're a left-leaning economist or sociologist looking to work at Heritage, good luck to you! In this way, it is similar to the Church—just as the Church is not a forum for people of multiple faiths and beliefs to voice their opinions and worship as they see fit, Heritage is not the place for individuals espousing multiple ideologies and trying to work together for some shared goal.

I think this captures the core of the complaint many of us would have if Heritage were to receive public funds—it's not an institution that is structured in the right way so as to promote goals that we could all reasonably agree with. One goal that we could all reasonably agree to is the goal of getting at the truth about important social matters. But if Heritage did get at the truth, it would be an *accident* or stroke of luck. This is not to say that Heritage cannot contribute to society in important ways. Perhaps it will enrich the pool of data and arguments that society as a whole has access to, and perhaps this might allow us collectively to become better situated from an epistemic point of view. But the institution's *telos* or goal is not to attain the truth, whatever it is. If that were the goal, then depending on the institution's effectiveness, a case for public funding may be made. But given that its telos is to promote conservative ideas—something that not all of us can reasonably agree to—the case for public funding fails.

5.4 Are Modern Universities Like the Heritage Foundation?

While Heritage leans right, modern universities lean left—and dramatically so. A 2016 study showed that the ratio of registered Democrats to Republicans within history, journalism, law, psychology, and economics departments is 10:1 for the United States as a whole.[9] For elite institutions like UC-Berkeley or Yale, the ratio is even higher. Among these fields, economics has the most balanced ratio at 4.5:1, while the ratio in history is 33.5:1. A more recent study of faculty from top liberal arts colleges (a sample of 51 colleges, 8,688 tenure-track professors) found D:R ratios of 43.8 in sociology, 48.3 in English, and did not find a single Republican in anthropology and communications departments.[10] A recent survey of philosophy professors showed that 75% of the profession leaned left while 14% leaned right and 11% identified as moderate.[11] A 2008 tally of public voting records found that 87.2% were Democrats while 7.7% were Republicans.[12] Note that much of this data is from before the 2016 election, so the skew is not merely a response to recent political upheavals.

Now, one might think that imbalance alone need not be worrying by itself. If universities are genuinely open to people with different political orientations, but for whatever reason, academic pursuits are more attractive to people on the left, while moderates and conservatives prefer non-academic pursuits, then universities would not be like the Heritage Foundation. Despite the lopsided representation of political orientation within the academy, it may be said, this is the best we can do, given various processes of self-selection.

Even if self-selection is the only reason for the disparities, there are several reasons to worry. The crux of the worry is: can institutions that are sufficiently lopsided in terms of political orientation be robustly oriented towards getting at the truth? The answer, I think, will depend on what the object of inquiry is. Suppose it turns out that a mathematics or mechanical engineering department is lopsided in terms of political orientation. Plausibly, there is little (if any) reason to worry here about the epistemic reliability of the department's research programs. That is because the topics that mathematicians work on—number theory, topology, differential equations, graph theory, and so on—do not bear directly upon social and political disputes. The same goes for the kinds of topics mechanical engineers explore—heat transfer, theories of plates and shells, fluid dynamics, and so on. Hence, the distribution of personal political beliefs of such researchers will plausibly not affect the quality or direction of their research.

What about fields that do touch on political and social issues? What about sociology, anthropology, philosophy, or social psychology? The situation is plausibly different here. In these cases, lopsided political representation should cause worry about the ultimate quality of research programs. One quick proviso is in order: some of the topics within such fields do not touch on social or political issues. For example, the lopsided distribution of political ideology in philosophy need not affect the quality of research with respect to questions about the theory of linguistic meaning, or mereology, or the hard problem of consciousness. The same could be said about research programs that, though engaging in normative issues, are sufficiently abstract: debates on free will, realism or antirealism about ethical properties, and so on.

Many of the topics that the aforementioned fields investigate, however, are decidedly political in the sense that they investigate social issues on which political ideologies disagree. To mention a few: the causes of crime, the causes of inequality, distributive justice, or fair immigration policy. It is here that the lopsided distribution of political ideology can undermine truth-seeking, given what we know about human biases in the political realm.

Several recent studies have brought out the distorting effects of political ideology on reliable belief formation. One study suggests that people on both sides of the political spectrum are prone to assess the *logical validity*

of arguments based on whether or not they agree with the conclusion. This naturally leads to predictable error.[13] Dan Kahan and colleagues famously provided compelling evidence that individuals on both sides of the political spectrum are liable to make basic errors of statistical interpretation and inference so as to suit their antecedently held political beliefs. Importantly, more numerate individuals (i.e., people who are better at math) are also liable to these mistakes, and in fact polarization *increases* among such individuals.[14] We also know about the phenomenon of *group polarization*— groups of like-minded individuals tend to form *more extreme* opinions after they deliberate together.[15] Institutions that are concentrated with individuals of a particular ideology at the exclusion of others, then, are likely to settle on views that are more extreme than warranted on the basis of evidence, even if that ideology is broadly correct. Furthermore, political ideology can lead us to epistemically downgrade the testimony of others when doing so is not warranted. A recent study documented that individuals were less likely to turn to people who disagreed with them politically when it came to an incentivized shape recognition task. This is irrational because a person's politics is presumably not a reliable indicator of how well that person can recognize shapes. Indeed, the authors find that this distrust led to predictable errors.[16] Political beliefs are "close to us" in a way that garden variety politically neutral empirical beliefs are not. A recent neural imaging study suggests that our brains react differently when we are confronted with evidence that challenges our political beliefs as opposed to beliefs about multivitamins or Thomas Edison.[17] It might be thought that more intelligent people are better at recognizing and not falling prey to such biases. And since academics might be thought to occupy the top end of the spectrum in this regard, perhaps they are more immune than the general public. This, however, is not true—empirical work suggests that cognitive sophistication does not yield a greater ability to recognize one's own blind spots.[18]

In addition, the manner in which political beliefs correlate among partisans is epistemically suspicious. Political partisans in the modern U.S. context, for example, have predictable opinions on complex policy issues ranging from abortion to minimum wages to immigration to crime and policing. However, the kinds of reasons and evidence relevant to these issues are plausibly very different. And it seems hard to find some political or moral principle that unites the typical views on this held by partisans on either the left or the right, assuming only dispute-independent empirical facts. Presumably, the best explanation of why individuals exhibit these striking patterns of belief on such diverse topics then will have socio-cultural, non-truth-tracking, explanations that undermine the epistemic status of those beliefs.[19]

Lastly, a fairly robust result in the recent psychology literature is that our moral beliefs tend to affect how we process *non-moral* empirical evidence implicated by those moral beliefs.[20] For example, thinking that

the death penalty is unjustified on *deontological* grounds correlates with thinking that the death penalty has fewer positive *consequences*—substantial deterrence of crime for example.[21] Of course, the claim that the death penalty is wrong on deontological grounds is perfectly consistent with the claim that the death penalty substantially deters crime. The correlation of these two beliefs within people's minds is thus epistemically suspect. Thus, our moral beliefs color how we see non-moral aspects of the world in a way that's not appropriately sensitive to the truth-makers of the non-moral facts at hand.[22] If a field of research is dominated by a particular moral and political ideology, then its assessment of even the *non-moral* facts relevant to that ideology is likely to be mistaken.

With all these findings in mind, we should be skeptical that groups of politically likeminded individuals can dispassionately and robustly track the truth on research topics that touch on political issues. The mechanisms by which truth-tracking may break down are myriad. First, dissenters who do not agree with certain research programs or methods may be hesitant to speak up for fear of real or imagined social repercussions—even if they are ultimately right.[23] Second, the assumptions that are commonly shared and the research questions that receive attention will be enormously influenced by the ideological composition of the field. Ideological homogeneity will mean certain assumptions, though unfounded, may never get questioned, and some research programs will be unduly neglected while others will receive more attention than they merit.[24] Lee Jussim, for example, has argued that the inaccuracy of stereotypes was a long-held and unquestioned assumption within social psychology, but which, upon scrutiny, did not ultimately mesh with the data.[25] Among others, Steven Pinker has argued that blank slatism—or the idea that differences in human behavior are entirely due to the environment—is a pervasive yet unfounded assumption in much of social science research.[26] These are just two examples, and the reader may disagree with the particular claims of Pinker and Jussim, but the point is perfectly general. Given what we know about human psychology, it would be highly surprising if an institution that leaned one way or the other with such a small number of dissenters *did not* have research blind spots. If you're not convinced, just imagine: if the academy were composed of 95% Catholic priests or 95% free-market libertarians, would it have blind spots? Would legitimate research questions get ignored? Would there be unfounded but unchallenged assumptions? Third, even without explicit or implicit bias, academic hiring will be skewed by the kinds of research questions deemed important by the majority. For these and other reasons, then, we should not expect inquiries into politically charged topics to resemble the kind of self-correcting science that we observe and expect in physics or chemistry or geology.[27]

The arguments presented so far in this section do not rely on any claim about explicit or implicit bias in hiring or other evaluation within the academy. Regrettably, there is substantial evidence that we are likely to harbor such biases and that the biases are quite strong. Recent work suggests that implicit bias as measured by the Implicit Association Test is now much stronger for political party affiliation than race. Another study found that evaluators preferred to award scholarships to high school seniors who were politically aligned with the evaluator. Even candidates with lower GPAs but aligned politics were frequently preferred to those with higher GPAs but differing political views.[28] A study of social psychologists found that many explicitly said they would hire a liberal over a conservative if they had to choose between equally qualified candidates. And the more liberal the responder, the more willing they were to discriminate.[29] Recent data show a similar phenomenon among philosophers.[30]

Political diversity is important for the university because it aids in the mission of tracking the truth. Politically diverse teams and institutions are more likely to arrive at the truth, and more robustly so. Individuals with different perspectives can challenge each other's blind spots in various ways and mitigate group polarization.[31] There is some direct empirical evidence to this effect. Feng Shi and colleagues find that ideologically diverse teams reliably produce better quality work on issues touching on political and social topics.[32] Psychologist José Duarte and colleagues marshal evidence to argue for the following four claims:

1) Academic psychology once had considerable political diversity, but has lost nearly all of it in the last 50 years;
2) This lack of political diversity can undermine the validity of social psychological science via mechanisms such as the embedding of liberal values into research questions and methods, steering researchers away from important but politically unpalatable research topics, and producing conclusions that mischaracterize liberals and conservatives alike;
3) Increased political diversity would improve social psychological science by reducing the impact of bias mechanisms such as confirmation bias, and by empowering dissenting minorities to improve the quality of the majority's thinking; and
4) The underrepresentation of non-liberals in social psychology is most likely due to a combination of self-selection, hostile climate, and discrimination.[33]

If these points are true with respect to social psychology, they're plausibly true with respect to sociology, anthropology, several areas of philosophy, and so on. Political homogeneity can lead to group dynamics

that discourage the exploration of alternative hypotheses which may explain the data equally well or better. Thus, economist Glenn Loury laments:

> The notion of objective research—on the employment effects of the minimum wage, say, or the influence of maternal employment on child development—can have no meaning if, when the results are reported, other "scientists" are mainly concerned to pose the ad hominem query: "Just what kind of economist, sociologist, and so on would say this?" Not only will investigators be induced to censor themselves, the very way in which research is evaluated and in which consensus about "the facts" is formed will be altered.[34]

John Stuart Mill raised some of these concerns a century and a half ago, particularly in his *On Liberty*. There he stressed, among other things, that opinions that are "heretical" often have a kernel of truth to them, and that the best way to be justified in thinking what we do is to hear the best case to be made *against* our opinions and be able to see where it errs. He also stressed that at best what an ideology or comprehensive moral and political doctrine can achieve is "half-truth." Despite being a Christian, he thought this was true of Christian ethical thought as well. With respect to politics, he writes: "a party of order or stability, and a party of progress or reform, are both necessary elements of a healthy state of political life."[35] If Mill is right about these things then, individuals on both sides of the political spectrum might have important insights to contribute on society and justice—so that the near-total exclusion of one perspective may be detrimental to truth-seeking.

5.5 The University's Educational Mission

Political homogeneity can also be detrimental to the mission of teaching. First, the choice of what is taught, what is stressed, and which facts are presented will undoubtedly be influenced by the political views of teachers—even if they explicitly commit themselves to be ideologically neutral. Second, in a politically homogenous environment, a culture can arise that condones or even encourages individuals to be non-neutral. Max Weber, one of the founders of modern sociology, thought this would be contrary to the proper role of educators. He wrote:

> the true teacher will beware of imposing from the platform any political position upon the student whether it is expressed or suggested …. And if he feels called upon to intervene in the struggles of world views and party opinions, he may do so outside, in the market place, in the press, in meetings, in associations, wherever he wishes. But after all, it is somewhat too convenient to demonstrate one's

courage in taking a stand where the audience and possible opponents are condemned to silence.[36]

Perhaps in an ideal world, where human beings were perfectly able to leave their biases at the door when they entered the classroom as teachers, we could be more confident of the modern university carrying out its educational mission in a justifiable way. However, it's far from obvious that we are able to leave our biases at the door when we discuss policy-relevant issues in the classroom. One immediate cause for concern is the fact that many students report censoring their views on social and political matters within the classroom, and that this self-censorship increases robustly as we move from self-identified liberals to self-identified conservatives.[37]

To the extent one doubts this, consider if we flip the script. Imagine that the overwhelming majority of faculty in the humanities and sociology were on the political "right." Imagine that various forms of radical views on the right end of the spectrum were held by substantial numbers, while even center-left views were largely unrepresented. Would it be plausible that this distant possible world would not differ substantially with respect to the sorts of pedagogy the academy engaged in? Would certain arguments and viewpoints not be presented more favorably, while others got short shrift, even if this were not justified by the merits of the arguments?

Again, the moral issue here is not whether such institutions should *exist*—it's rather whether they ought to be funded publicly. If the faculty at the average university looked, in their political and moral persuasions, like the Heritage Foundation, there would be a legitimate complaint on behalf of the rest of us who don't subscribe, in various ways, to Heritage's ideology.

There are two chief reasons we might worry about such a scenario. First, students are in a *vulnerable* position with respect to their teachers—both professionally and epistemically. Professionally because their grades and other assessments impact their future prospects. Epistemically because the faculty are putative experts in their respective fields of study, and thus command an authority with respect to their students. We would thus worry that many students—save the minority who are exceptionally independent—might come to accept, or at least move in the direction of, Heritage's ideology in certain objectionable ways.

We would particularly be on the lookout for the phenomenon of *indoctrination*. Now, 'indoctrination' is a strong and often charged word, but philosophers Joshua DiPaolo and Robert Mark Simpson have offered a helpful recent analysis. Indoctrination, in their view, is a way of objectionably bypassing an individual's epistemic agency, ultimately rendering her views susceptible to epistemic challenges. They also note that the most effective indoctrination covers its tracks—it doesn't present itself

as such, and often there are costs in wondering out loud whether it is taking place at all in a given context. For stark examples, think of religious indoctrination throughout history or various forms of ideological indoctrination within World War II Germany or Stalinist Russia.

DiPaolo and Simpson give us the following plausible conditions for indoctrination, with respect to certain "Target Beliefs":

> *Deterrence*: students are discouraged (explicitly or implicitly) from asking critical questions about, and from entertaining possible reasons to doubt, Target Beliefs.
>
> *Allegiance-Building*: students are encouraged (explicitly or implicitly) to understand their ongoing acceptance of Target Beliefs as a matter of loyalty or fidelity to a social group.
>
> *Credibility-Prejudicing*: students are encouraged (explicitly or implicitly) to prejudicially accord high credibility to those who endorse Target Beliefs, and to prejudicially accord low credibility to those who oppose them.
>
> *Affective-Conditioning*: students are trained to associate positive feelings (e.g. pride, joy, honor) with acceptance of Target Beliefs, and to associate negative feelings (e.g. fear, shame, dishonor) with rejection of them.
>
> *Repetition*: students are subjected to gratuitously repetitive endorsements of Target Beliefs, i.e., repetition beyond what's necessary for normal educational purposes (e.g. rote memorization).[38]

One of our worries with an academy lopsided in the manner of Heritage would be that such patterns are hard to avoid given human imperfections and biases—especially when a like-minded group is able to wield great authority. Even if the indoctrination were relatively mild compared to its forms in other places and times, we would worry that it would exist in sufficient strength to merit legitimate complaint. At any rate, we would not want to be *compelled* to fund such institutions.

Secondly, the academy has a huge impact on determining future public opinion. It does so directly by influencing the students who go to college. But it also has enormous indirect power—most people in positions of cultural influence (journalists, artists, public intellectuals) are themselves shaped by the academy. If the academy looked like Heritage, we who disagree with Heritage's views would lament this near-total control it had in shaping the views of future generations, and what's more, we were compelled to fund it.

The problem is made more pressing by the fact that large parts of the academy are not democratically accountable. Voters have little to no control on who gets hired or promoted or put in positions of administrative power. Typically, for example, who is chosen as a new hire will be solely determined by the faculty of the department in question, with

some rubber-stamp approvals from administrators. These faculty, of course, are not elected (and likely would not be elected if they stood for office and made their views known). Insofar as one is sympathetic to the basic democratic principle that what shapes a society and its future in fundamental ways ought to be responsive to the will of the demos at large, these observations raise significant and underexplored problems.[39]

5.6 The Upshot for Public Funding

The considerations marshaled so far point to the conclusion that politically adjacent fields within modern American academia are regrettably not robustly geared towards tracking the truth. If politically adjacent fields are not robustly truth-tracking, then the case for their public funding is severely undermined. Furthermore, if there isn't a genuine open door for individuals from a variety of political perspectives to contribute, then the public—being of a drastically different ideological composition from the academy—cannot be justly taxed to support such institutions. This is true of the Heritage Foundation, and it would be true of politically adjacent departments within universities had they been composed of 95% Catholic priests or 95% free-market libertarians. If the reader identifies as being on the left side of the spectrum, I invite them to consider whether they'd feel it was just that their tax dollars went to the aforementioned hypothetical departments.

Now someone might respond that despite the second-order worries rehearsed in the previous section, the perspectives that enjoy majority representation in politically adjacent fields are simply *correct*. As such, the fact that much of the public holds a different view is beside the point. Indeed, the purpose of the academy is in part to educate the public into having more accurate views.

This type of flat-footed response is unsuccessful in two ways. First, it misses force of the public reason objection that institutions must be justified to people with differing conceptions of the good life. Even if it turns out that one conception of the good is correct, or one particular religion is in fact the true gospel, nonetheless, a liberal state may not act in such a way that favors that religion or conception of the good.[40] The ideal of a pluralistic liberal society forbids this. Second, given that we are not particularly good at recognizing our biases, we should take our first-order political judgments with generous grains of salt. Moreover, to the extent that we are caught in an "echo chamber" we might have a difficult time in reasoning ourselves out of it, or even being aware that we're in an echo chamber.[41] Insofar as one is in an echo chamber one is likely to be shielded from evidence and data that disconfirm the beliefs of the echo chamber. Naturally, within a field that is dominated by one political perspective, what is taught, researched, etc., is likely to avoid, or give inadequate weight to, evidence that disconfirms the political perspective

in question. A student or practitioner of such a field then, ought not be too confident in her first-order judgments, insofar as they conform to the majority opinion, as a means of rebutting the second-order evidence mentioned earlier.

I want to make clear that the argument here is meant to apply only to public funding. Just as the Heritage Foundation has a right to exist, so do institutions lopsided in the other direction, so long as they are supported with private resources. Moreover, the conclusion only applies to politically adjacent fields without sufficient ideological diversity. The worries thus do not apply to chemistry departments, for example, because their ideological composition is unlikely to affect the nature or quality of their work. Neither do the worries apply to sociology departments that have a sufficiently ideologically diverse faculty.

Now, universities in the United States rely upon public money in a variety of ways. State universities, like the University of California system, are directly funded by the state in which they exist. But even private universities like Yale or Cornell rely upon government funds indirectly. The federal government subsidizes student loans for individuals wanting to attend college, and thus indirectly funds departments within private universities. The government also gives research grants to private universities, which in turn directly or indirectly fund their various departments and administrations. But if granting public funds to the Heritage Foundation is unjust because it cannot be justified to the public at large, then so is giving public funds to institutions that lean the other way—viz., departments within modern universities that investigate social and political issues.

Justice thus requires one of two things. On the one hand, universities can encourage the hiring of ideologically diverse faculty and take steps to combat political discrimination, with the hopes that over time, the current imbalance will diminish. Alternatively, state and federal agencies should seek ways to decrease the funding they allocate to the kinds of departments and research programs discussed here.

Notes

1 Department of Philosophy, Bowling Green State University, 306 Shatzel Hall, Bowling Green, OH 43403.
2 For a detailed defense of why diversity of viewpoints and assumptions is essential for a scientific practice to be objective in an important sense, see Longino, *Science as Social Knowledge*.
3 Here I talk in terms of universities for ease of discussion, but the points apply more broadly to institutions of higher education.
4 For recent defenses of this idea, see Whittington, *Speak Freely: Why Universities Must Defend Free Speech*; Lukianoff and Haidt, *The Coddling of the American Mind*.
5 See, for example: Chemerinsky and Gillman, *Free Speech on Campus*.
6 Simpson, "The Relation between Academic Freedom and Free Speech."
7 The Heritage Foundation, "Mission."

8   Rawls, *Justice as Fairness: A Restatement*, 19.

9   Langbert, Quain, and Klein, "Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology." For more recent data, see also: Grossman, *How Social Science Got Better: Overcoming Bias with More Evidence, Diversity, and Self-Reflection.*

10 Langbert, "Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty."

11 Peters et al., "Ideological Diversity, Hostility, and Discrimination in Philosophy."

12 Schwitzgebel, "Political Affiliations of American Philosophers, Political Scientists, and Other Academics."

13 Gampa et al., "(Ideo)Logical Reasoning: Ideology Impairs Sound Reasoning."

14 Kahan et al., "Motivated Numeracy and Enlightened Self-Government."

15 Sunstein, *Conformity.*

16 Marks et al., "Epistemic Spillovers: Learning Others' Political Views Reduces the Ability to Assess and Use Their Expertise in Nonpolitical Domains."

17 Kaplan, Gimbel, and Harris, "Neural Correlates of Maintaining One's Political Beliefs in the Face of Counterevidence."

18 West, Meserve, and Stanovich, "Cognitive Sophistication Does Not Attenuate the Bias Blind Spot."

19 Joshi, "What Are the Chances You're Right about Everything? An Epistemic Challenge for Modern Partisanship."

20 Cusimano and Lombrozo, "Morality Justifies Motivated Reasoning in the Folk Ethics of Belief"; Kahan and Braman, "Cultural Cognition and Public Policy."

21 Liu and Ditto, "What Dilemma? Moral Evaluation Shapes Factual Belief."

22 Levy, "Suspiciously Convenient Belief"; Greco, "Climate Change and Cultural Cognition."

23 Cf. Asch, "Opinions and Social Pressure."

24 Joshi, *Why It's OK to Speak Your Mind.*

25 Jussim, *Social Perception and Social Reality: Why Accuracy Dominates Bias and Self-Fulfilling Prophecy.*

26 Pinker, *The Blank Slate.*

27 Longino, *Science as Social Knowledge*; Cofnas, "Science Is Not Always 'Self-Correcting.'"

28 Iyengar and Westwood, "Fear and Loathing across Party Lines: New Evidence on Group Polarization."

29 Inbar and Lammers, "Political Diversity and in Social and Personality Psychology."

30 Peters et al., "Ideological Diversity, Hostility, and Discrimination in Philosophy."

31 Sunstein, *Conformity.*

32 Shi et al., "The Wisdom of Polarized Crowds." See also: Wang et al., "Team Creativity/Innovation in Culturally Diverse Teams: A Meta-Analysis."

33 Duarte et al., "Political Diversity Will Improve Social Psychological Science."

34 Loury, "Self-Censorship in Public Discourse," 453.

35 Mill, *On Liberty and Other Essays.*

36 Weber, "Science as a Vocation."

37 See, for example: Larson, McNeilly, and Ryan, "Free Expression and Constructive Dialogue at the University of North Carolina at Chapel Hill"; Stiksma, "Understanding the Campus Expression Climate: Fall 2019"; Naughton, "Speaking Freely: What Students Think about Expression at American Colleges."

38 DiPaolo and Simpson, "Indoctrination Anxiety and the Etiology of Belief," 3087.
39 There is a long-standing debate about whether and to what extent the civic education necessary for a properly functioning liberal society can avoid imposing some minimal but substantive, non-value-neutral, demands on the populace. See, for example: Galston, "Two Concepts of Liberalism"; Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy*. However, even if there are some substantive demands required, it is very plausible that the Heritage Foundation, were it an educational institution, would exceed these minimum requirements and stand firmly in the territory of liberally unacceptable value imposition. Similar points may be made with respect to parts of the modern university as well, where some have argued that the norms and pedagogical techniques in play stand in *tension* with liberalism. See, for example: Whittington, *Speak Freely: Why Universities Must Defend Free Speech*.
40 Gaus, *The Order of Public Reason*; Quong, "Public Reason."
41 Nguyen, "Echo Chambers and Epistemic Bubbles."

References

Asch, Solomon E. "Opinions and Social Pressure." *Scientific American* 193, no. 5 (November 1, 1955): 31–35. https://doi.org/10.1038/scientificamerican1155-31

Chemerinsky, Erwin, and Howard Gillman. *Free Speech on Campus*. New Haven, CT: Yale University Press, 2017.

Cofnas, Nathan. "Science Is Not Always 'Self-Correcting'." *Foundations of Science* 21 (2016): 477–92.

Cusimano, Corey, and Tania Lombrozo. "Morality Justifies Motivated Reasoning in the Folk Ethics of Belief." *Cognition* (2021). https://doi.org/10.1016/j.cognition.2020.104513

DiPaolo, Joshua, and Robert Mark Simpson. "Indoctrination Anxiety and the Etiology of Belief." *Synthese* 193 (2016): 3079–98.

Duarte, José, Jarret Crawford, Charlotta Stern, and Jonathan Haidt. "Political Diversity Will Improve Social Psychological Science." *Behavioral and Brain Sciences* 38, no. e130 (2015).

Galston, William A. "Two Concepts of Liberalism." *Ethics* 105 (1995): 516–34.

Gampa, Anup, Sean Wojcik, Matt Motyl, Brian Nosek, and Peter Ditto. "(Ideo) Logical Reasoning: Ideology Impairs Sound Reasoning." *Social Psychological and Personality Science* 10, no. 8 (2019): 1075–83.

Gaus, Gerald. *The Order of Public Reason*. New York: Cambridge University Press, 2010.

Greco, Daniel. "Climate Change and Cultural Cognition." In *Philosophy and Climate Change*. Oxford University Press, 2021.

Grossman, Matt. *How Social Science Got Better: Overcoming Bias with More Evidence, Diversity, and Self-Reflection*. New York: Oxford University Press, 2021.

Inbar, Yoel, and Joris Lammers. "Political Diversity and in Social and Personality Psychology." *Perspectives on Psychological Science* 7, no. 5 (2012): 496–503.

Iyengar, Shanto, and Sean J Westwood. "Fear and Loathing across Party Lines: New Evidence on Group Polarization." *American Journal of Political Science* 59, no. 3 (2015): 690–707.

Joshi, Hrishikesh. "What Are the Chances You're Right about Everything? An Epistemic Challenge for Modern Partisanship." *Politics, Philosophy & Economics* 19, no. 1 (2020): 36–61.

———. *Why It's OK to Speak Your Mind*. New York: Routledge, 2021.

Jussim, Lee. *Social Perception and Social Reality: Why Accuracy Dominates Bias and Self-Fulfilling Prophecy*. New York: Oxford University Press, 2012.

Kahan, Dan, and Donald Braman. "Cultural Cognition and Public Policy." *Yale Law & Policy Review* 24, no. 1 (2006): 149–72.

Kahan, Dan, Ellen Peters, Erica Cantrell Dawson, and Paul Slovic. "Motivated Numeracy and Enlightened Self-Government." *Behavioural Public Policy* 1, no. 1 (2017): 54–86.

Kaplan, Jonas, Sarah Gimbel, and Sam Harris. "Neural Correlates of Maintaining One's Political Beliefs in the Face of Counterevidence." *Nature Scientific Reports* 6, no. 39589 (2016). https://doi.org/10.1038/srep39589

Langbert, Mitchell. "Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty." *Academic Questions* 31 (2018): 186–97.

Langbert, Mitchell, Anthony Quain, and Daniel Klein. "Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology." *Econ Journal Watch* 13, no. 3 (2016): 422–51.

Larson, Jennifer, Mark McNeilly, and Timothy J Ryan. "Free Expression and Constructive Dialogue at the University of North Carolina at Chapel Hill." Chapel Hill: UNC, March 2, 2020. https://fecdsurveyreport.web.unc.edu/wp-content/uploads/sites/22160/2020/02/UNC-Free-Expression-Report.pdf

Levy, Neil. "Suspiciously Convenient Belief." *Ethical Theory and Moral Practice* 23 (2020): 899–913.

Liu, Brittany S, and Peter H Ditto. "What Dilemma? Moral Evaluation Shapes Factual Belief." *Social Psychological and Personality Science* 4, no. 3 (2013): 316–23.

Longino, Helen. *Science as Social Knowledge*. Princeton, NJ: Princeton University Press, 1990.

Loury, Glenn. "Self-Censorship in Public Discourse." *Rationality and Society* 6, no. 4 (1994): 428–61.

Lukianoff, Greg, and Jonathan Haidt. *The Coddling of the American Mind*. New York: Penguin, 2018.

Macedo, Stephen. *Diversity and Distrust: Civic Education in a Multicultural Democracy*. Cambridge, MA: Harvard University Press, 2000.

Marks, Joseph, Eloise Copland, Eleanor Loh, Cass Sunstein, and Tali Sharot. "Epistemic Spillovers: Learning Others' Political Views Reduces the Ability to Assess and Use Their Expertise in Nonpolitical Domains." *Cognition* 188 (2019): 74–84.

Mill, John Stuart. *On Liberty and Other Essays*. Edited by John Gray. Oxford, New York: Oxford University Press, 2008.

Naughton, Kelsey Ann. "Speaking Freely: What Students Think about Expression at American Colleges." *Foundation for Individual Rights in Education* (2017).

Nguyen, C. Thi. "Echo Chambers and Epistemic Bubbles." *Episteme* (2018). https://doi.org/10.1017/epi.2018.32

Peters, Uwe, Nathan Honeycutt, Andreas De Block, and Lee Jussim. "Ideological Diversity, Hostility, and Discrimination in Philosophy." *Philosophical Psychology* 33, no. 4 (2020): 511–48.

Pinker, Steven. *The Blank Slate*. New York: Penguin Books, 2002.

Quong, Jonathan. "Public Reason." *Stanford Encyclopedia of Philosophy* (2017). https://plato.stanford.edu/entries/public-reason/

Rawls, John. *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press, 2001.

Schwitzgebel, Eric. "Political Affiliations of American Philosophers, Political Scientists, and Other Academics," 2008. http://schwitzsplinters.blogspot.be/2008/06/political-affiliations-of-american.html

Shi, Feng, Mish Teplitskiy, Eamon Duede, and James A Evans. "The Wisdom of Polarized Crowds." *Nature Human Behavior* 3 (2019): 329–36.

Simpson, Robert Mark. "The Relation between Academic Freedom and Free Speech." *Ethics* 130, no. 3 (2020): 287–319.

Stiksma, M. "Understanding the Campus Expression Climate: Fall 2019." Heterodox Academy, 2020.

Sunstein, Cass. *Conformity*. New York: New York University Press, 2019.

The Heritage Foundation. "Mission." Accessed March 15, 2020. https://www.heritage.org/about-heritage/mission

Wang, Jie, Grand H.L. Cheng, Tingting Chen, and Leung Kwok. "Team Creativity/Innovation in Culturally Diverse Teams: A Meta-Analysis." *Journal of Organizational Behavior* 40, no. 6 (2019): 693–708.

Weber, Max. "Science as a Vocation." In *From Max Weber: Essays in Sociology*. New York: Oxford University Press, 1946.

West, Richard F, Russell J Meserve, and Keith E Stanovich. "Cognitive Sophistication Does Not Attenuate the Bias Blind Spot." *Journal of Personality and Social Psychology* 103, no. 3 (2012): 506–19.

Whittington, Keith. *Speak Freely: Why Universities Must Defend Free Speech*. Princeton, NJ: Princeton University Press, 2018.

6 Free Speech, Celebrity Status, and Ethical Obligations

Chris W. Surprenant[1]

On August 14, 2016, San Francisco 49ers quarterback Colin Kaepernick remained seated on the bench during the playing of the national anthem during the first preseason game. On August 20, during the second preseason game, he did the same thing. No one said anything. But on August 26, this time wearing his 49ers uniform instead of street clothes, Kaepernick once again sat on the bench while the national anthem was played, and his actions attracted national media attention. When asked after the game why he did not stand, Kaepernick responded, "I'm not going to stand up and show pride in a flag for a country that oppresses black people and people of color" (Kaepernick 2016).

During that season—the last season Kaepernick would play in the NFL—he attracted national attention for kneeling during the national anthem in the last preseason game and all 16 regular-season games. (He changed his protest from sitting to kneeling after listening to comments from former Green Beret and NFL player Nate Boyer that kneeling would be more respectful than sitting [Elman 2020].) Kaepernick's actions set off a firestorm of debate around racial issues in the United States, especially in regards to policing, as well as whether it was appropriate for professional athletes (and other people with celebrity status) to use something like a football game to advance positions on social or political issues important to the individual athletes.

This chapter examines the ethical obligations of professional athletes and other people with celebrity status to use their platform to speak out against instances of injustice when doing so is likely to attract attention to these issues and lead to positive change. Just as we would expect the moral person to provide aid to someone else when doing so is likely to be effective and the benefits of doing so clearly outweigh the costs, I argue that individuals with celebrity status are under a similar obligation to use their platform the advance social change when doing so is likely to be effective and is unlikely to impose an unreasonable cost. This discussion is divided into three parts: First, I examine the history of and impact of celebrities using their platform and status to advance social change; second, I consider "samaritanism" as a moral principle and why there is

a moral obligation to provide aid to others under certain circumstances; and third, I show why this principle, when applied to specific situations, justifies some celebrities in speaking out, obligates others to do so, and sometimes suggests that doing so would be blameworthy.

6.1 Celebrity Status and Social Change

Kaepernick was not the first (and won't be the last) celebrity to use his status to try to advance social change in the United States. There is a history of celebrity activism in this country, and many of our successful social movements were successful because of celebrity activism. For example, during the civil rights movement of the 1950s and 1960s, entertainers such as Harry Belafonte, Ossie Davis, Ruby Dee, Sammy Davis Jr., Dick Gregory, and Sidney Poitier not only pushed for changes to how black Americans were treated in Hollywood, but also for how black Americans were represented in films (Raymond 2015). By securing support from other well-known Hollywood actors, including Marlon Brando, Theodore Bikel, Diahann Caroll, Dorothy Dandridge, Charlton Heston, Burt Lancaster, Lena Horne, Eartha Kitt, Paul Newman, and Elizabeth Taylor, they not only played a crucial role in the success of the civil rights movement but also paved the way for future celebrity activism.

In recent U.S. history, athletes have enjoyed celebrity status and many have been able to leverage that status to advance social change or otherwise draw attention to issues of importance. Perhaps the most well-known activist athlete was professional boxer Cassius Clay. In 1961, Clay converted to Islam and became a vocal and public advocate for the religion, even changing his name—to Muhammed Ali. In 1967, Ali refused to participate in the draft for the Vietnam War, maintaining his right not to be drafted based on religious grounds (Gonyea 2016). He was convicted of draft evasion, fined $10,000, and banned from boxing for three years—all at the peak of his career (History.com 2021). While he never ended up serving time in jail due to his appeals and the Supreme Court ultimately overturning his conviction, Ali was able to use his platform as a boxer and his refusal to participate in the draft for the Vietnam War to advocate for other important civil rights issues during the rest of his life.

Now, it's not just athletes and actors who have platforms. Social media has created an environment where traditional celebrities and noncelebrities alike can reach large audiences quickly and with minimal effort. Kim Kardashian—one of the first social media celebrities who we can say was "famous for being famous"—has used her platform to advocate for changes in the U.S. criminal justice system, with a specific focus on prison reform. Scrolling through Twitter one night (Kardashian 2020a), Kardashian ran across the story of Alice Marie Johnson, a grandmother who was sentenced to life in federal prison for her role in a drug

trafficking ring. She didn't understand how someone could be sentenced to life for a non-violent drug offense, and so she started learning more about the U.S. criminal justice system and Johnson's case.

Kardashian was able to leverage her celebrity status, as well as her personal relationship with Ivanka Trump and Jared Kushner (daughter and son-in-law of U.S. President Donald Trump), to get the sentences of Johnson and others commuted, as well as support broader change such as the passing of the First Step Act (Overhultz 2021). Perhaps most impressive about her work is that she has been thoughtful and intentional about how she uses her platform, including when how she decides to speak out: "I know my role, that I can be there at the end to push it through. I can also be a silent partner. I think it's knowing when to speak out and when not to, and when to privately call. People think you need to shout it out on social media and shame people into making decisions, but that's not how it is" (Kardashian 2020b).

But not all celebrities have been as thoughtful or have used their status in positive ways. More often than not, it is not because these celebrities are vicious, but rather because they have spoken out after being misinformed or underinformed. On the night April 19, 1989, a group of 20–30 teenage boys in New York's Central Park were harassing and attacking people jogging and walking through the park. The police responded and arrested around 20 people who were supposedly taking part in these attacks. That same evening, Trisha Melli was jogging through the park when she was attacked, raped, and nearly beaten to death. Believing some of the boys who had been arrested were responsible for the attack on Melli, the police conducted lengthy interrogations of the boys and, eventually (on April 21, 1989), got four to confess to attacking Melli and a fifth who admitted to being with the other four but denied that he had anything to do with that specific attack.

On May 1, 1989, well-known New York real estate tycoon Donald Trump took out full-page advertisements in all four major New York City newspapers to express his belief that these five were guilty of assaulting Melli, and that the city wasn't doing enough to protect its citizens from people like these five boys. The large, bold print at the top of the ad read: "Bring back the death penalty. Bring back the police!" According to Yusef Salaam, one of the five boys accused of this crime, Trump's ad was the "fire starter" that "manipulated and swayed" "common citizens… into believing we were guilty." Although there was no physical evidence matching the boys to the crime, the videotaped confessions were used to convince a jury of their guilt.

But the boys hadn't committed the crime. In 2001, convicted serial rapist and murderer Matias Reyes confessed to the crime. His DNA matched the DNA at the crime scene and he had information related to the crime that was never released to the public. In 2002, based on this evidence, the New York District Attorney withdrew all of the charges

against the five men and vacated their sentences. They then sued New York City for malicious prosecution, racial discrimination, and emotional distress, and received a $41M settlement in 2013.

Trump is not alone in using his celebrity status to advance opinions that ultimately cause significantly more harm than good, either due to malicious intent or extreme ignorance. Former Playboy Playmate turned television personality Jenny McCarthy used her celebrity status to advance her belief that vaccines lead to autism and that it is possible to cure autism (or at least that her child's autism was cured) through behavior therapy, natural supplements, and dietary changes. For many years, McCarthy was one of the primary faces of vaccine skepticism in the United States, a position that is dangerous and undermines public health. While McCarthy seems to have changed her views on the connection between autism and vaccines, the COVID-19 epidemic and the role that vaccine skepticism played in associated hospitalizations and deaths suggest that McCarthy and other vaccine skeptics are somewhat responsible for the extent of these negative outcomes.

Finally, a third example, this one a bit different. In the late 1990s and early 2000s, Bono, the lead singer for the musical group U2, was one of the most vocal public figures in support of increased foreign aid for Africa and the developing world. He wasn't just vocal, he was influential. Even then U.S. President George W. Bush wanted to cozy up to Bono to increase his own popularity, inviting him to the White House to meet with government leaders to talk about how and where foreign aid could be increased (LaFranchi 2002). But after Bono was heckled at a 2007 conference in Africa by Africans who said that isn't what their countries needed (Kristof 2007), he spent time researching how best to help developing nations, and learned that supporting more open and freer markets was their best path to prosperity (Hendrickson 2013). Now, Bono frequently speaks out in favor of capitalism as the best way of fighting extreme poverty around the world (Stolworthy 2019).

While many celebrities who have used their platforms to advance views that were ultimately shown to be wrong have also used their platform to correct their views or otherwise stopped advocating for those harmful positions, often the damage is done and cannot be easily corrected with a tweet or statement. Many people in the United States still reference McCarthy or Bono when they're looking to support their incorrect views on vaccines or economic development, even though those celebrities no longer hold those views. As a result, it seems as if celebrities may be under special obligations when it comes to their speech, obligations that people who lack celebrity status are not under.

These obligations may go in a few directions. The most obvious is that a celebrity could be under an obligation merely to "do no harm," refusing to speak out unless they are well-informed about a specific topic. This is the position that singer Taylor Swift has taken, refusing to comment on

political issues, for the most part, claiming that her knowledge (or lack thereof) of these issues does not match the impact her words will have given her celebrity status. While it seems correct that celebrities have an obligation to do no harm with their words, I will argue that their obligation extends further, and that they have a positive obligation to use their platform to make a difference in the world by becoming educated about issues that they can impact and advancing change. This obligation is grounded in the moral principle of samaritanism.

6.2 Samaritanism

One of the most influential articles in contemporary ethics is Peter Singer's "Famine, Affluence, and Morality." Singer starts from what he identifies as a fairly obvious ethical claim, which is "the assumption that suffering and death from lack of food, shelter, and medical care are bad…[and] if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it" (Singer 1972). This position seems reasonable enough to most people. So, for example, if I'm walking along and see that a child has fallen into a pool and I'm the only one who is able to go in and save her, then I should do so. I should rescue the child even if it might make me late to an appointment I'm on my way to, ruin my clothes, or have other negative consequences for me that are not comparably significant to saving a child's life.

What makes Singer's position contentious is how it gets extended. He argues that if we take this position seriously, then it would have far-reaching consequences in the lives of most individuals. For example, for most Americans, taking this position would lead to an obligation for them to donate almost all of their wealth to assist the global poor. It's possible to see how we get there via individual decisions made on a daily basis. When I go to the grocery store tonight to get food for my family's dinner, for a protein, I can choose between chicken thighs priced at $0.99/lb. and salmon priced at $13.99/lb. While both provide a perfectly healthy option for my family, I'll often choose the salmon because that's what my family prefers to eat. But does this preference for a slightly tastier meal outweigh the good I could have done with that $13, say, by donating it to the New Orleans Mission and feeding a family of four for the evening? For Singer, I've prioritized the tastebuds of my wife and daughters over the suffering of others who I could help, help fairly easily, and help without sacrificing anything of comparable moral worth.

But Singer goes further. This obligation to try to alleviate harm does not just extend to our fellow human beings, but all animals that can experience pain. By choosing the chicken thighs instead of, say, soy beans, my family is contributing to the suffering and death of chickens. If put side by side—the tastebuds of my family or the suffering of the

chickens—it seems that the principle requires prioritizing the reduction or elimination of suffering, which would lead to, among other things, a certain kind of ethical vegetarianism, as well as all sorts of other lifestyle decisions that would fundamentally change how many people live their lives.

At the core of Singer's position is a moral claim about harm reduction. But it's not clear that harm reduction is the motivation for the feeling connected to Singer's initial claim about our ethical obligations. Consider the following example and discussion provided by Christopher Wellman (1996):

> Consider the plight of Antonio and Bathsheba. Imagine that Antonio is driving along a highway when he stops to pick up a hitchhiker, Bathsheba. Bathsheba asks for a ride to Pleasantville, a town about twenty miles ahead. Antonio's route will take him through Pleasantville, so he agrees to take her. But Antonio is very explicit that he prefers driving alone, he is taking her only as a favor (suppose that he picks her up only because a storm is on the horizon), and under no condition would he be willing to take her any further. Bathsheba nods in understanding and thanks him profusely for the favor. After a twenty-mile drive in which no words are uttered, they arrive only to find that Pleasantville is anything but pleasant. In fact, it is a lawless town, a contemporary Hobbesian state of nature. The only people visible are the roving gangs of thugs responsible for the burning buildings, broken glass, and other signs of chaos that litter the scene. Antonio looks around in horror as Bathsheba begs him to escort her safely out of Pleasantville.
>
> Is Antonio at liberty to leave Bathsheba in Pleasantville (where the car has already attracted the gangs' attention), or does Antonio have a moral duty to transport her far enough away that she will no longer be in jeopardy? I assume that Antonio is dutybound to deliver Bathsheba to safety. But notice: Antonio's duty can be attributed neither to his consent, a special relationship to Bathsheba, nor to the harm principle. The obligation cannot be grounded in consent, because Antonio explicitly refused to take her any further than Pleasantville. There is no special moral relationship between Antonio and Bathsheba, since the two have just met and exchanged only a few words. And the duty cannot fall under the harm principle because any harm done to Bathsheba would subsequently come at the hands of a gang member rather than Antonio. What is more, Antonio could not have harmed Bathsheba, in the sense of morally wronging her (necessary for the harm principle), by taking her to Pleasantville, since she requested to be taken there, and Volenti non fit injuria.
>
> Antonio's duty can be explained only in terms of samaritanism. Bathsheba has a right to assistance from Antonio, and he has a

correlative duty to her. Antonio's samaritan duty results from the combination of (1) Bathsheba's extreme peril and (2) Antonio's ability to assist her at no unreasonable cost to himself. Both conditions are necessary for a samaritan duty to obtain, so that if the scenario were altered on either count, no duty would exist.

Singer's central moral claim was: "If it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it." While this claim is often understood to be about the prevention of harm or alleviation of suffering, it's not clear that in and of itself can drive this moral obligation. Like in Wellman's example of Antonio and Bathsheba, in the vast majority of examples from Singer, the harm I have an obligation to prevent is not coming from me, or at least not coming from me in any meaningful way. This claim is quite obviously true in the case of the drowning child—I had nothing to do with the child being by the pool or falling into the pool, and I will not be directly responsible for causing the child's death if I do nothing and let him drown. But it is clear that doing nothing would be morally blameworthy.

While moral samaritanism says that we ought to pull the child out of the pool, simply pulling the child out of the pool, placing him on the side, and then walking away is not enough to satisfy our obligations if it would mean that the child is likely simply to fall back into the pool. In other words, moral samaritanism does not just require us to help someone else from being harmed right now when it is both possible and easy to do, but it also requires taking similarly easy action to prevent harm that we have good reason to believe is likely to happen in the immediate future. This situation gets complicated if the parents of the child in the pool are unlikely to be found or if there are many children constantly and consistently falling into the pool, but, in straightforward cases, it provides an appropriate grounding for a moral feeling that seems connected with promoting the type of values necessary to keep communities and civil society together.

Think about a fairly straightforward example: My neighbor has gone on vacation and asked me to water her plants while she is going, which I agreed to do. One day when I go to water the plants, I notice that the water pressure is exceptionally low and a pool of water is forming in the middle of her yard, likely due to a ruptured pipe connecting her house to the watermain at the street. Samaritanism requires me to take a couple of extra minutes that day to turn the water off at the street, so the ruptured pipe does not continue leak while she is away. It does not require me to fix the pipe, at least in this example. But you could imagine a situation in which the neighbor's plants are one of her prized possessions, and for whatever reason, it is impossible for me to water them when the water at the street is turned off. If it is likely that the plants

will die if they're not watered and there's no other way to water them, samaritainism likely requires me to arrange to get the pipe fixed so that my neighbor's plants won't die.

What samaritanism will require in each situation will depend on the relevant circumstances involved, including those relevant to the person who is doing the helping, not just the person receiving the help. If both Magnús Ver Magnússon (four-time World's Strongest Man) and I are put into the same situation where promoting non-harmful outcomes requires a display of strength, what I will need to do to satisfy my moral obligations will likely be very different than what he may need to do—I may need to call people to help me lift something, while he would simply need to do it. This is important because it means that we cannot determine in advance what satisfying the principle of samaritanism will require, nor is it possible to say that it requires anything specific in any particular circumstance. That is, there may be multiple responses that satisfy this principle. What matters is that the person acting has good reason to believe that whatever he is doing will further non-harmful outcomes for the other person in need of assistance.

6.3 Speech, Celebrity Status, and Ethical Obligations

In 2001, the band Linkin Park was performing in London when one of the band's lead singers—Mike Shinoda—noticed that a couple of the band's fans who were participating in the mosh pit had fallen and were in danger of being trampled. Shinoda immediately stopped playing and the band's other lead singer—Chester Bennington—started yelling at the crowd that they needed to pick up the people who had fallen immediately. Before restarting the show, Bennington then led the crowd on a call and response chant, calling out, "What do you do if somebody falls," and then having the audience respond, "Pick them up" (Reams 2021)!

Shinoda and Bennington are not alone in stopping a performance to help a fan in distress. Kurt Cobain, Dave Grohl, Adele, Brandon Urie, Logic, Lil Pump, Billie Eilish, Corey Taylor, A$AP Rocky, and others did the same (ibid.). But in 2021, at the Astroworld Music Festival in Houston, ten people, including a nine-year-old boy, were trampled to death as the crowd rushed the stage to get closer to rapper Travis Scott. Although Scott was watching the mayhem unfold in front of him, he did not stop his performance, even as some of his fans in attendance screamed at him to do something (Blistein 2021).

It is not a bold claim to say that the actions of Linkin Park, Kurt Cobain, David Grohl, and the others who stopped their concerts to help a member of the audience in distress—when they were the only people in a position to deliver help under the circumstances—were obligatory and not merely praiseworthy. It is also not a bold claim to say that the inaction of Travis Scott under similar circumstances was blameworthy.

In these examples, it is easy to see how a celebrity is able to use his status to speak out for someone else who is being harmed (or is otherwise in danger), and know with reasonable certainty that this person will be able to receive the needed help as a result of the person with the platform (quite literally, in this case) speaking out on their behalf. Under these circumstances (when a person can use his status to speak out for someone else who is being harmed and is fairly certain that speaking out will have a positive impact), it seems obligatory to speak out.

But what about in situations where both of these conditions are not met, and, in particular, when it is unclear if speaking out will have a positive impact? Imagine a situation where someone speaks up, but either did not have complete information or was otherwise not in a position to bring about a positive impact, and so ended up causing harm, either to himself or to the people he is trying to help. Imagine also that the person speaking up has good reason to believe that harm would come about if he were to say something. What are our obligations in those situations?

After the Boston Marathon Bombing in 2013 and subsequent search for the attackers, regular people who wanted to play detective on the internet went through surveillance videos of the event to see if they could solve the case and identify the bomber. For some reason, they identified 22-year-old Sunil Tripathi, a student at Brown University, as a likely perpetrator, and within hours of this his named started trending on Twitter and his face and family's contact information were plastered all over the internet. People started harassing Tripathi's family, who, themselves, were experiencing their own grief related to Sunil: He had been missing for almost eight weeks (Shontell 2013). When Dzhokhar Tsarnaev and Tamerlan Tsarnaev were eventually arrested for the bombing, the internet super sleuths apologized for getting it wrong and putting the Tripathi family through additional trauma, trauma that was only made worse when Sunil Tripathi's body was found in the Providence River a few days after the Tsarnaev brothers were arrested.

It seems reasonable to believe that the internet detectives who misidentified Tripathi as the likely bomber were morally blameworthy for their behavior and were responsible for any negative consequences. They knew—or should have known—that given the frantic search for the bombers, pasting unclear pictures of the actual bomber alongside pictures of Tripathi, then drawing connections between those two pictures, would lead people to believe that Tripathi was involved in the attack. Although the individuals who connected Tripathi to the attack were not maliciously motivated and were simply trying to help in identifying the people responsible, their behavior was reckless. Even though none of these individuals possessed celebrity status, what they did was likely to generate significant attention and snowball into something beyond their control. In short: They were blameworthy because they should have been more careful.

People with celebrity status are caught in a difficult position: They seem to be under a Samaritan obligation to speak out when they can be reasonably confident that their words will prevent harm, but they also need to be even more careful than non-celebrities when they do speak out because their words are far more likely to have an impact, both good and bad. Further, whether we think someone ought to do something, is justified in doing something, or should avoid doing something will depend on the circumstances relevant to the specific situations. The vast majority of cases rest somewhere between the clearly obligatory behavior of the musicians who stop their show to assist someone in need, and the blameworthy behavior of internet super sleuths who accuse someone of murder and post their personal information with little to no evidence of actual wrongdoing.

So, how should someone with celebrity status operate when it comes to speaking out on seemingly controversial issues? Just like the Samaritan who comes across someone in need and the means to provide that assistance, minimally, individuals with celebrity status are obligated to act in the same way when they are confronted with genuine injustices or otherwise encounter individuals who are genuinely in need and can be assisted by that celebrity drawing attention to their situation. How the celebrity ought to respond—that is, what specific words should be said or actions taken—will depend on the circumstances and what is most likely to have a positive impact. As a result, celebrities who speak out for the benefit of others must take care to ensure that how they're speaking out is most likely to do good and not harm, even if unintentional. Harms can be mitigated by taking actions that are likely to bring any harms back on the celebrity himself, instead of on the individual or groups he is trying to assist.

Returning to the example from the beginning of this discussion, was Kaepernick under an obligation to speak out and draw attention to racial injustices in the country and did he do it in a way that such that the only blowback would be directed at him and not more vulnerable individuals? Taking the second part of this question first, it is fairly clear looking at this example with hindsight that his actions were only going to cause harm to him and his own career, and not members of the group he was trying to assist. Even in the moment, there was enough historical evidence about how protest actions like his played out and he would have known that the only real risk was to himself. The more difficult question is whether he was under an obligation to do anything at all or whether he would have been justified in remaining quiet. Put differently, even if we recognize Kaepernick's behavior as "the right thing to do," was it morally praiseworthy or morally obligatory?

Kaepernick's position is interesting because he had no good reason to believe that he would be able to bring the level of attention to this issue that he ultimately received. He knew (or should have known) that the blowback on him would be significant, but that it was unclear whether he would be successful in creating meaningful change. It's still not clear

if the situation for black Americans now is substantially better than it was in 2016, but what is clear is that because of Kaepernick's actions we've been engaging in a national discussion about policing, criminal justice, and black Americans. Without knowing for certain that his actions would likely have a positive impact, it's not possible to say that they were obligatory, but given that he drew attention to this important issue in the way that he did, it's clear that his actions were praiseworthy. As American billionaire entrepreneur Mark Cuban said about Kaepernick in the early days of his protest, "He didn't throw a bomb, fire a shot, start a riot, throw a punch, shut a business, yell at someone, troll anyone. He just sat there quietly … I may not understand his perspective or agree with him, but Colin Kaepernick taught us we can still disagree in this country, peacefully" (Cuban 2016).

But five years later, the story is a bit different. Athletes are now more aware of the power they possess to influence public opinion on these issues and advance social change. Further, the influence and impact of social media has only grown, and it is now even easier for celebrities with large numbers of followers to have a substantive impact on important policy issues and to otherwise provide assistance to people who are being harmed, especially if these actions are done intentionally and strategically. With great power not only comes great responsibility but the obligation to use that power to positively impact the lives of others by drawing attention to harms that are impacting them and acting to alleviate those harms. Celebrities like Kim Kardashian have shown that leveraging their status and drawing just a little attention to specific instances of injustice can often result in that injustice getting addressed. In those cases, when celebrities have the ability to have this kind of positive impact at relatively little comparable cost, it is hard to see how such behavior would not be obligatory.

Note

1 100 Milneburg Hall, University of New Orleans, 2000 Lakeshore Dr., New Orleans, LA 70148.

References

Blistein, J. (2021). "Astroworld Victims Died of 'Compression Asphyxia,' Medical Examiner Determines," *Rolling Stone*, published on December 16, 2021, at: https://www.rollingstone.com/music/music-news/astroworld-victims-cause-of-death-1272930/

Cuban, M. (2016). Quoted in Gaines, C., "Mark Cuban defends Colin Kaepernick's decision to protest national anthem and US flag," *Business Insider*, published on August 28, 2016, and available at: https://www.businessinsider.com/mark-cuban-defends-colin-kaepernick-protest-national-anthem-2016-8

Elman, J. (2020). "When Did Colin Kaepernick First Protest the National Anthem," *Sportscasting*, published on August 27, 2020, and available at: https://www.sportscasting.com/when-did-colin-kaepernick-first-protest-the-national-anthem/

Gonyea, D. (2016). "In Political Activism, Ali Pulled No Punches – And Paid A Heavy Price," *NPR*, published on June 10, 2016, and available at: https://www.npr.org/2016/06/10/481523465/in-political-activism-ali-pulled-no-punches-and-paid-a-heavy-price

Hendrickson, M. (2013). "U2's Bono Courageously Embraces Capitalism," in *Forbes*, published on November 8, 2013, and available at: https://www.forbes.com/sites/markhendrickson/2013/11/08/u2s-bono-courageously-embraces-capitalism/?sh=60f1a469575a

History.com. (2021). "Muhammad Ali refuses Army induction," *This Day in History*, published on May 5, 2021 at: https://www.history.com/this-day-in-history/muhammad-ali-refuses-army-induction

Kaepernick, C. (2016). NFL Post-Game Press Comments made on August 26, 2016, available online at: https://www.youtube.com/watch?v=rd3qpRmP63k&t=60s

Kardashian, K. (2020a). "Forward," in Johnson, A.M., *After Life: My Journey from Incarceration to Freedom*," Harper Paperbacks, 2020.

Kardashian, K. (2020b). Quoted in Harris, E., "Inside Kim Kardashian's Prison-Reform Machine," *The New York Times*, published on April 20, 2020, and available at: https://www.nytimes.com/2020/04/02/arts/television/kim-kardashian-prison-reform.html

Kristof, N. (2007). "Bono, Foreign Aid, and Skeptics," in *The New York Times*, published on August 9, 2007, and available at: https://www.nytimes.com/2007/08/09/opinion/09kristof.html

LaFranchi, H. (2002). "Bono-fied increase in foreign aid, with strings," in *The Christian Science Monitor*, published on March 19, 2002, and available at: https://www.csmonitor.com/2002/0319/p02s01-uspo.html

Overhultz, L. (2021). "Kim Kardashian didn't care about criticism from the left over her work with Trump: 'Destroy me then,'" *Fox News*, published on December 16, 2021, and available at: https://www.foxnews.com/entertainment/kim-kardashian-didnt-care-criticism-left-working-president-donald-trump-criminal-justice-reform

Raymond, E. (2015). *Stars for Freedom: Hollywood, Black Celebrities, and the Civil Rights Movement*, University of Washington Press.

Reams, J. (2021). "10 Times Bandleaders Have Stopped a Concert to Help a Fan," *Music in Minnesota*, published on November 19, 2021, at: https://www.musicinminnesota.com/ten-times-concerts-stopped-for-fans/

Shontell, A. (2013). "What It's Like When Reddit Wrongly Accuses Your Loved One Of Murder," *Business Insider*, published on July 26, 2013, and available at: https://www.businessinsider.com/reddit-falsely-accuses-sunil-tripathi-of-boston-bombing-2013-7

Singer, P. (1972). "Famine, Affluence, and Morality," *Philosophy and Public Affairs*, Vol. 1, No. 3: 231.

Stolworthy, J. (2019). "Davos 2019: Bono tells protestors 'capitalism is not immoral – it's amoral,'" in *Independent*, published on January 23, 2019, and available at: https://www.independent.co.uk/news/uk/home-news/davos-2019-bono-u2-capitalism-immoral-africa-aids-wef-poverty-un-a8742071.html

Wellman, C. (1996). "Liberalism, Semaritanism, and Political Legitimacy," *Philosophy & Public Affairs*, Vol. 25.

7 Rereading *Black Like Me*
Speech Matters, Context Matters

Kathryn L. Lynch[1]

> "And herein lies the tragedy of the age: not that men are poor—
> all men know something of poverty; not that men are wicked—
> who is good? not that men are ignorant—what is Truth?
> Nay, but that men know so little of men."
> (W. E. B. Dubois, The Souls of Black Folk)

Sixty years ago, in 1961, the white Texan John Howard Griffin published *Black Like Me*, the best-selling memoir of his six-week journey through Louisiana, Mississippi, Alabama, and Georgia disguised as a Black man. Griffin dyed his skin black and shaved his head to remove traces of his natural ethnicity. The disguise was as complete as he could make it, and as he tells the story he easily passed as Black, despite resolving never to lie about his name or identity during his travels. When he was done, he had successfully replicated for his 1960s readers the bitter experience of oppression commonplace to mid-century Black Americans in the Jim Crow South.

I read *Black Like Me* at the age of ten, when it first appeared. I was just beginning to make my way through hard books; *Black Like Me* was a stretch. It helped that I read it with a close friend, two years older (we had a kind of informal book club that summer). This book was making a big splash, and we wanted to be in on it. I've forgotten most of that original reading. But I remember the paperback's cover, the back of a Black man's head as he marched purposefully away from the reader into a hall of racist horrors beyond my ken. No Black people lived in my California beachside community, and "the South" was a distant place that I didn't guess I'd ever visit. This book, with its shadowy figure striding forth into the unknown, offered a window onto a place I couldn't know on my own, an adult world, an important one where history would be made. In retrospect, *Black Like Me* fully lived up to its promise of helping to shape a rising generation's attitudes about racial equality. But rereading the book in its 60th anniversary year—and confronting what has changed over the decades—reminds me there is still more we can learn from this book, even as I realize uneasily that some of its features do

not wear well. Here, I will explore that paradox, focusing on the white man's license to speak on an issue so far outside his personal expertise.

Although, even at its original publication, some had misgivings about the wisdom of Griffin's "experiment," *Black Like Me* was an enormous popular and critical success. It made its author an overnight celebrity, was widely and enthusiastically reviewed, and placed Griffin at the center of the battle for racial equality that roiled the 1950s and 1960s. Over the next twenty years until his death in 1980, Griffin traveled the lecture circuit, delivering over 1,200 talks, creating more than two dozen documentaries, and writing 150 essays and ten books inspired by what he had learned from passing as Black (Bonazzi 2010; Griffin 1977, Front Matter; Griffin 2004, Front Matter). The book inspired a 1964 film starring Academy Award nominee and Tony winner James Whitmore and, as late as 2012, a French one-woman-show for the stage. A decade after Griffin's trek to the South, Grace Halsell, a white political journalist, similarly dyed her own skin and in *Soul Sister* wrote about her parallel journey, which included Harlem as well as Mississippi (Halsell 1969). Continuously in print since its original publication, *Black Like Me* has been translated into sixteen languages and sold more than 16,000,000 copies (Bonazzi 2018, 415–16). A decade ago in 2011, its 50th anniversary saw numerous celebrations of the book's enduring importance[2] as well as an anniversary edition, with a Foreword by Studs Terkel (2004 [2010]), who along with other media greats like Mike Wallace and Dave Garroway had interviewed the author when the book first appeared (Bonazzi 2018; Manzoor 2011).

It is inconceivable that the 60th anniversary of this book will excite the same uncomplicated eulogies as did the 50th. Today the author's epigraph from Langston Hughes's "Dream Variations"—"Night coming tenderly/Black Like Me"—feels less a tribute and more a shocking appropriation; the breezy tone of Terkel's "this is a contemporary book, you bet" naïve at best. In 2021, even compared to a decade ago, we find ourselves at a dramatically different point in our nation's racial accounting. The initials *BLM* stand for a position on the mixing of identities sharply opposite to that invoked by *Black Like Me*. This stark new outlook limits the common human experience of individuals on different sides of the color line, if not denying it altogether. The phrase "All Lives Matter" is regarded as a hostile counterclaim to the assertion "Black Lives Matter," something close to an insistence that "White Lives (alone) Matter." In such an environment, individuals are trapped within their socially assigned, but nonetheless immutable categories. They are then excoriated for presuming to speak across identities. This is far from the world that Griffin tried to bring into being. In his Preface, he describes "the real story" he set out to tell as "a universal one," shared by any victim of prejudice or racism, not a Black story or a white one.

That universalist philosophy was central to Griffin's personal creed. A war injury blinded him for a decade before writing his most famous book, and that experience formed a deep-seated belief that what "mattered" about each human being was not what could be perceived by the exterior senses, but what was essential and interior. At what he came to regard as the high point of his journey as a Black man he had a similar epiphany when a Black sawmill worker, his wife, and their six small children offered him shelter. He sees their hardscrabble Alabama household "not as a white man, not as a Negro, but as a human parent." The little children, as they kiss their houseguest good-night, are no different from Griffin's own children save for the "accident" of their "skin pigment," "this least important of all qualities" (Griffin 1961, 110).

While making the fraught decision to break through the barricade of racial difference by disguising himself as Black, Griffin had doubts and fears—which were given voice by others who attempted to dissuade him from the experiment. But these doubts about the wisdom of his racial pilgrimage were based on the danger to himself and to his family that would be involved in his passage south as a Black man—not on its moral fitness. You'll get yourself killed, warned one. Another cautioned, even if you successfully complete this experiment, you'll become the target of hate groups (Griffin 1961, 8–9). The warnings were well founded. Griffin did court danger, especially after he published his findings. He was hung in effigy in his hometown of Mansfield, Texas, figured as half black, half white, with a yellow line painted down his back (Griffin 1961, 149). A cross was burned on the lawn of the Negro church in his community (Bonazzi 2018, 190). When the death threats got bad enough, his family and his elderly parents fled for safety to Mexico. And a few years after the book was published he was tracked down, beaten, and left for dead by thugs from the Ku Klux Klan (Bonazzi 2018, 261). As Griffin set out on his journey, however, nobody warned him against adopting a Black identity because that identity was not his to take. Nobody worried about the ethics of his coloring his skin or urged him against appropriating the life experience of a Black man.

This difference is worth taking note of now, when racial and cultural appropriations are governed each day by ever-stricter taboos. Griffin blackened his skin in order to demonstrate solidarity with the Negro community of his era and to lend his voice to the cause of racial equality; his good faith was unquestioned. Good intentions, though, are no longer an excuse for race-crossing, even in the most benign circumstances. Popular white liberal comedians and their producers are pulling episodes of racially transgressive shows, including those that used blackface or other forms of racial impersonation for the sole purpose of satire and condemnation. As actor Tina Fey said about episodes retracted from the TV show *30 Rock*, "I understand now that 'intent' is not a free pass for white people to use these images" (Adalian 2020). Nor does this taboo

apply only to transitory performances, to comedic impersonations, or to imaginative fictional works. Sustained real-life racial passing is widely regarded as more seriously harmful, offensive, and career-ending than the playful sort in which *30 Rock* and other fashionable media have engaged. Notorious cases of actual passing across racial lines can expect to be swiftly and universally condemned.[3]

Consider, for instance, the outcry that followed the case of Rachel Dolezal, a white woman who posed as Black while serving as president of the Spokane chapter of the NAACP, or of the George Washington University historian Jessica Krug, who wrote about communities of color under a false cover of being mixed race. There is no reason to think that the excoriations and denunciations that fell against these women would not today apply to a project like Griffin's, even one born of such ostensibly noble dreams. Neither the excuse of "intent" nor of historical context would be likely to gain traction at a time when racial redress is toppling previously revered heroes, from founding fathers to icons of popular culture. Blackface is now regarded as impermissible for any reason, in the present or in the past. A white person's appropriation of a Black or brown person's racial personhood is widely understood as "racial identity theft," a form of robbery that inflicts material harm on a whole community (McClendon 2015; Stevens and Maurantonio 2018).

A contrast of *Black Like Me* with the #1 bestseller and Oprah book-club selection *American Dirt* will highlight some of the relevant issues evolving in our current culture—especially those related to the freedom to speak and to be heard. Published by Flatiron Books early in 2020, this novel by Jeanine Cummins tells the fictional story of Lydia Pérez, a middle-class bookseller from Acapulco, and her son as they flee to the U.S.A. after more than a dozen close family members are murdered by a Mexican drug cartel. Translated into 32 languages, the book was a commercial success for both its writer, whose seven-figure advance became legendary, and for its publisher. It was notably less successful with reviewers.

In a controversial "Author's Note," Cummins describes motives for writing that are reminiscent of Griffin's. She wanted, she explains, to challenge a narrative of migrants as "an invading mob of resource-draining criminals, and, at best, a sort of helpless, impoverished, faceless brown mass, clamoring for help at our doorstep." Her political goal was to inspire Anglo readers to regard migrants as individuals, "as our fellow human beings" (Cummins 2020, 381). Both Griffin and Cummins regarded themselves as "bridge" writers, reaching across ethnic chasms. They shared a goal of trying to bring to a mainstream American audience the hard truth of minority oppression —and thereby to support social justice and equality. Both did substantial background research on behalf of the groups they strove to represent. Both were achingly sympathetic to the struggles of those groups. And both faced friends and

foes in the reading public. And like the response to *Black Like Me*, the reception of *American Dirt* revealed sharp social divisions.

But here the similarities end. Unlike *Black Like Me*, *American Dirt* triggered a deeply critical response from the very readers it was designed to champion, as members of the minority community rose up against it. The book's enemies were not those who sought to minimize or deny the oppression Cummins described or who feared for her safety as had been the case with Griffin's book (though her book tour had to be canceled due to threats), but those who rebelled against a white woman's right to tell the story at all. Cummins attempted to pre-empt these concerns in her Author's Note by revealing life experiences she believed gave her the personal authority—or at least the sympathetic understanding—to write. Her husband, she explains, was an illegal immigrant until they married. Her cousins and brothers were victims of a horrible violent crime, aligning her with victims everywhere. Her grandmother was Puerto Rican (Cummins 2020, 380–82). But Cummins doesn't fundamentally resist the idea that lived experience and the relevant identity provide a necessary license to speak. As she explains, she worried from the start of researching and writing that she "had no business" writing this book, and she wished that "someone slightly browner" were writing it. She sought support from an expert, a Chicana Studies professor, who reassured her that she could safely add her voice to those of others who shared her social justice goals (Cummins 2020, 382).

But this reassurance proved to be misplaced. Backlash against the book was swift and vigorous. A gritty and derisive online review by writer and blogger Myriam M. Gurba suggested Cummins was guilty of a form of plagiarism and recommended the book's pages be "upcycled as toilet paper" (Gurba 2019). NPR's Maria Hinojosa called it "the book that set the internet on fire" (Cereijido 2020). The firestorm engulfed not just the author but others who participated in the acrimonious conversation, including reviewers. In the *New York Times Book Review*, Lauren Groff (who is neither Mexican nor an immigrant) reproduced the anguish professed by the author when she expressed anxiety over her own ethnic identity in her largely favorable review—and received the same counter-attack. Groff found the story "propulsive," especially its portrayal of the tension and horror of the immigrant's plight, "[b]ut another, different, fear had crept in as I was reading: I was sure I was the wrong person to review this book" (Groff 2020). Groff's fears were soon validated. Agreeing that she was a poor choice, *Washington Post Writers Group* columnist Esther J. Cepeda responded curtly, "Groff hit the nail on the head" (Cepeda 2020).

In a way, Cummins' concession that the story she was telling belonged to others and was unseemly at best for her made her complicit in the controversy and was duly used against her. Humility and good intentions would not save her. The phrase "faceless brown mass," from her

Author's Note, was experienced by Latino readers as demeaning, though Cummins' expressly stated goal was to challenge that characterization. The fact that her husband was an illegal from Ireland, not Mexico or another country to the south, undermined rather than supported her qualifications to tell an immigrant's story. An editorial she had written for the *New York Times* in December 2015 was dredged up as evidence that Cummins' own identity had long been securely and exclusively white, until she decided to cash in on brown trauma. "I am white," she had written there bluntly about the shadow of race that haunted the rape and murder of her two cousins near Ferguson, Missouri, in 1991. While she and her cousins shared a Puerto Rican grandmother, "in every practical way, my family is mostly white. I'll never know the impotent rage of being profiled, or encounter institutionalized hurdles to success because of my skin or hair or name" (Cummins 2015).

Although Cummins' point was to denounce the ugliness of racism that warped the trials of her cousins' murderers, her critics were unpersuaded. They focused on the way this same grandmother reappeared in her Author's Note as qualifying her to write about Southern border immigration. These critics accused her of hypocritically "re-branding" herself as a brown person: "I repeat: Four years ago Cummins was white," stressed Gurba (2019). The book was indicted as "brown face" and "white washing." Paradoxically the very thing that Cummins had most feared when she took on the radioactive topic of race in her op-ed had come to pass: "I *really* don't want to write about race," she had said. "I'm terrified of striking the wrong chord, of being vulnerable, of uncovering shameful ignorance in my psyche. I'm afraid of being misinterpreted" (Cummins, 2015).

Never mind that. *American Dirt* became Exhibit A in the battle against cultural appropriation waged under such hashtags as #DignidadLiteraria, #OwnVoices, #DisruptTexts, and others. One lesson seems that no confession of privilege or gesture of solidarity will ever be sufficient to admit a writer into a group that doesn't want her or think she belongs. Some experiences are simply not hers to report. Even more tellingly, confessions of inauthenticity and rituals of conciliation signal the writer's agreement to an identitarian philosophy that excludes her from reciting certain stories—and so will make her more vulnerable to attack when she does. Of course, such a philosophy also has unfortunate consequences for minority writers. Cepeda makes this point complaining that Latino readers and writers have interests far beyond "stories about marginalization or culture shock." As she continues, "what we really need is for the Latino Patricia Cornwell, Stephen King, and E. L. James to step up" (Cepeda 2017). Latinos, she points out reasonably, not only object to non-Latino writers stealing their stories, but are also frustrated by being pigeon-holed and restricted by the expectation that their imaginations extend only to Latino-related subject matter. But these two

phenomena are the yin and the yang of identity politics. To deny one author universal access to human experience is to deny it to all.

Who is permitted to speak and about what? At what point does an author's identity disqualify her from touching upon a sensitive issue? How will the boundaries drawn by identity be policed and by whom? These questions inevitably touch upon the freedom of expression of all writers. The specific debate was not over whether Cummins' imaginative recreation of the experiences of Mexican migrants should be allowed to stand; the book had been written, and her most energetic critics were not asking her to withdraw it. But many had strong feelings about the prior, existential question of whether her book ever should have been written or published at all. On its face, an answer of "no" appears an obvious rebuke to the author's artistic freedom. But in an episode of "Oprah's Book Club" "leaning in" to the controversy over the book, aired March 6, 2020, novelist and memoirist Reyna Grande vigorously resisted the characterization of the novel's foes as opponents of freedom of expression, turning the accusation of repression instead against the industry that selected and promoted Cummins' work. "It's the publishers who really need to do a better job of supporting freedom of expression." When Cummins' publishers "elevated the voice of a white person to speak for a marginalized community," Grande continued, they were "robbing that community of its right to speak for itself" (Winfrey 2020).

This is freedom framed as a "positive" rather than a "negative" value, "freedom to" or "for" rather than "freedom from."[4] As we will see, "positive freedom" may benefit groups (even against discrete persons), whereas "negative freedom," which simply protects against external interference, belongs exclusively to individuals. Systems seeking "positive freedom," as Isaiah Berlin explains in his classic essay "Two Concepts of Liberty," begin with the assumption that individuals achieve freedom most perfectly by moving through the world in accord with their highest rational purposes. Theories of "positive freedom" attribute this liberation to enlightened self-governance, as ideally each individual autonomously brings will or desire into alignment with reason. But the divided-self implied by this model also offers an invitation to outsiders with a will to power. For when the higher powers of the self are not strong enough to free the lower self, a benevolent force outside the individual, a Platonic guardian of sorts, may step in (albeit temporarily).

Authoritarian political systems thus find their rationale in the need of unenlightened individuals for benevolent progressive government, which alone guarantees fully realized "freedom." Although, of course, not every embrace of "positive freedom" leads to political repression or totalitarianism, repression routinely finds justification in the argument that rulers know better than citizens what is good for them. Governments "free" the governed to achieve their highest self-actualized liberation. "Negative freedom" is, in contrast, more compatible with minimalist states, which

impose the fewest number of laws compatible with an ordered society and do not prejudge what a "liberated" life will look like (Berlin 2017, 169–200). Because arguments for "positive freedom" recalibrate concepts of individual freedom to coincide with judgments by outsiders, they lead naturally to policies that affirmatively enable the "freedom," "dignity," or "personality" of whole groups or classes of people, policies that can be coerced by non-governmental actors as well as by the state. While "negative freedom" remains firmly solitary, when taken to this limit "positive freedom" moves from honoring the individual, where it began, to protecting collectives and even granting collectives the moral authority to impose their will on others.

Maximizing positive freedom, so considered, proposes to elevate not only the individual, but the overall standing of a disadvantaged class, as Grande suggests above, at the expense of historically privileged others. Without such compensation, the argument goes, freedom is not true freedom because it remains unequally distributed. The drive for "positive freedom" is non-trivial. Berlin characterized it as a "profound and universal craving for status and understanding." But this "positive freedom," focused on group status, has strayed far from the imperative for singular, "negative" liberty. At the extremes, the demand of "positive" freedom for collective objectives cannot help but abridge "negative" freedom from personal trespass (Berlin 2017, 204). The group as it asserts its imperatives profits at the expense of the individual.

It is tempting to resolve the tension between limit cases of "negative" and "positive" freedom by splitting the difference between the two—by proposing that both are possible and can coexist without coming into serious conflict. Both, after all, are called by the name of and are recognizable as forms of "freedom." This was Oprah's approach. She was stalwart for Cummins' artistic freedom, refusing to cancel her selection of the novel for her book club: "I fundamentally believe in the right of anyone … to write and to act, to sing, to create, to perform whatever they choose. And if one author, I felt, one artist is silenced, we're all in danger of the same." But Oprah also welcomed suggestions from the novel's opponents that she adjust her protocols to ensure the future selection of more Latinx authors. "I am guilty," she confessed, "of not *looking* for Latinx writers. I have never looked for any particular race. I will now behave differently" (Winfrey 2020).

Similarly, PEN America, which for almost a century has been a visible and staunch defender of free expression, labored in its formulation of the *American Dirt* controversy to split the difference and to accommodate both kinds of freedom, "negative" and "positive." "We categorically reject rigid rules," PEN declared, "about who has the right to tell which stories." But at the same time there is "no contradiction between that position and the need for the publishing industry to urgently address its own chronic shortcomings [in …] how books are sourced, edited,

and promoted" (PEN America 2020). In this proclamation PEN first stands unequivocally on the side of "negative freedom," that is, against any interference with a writer's prerogative to any narrative she chooses, defending Cummins. But PEN then shifts tactics, attaching a positive value to the needs and rights of authors with specific identities, asserting that the publishing industry as a whole must take active steps to position marginalized writers at the head of an identity queue, and implying that the publication and promotion of Cummins' book imposed a kind of freedom tax on those whose personal histories gave them a more authentic entitlement to speak about the migrant experience.

Free speech as a legal category was not at issue in this controversy. Nobody in the debate about *American Dirt* argued that the publication of Jeanine Cummins' book ought to have been forbidden by law. But social sanctions can be as powerful as legal ones. As the 18th-century political theorist Benjamin Constant memorably said, "It is not against the arm that one must rail, but against the weapon" (Berlin 2017, 209). With sufficient power and ambition, what John Stuart Mill called "the tyranny of prevailing opinion and feeling" can be "more formidable than many kinds of political oppression" (Mill 2006, 11). Such is the case here. Those who would place new burdens on the collective "publishing industry," requiring that it re-slope the field by actively seeking out minority writers to narrate stories reflecting their identities, implicitly adopt—and impose on others—a view of freedom of expression that goes much further than simply removing obstacles to speech. They reframe liberty as a set of affirmative steps that advantage one set of speakers or writers over another. It is naïve to believe that such a position promoting positive liberty for members of a preselected group does not clash with the expressive rights, or the negative liberty, of individual authors not benefiting from such preferment.

Under the system demanded by those who found Cummins' book offensive, publishers would assign scarce resources not based on which story they find most compelling or artistically interesting (or they think will make them more money) but would aggressively recruit authors with the "correct" disadvantaged identities to speak on predefined topics of interest to their group.[5] "Nothing about us without us," as the standpoint rallying cry insists. Of course, equity-based groups lobbying for such a benefit trust that they are simply rebalancing scales unequally tilted against them, but that claim doesn't alter the fact that their remedy demands prioritizing the collective's "positive" rights over the individual's "negative" interest in not being interfered with. Equity for one means unequal treatment for another. Accordingly, the enabling writing workshop truism "write what you know" for some has now become the disabling one "and be very sure you *don't* write what you *don't* know." This remedy is a more than gentle counsel to silence; too often it extracts severe personal and professional penalties for speaking out of turn, or effectively censorship.

A willingness to accept such encroachments upon freedom of expression marks another important point of difference between *American Dirt* and *Black Like Me*. Griffin did not accept that his race invalidated his perspective on Black lives, though he knew that experience inflected understanding. He had set out to combat race-based limitations on liberty. In the wake of the Second World War, many writers of Griffin's generation, including Berlin, were instinctively fearful of incursions on individual "negative" liberties and suspicious of impositions on those freedoms in the name of social improvements or "positive" freedoms, unlikely ever to be fully realized. They respected the power of "freedom from" and suspected "freedom for" (Milosz 1985, 35). They had witnessed first-hand the cruelty of final solutions and possessed a healthy fear of human "readiness to accept totalitarian terror for the sake of a hypothetic future" (Milosz, 1985, vii).

Griffin was of this generation. As a young man, he had worked in the French resistance, hiding Jewish families from the Nazis before the U.S.A. joined the war. Then he had fought that war in the Pacific theater. These tribulations left an indelible mark, both increasing his lifelong hatred of racism and instilling within him an abiding respect for individual liberty. "There is no such thing," he wrote, "as an inherent right to impugn someone else's rights; and it is an utter distortion to claim the freedom to deny someone else's freedom." This steadfast defense of individual liberty, this aversion to anyone who would try "to gobble everyone up, to make him conform to our individual or group prejudices" informed Griffin's thinking and writing throughout his life (Griffin 2011b, 3). His was a classic affirmation of "negative liberty."

If wartime experiences quickened his attachment to freedom, Griffin's personal encounters with censorship deepened it. Before he was the author of *Black Like Me*, and during the decade of his blindness, Griffin was a successful novelist. His debut novel, *The Devil Rides Outside*, established his reputation and launched what looked likely to become a career as a writer of fiction. But the book hit headwinds. Acclaimed for its vigor if not its narrative self-discipline, this early work, published in 1952, was banned as obscene and then became a test case for over-inclusive censorship statutes. *Butler v. Michigan* (1957), which concerned a bookseller who sold *The Devil Rides Outside* (Griffin 1952) to a Detroit police officer, went all the way to the Supreme Court, where the Court ruled for the novel and against the censors. Although *Black Like Me* has overshadowed *Butler* as the centerpiece of Griffin's biography, the experience of being first canceled and then rescued was also essential to Griffin's world view.

Though *Butler* has never received its due in the history of free speech jurisprudence, it helped keep alive the overbreadth doctrine as a key principle of free expression (Calvert 2012). Restricting the sale of the book beyond minors, would be, in the Court's words, "to reduce the adult

population … to reading only what is fit for children." "Surely, this is to burn the house to roast the pig," Justice Frankfurter memorably wrote. "How sweet is justice," observed Griffin in his journal two days after the decision (Griffin 2004). His aversion to "smut hunters" inspired free speech activism and writing throughout his life and provided the theme of his third novel, the comic *Street of Seven Angels*, drafted during the 1950s (published posthumously in 2003), a lively anti-censorship satire.

The Court based its ruling in *Butler* on the ban's groundless extension to adult readers. But the case as presented raised other issues as well, like whether a book could be outlawed for "containing" isolated material that, while controversial, was necessary for the literary integrity of the whole. This was an especially important point for Griffin, who (erroneously) declared that *Butler* had made "containing statute legislation" unconstitutional; such laws allowed a person to denounce a book, sometimes without actually reading it, merely based on lists of words. Griffin was also outraged by censors who judged a book guilty by association—i.e., according to the beliefs or traits of the author rather than "on its own merits" (Griffin 1962). Finally, he recognized that book-banning could shut down expression without the arm of the law behind it. "Coercive censorship," as he called it, was just as harmful as the legal kind, forcing volumes "off the shelves by the manipulation of public opinion" (Griffin 1962, 193–94). Fundamentally Griffin objected to the hypocrisy of censorship, which permits some to decide for all what to read and think. He regarded freedom from interference as the paramount liberty, not to be superseded by other, positive social goals: "Any attempt to preserve liberties by subverting freedoms," he testified, "soon reduces itself to an absurdity" (Bonazzi 2018, 237).

In his rebukes to the censors—delivered in his fiction and essays—Griffin anticipated many of the questions that have emerged in recent cases like that of *American Dirt*: Is it fair to assess a work of art piecemeal? May the author's social or moral standing legitimately be held against her creation? Is it noble or just for a body of people, with or without legal warrant, to quash an artistic product made by an individual—and to prevent others from enjoying it? Although the context in which he articulated these positions was entirely different in the 1950s and 1960s from today, Griffin stood firmly against all attempts to limit the scope of a writer's imagination.

Readers may reasonably object that these differences in historical context really do change our analysis of a book's reception in 2021, against one published in 1961. Much of what Griffin was fighting for—the destruction of legal segregation and the widespread recognition of racial equality—has today been accomplished, at least in theory if not consistently in practice. In this new environment, Black people and other minorities may not welcome white people poking themselves in on their behalf especially regarding issues that do not seem to concern

them directly. From another angle, however, this difference is exactly my point. The profound cultural changes that have arguably both improved and fragmented our society, especially within the past decade, have substituted one set of moral priorities for another, shifting the balance from protecting individual rights to advancing values cherished by identity groups with shared interests and growing power.

It is important to recognize this shift and ask if we are satisfied with the new balance. Already, when Griffin wrote *Black Like Me*, he and his readers understood that members of different groups suffered within society in different ways and that communication across the lines that separated Black from white was difficult, charged, and might always remain so. But Griffin thought his attempt to breach these was warranted—and the politically liberal readership of his book embraced his individualistic and "color-blind" objectives. As we enter the third decade of the 21st century, these values are contested and losing ground.

The original reception of *Black Like Me* in the liberal press bears out this historical narrative and reveals some of the reasons behind it. That reception displayed a shared egalitarian purpose, even among members of a then-smaller Black press. The distinguished African American journalist Louis Lomax gave the book one of its most important notices in the *Saturday Review* in December 1961. As a Black writer, Lomax was well aware that Griffin's sojourn among southern Blacks was something like white tourism. "There is a saying among Negroes that no white man, no matter how hard he tries, can really understand what it is like to be black in America." But this caution introduces Lomax's main point: Griffin "has come closer" to such an understanding than "any other white man." Lomax evinces confidence that Griffin's tale of his experience will "go a long ways" towards improving communication between Black and white people and persuading whites that "the plight of the American Negro is a disgrace" that blights the nation's "world leadership role."

Lomax welcomed Griffin's intervention strategically because, in the American South at that moment, a white voice offered an advantage, and Griffin was willing to share his, even at personal cost. In Lomax's words, "since there are white people who doubt everything a Negro says, perhaps now they will hear us…" (Lomax 1961). Griffin was similarly aware of his privileged position as a white man and determined to use it for good; he spoke on behalf of Black people not because he felt entitled but because he felt needed. He understood that defects of outlook in his white audience required a voice like his, one that had been there and back again: "I, as a man now white once again, could say the things that needed saying but would be rejected if black men said them" (Griffin [1977] 2010, 177).

With all of this in mind, Lomax accepted Griffin's good faith, acknowledging that his racial passage "was not a stunt" and that his memoir was

genuinely motivated by a white man's desire to testify first-hand about the race problem to members of his own tribe previously disinclined to hear the truth. Lomax hopes sincerely for the book's success. His tone is one of tolerant humor and reconciliation: "As a Negro I was somewhat amused as Griffin eased from the white world into the black and encountered hostilities that have been my daily bread since childhood." While granting the challenge of achieving abstract understanding not forged in extended personal experience, the Black journalist suspends judgment against the white author's presumption for imagining that six weeks' disguise—a "brief encounter with being black," as Lomax calls it—gave him standing to speak on the situation of the Black man (Lomax 1961). He acknowledges a common purpose.

At the time, only outright racists and their sympathizers deployed Griffin's group identity against him—only committed segregationists and those who found a white man's criticism of other whites unseemly. Such attacks on him as a race-traitor were especially painful in his hometown of Mansfield, Texas. An anonymous caller demanded of Griffin's mother "how he could turn against his own race." Others accused him of airing the white man's "dirty linen." "'Which side are you on,' they ask, implying that one must either be on the 'white' side or the 'Negro' side.'" In a sharp historical irony, the identity-based objection belonged then to the opponents of equality and racial justice, while over and over Griffin insisted that he was "on the side of humanity" (Griffin 1960b, 13, 18, 17). His methodology was not to "think white" but to "think human" (Griffin 2011a).

Today's proponents of identity-based goals would likely call Griffin's position naïve. Nor would they be entirely wrong. During his trip South as a Black man, Griffin was on vacation from his whiteness. He never lost the double consciousness of being both Black and white during his journey, for part of the time even literally scrubbing himself white and "zigzagging back and forth" between identities (Griffin 1961, 121). His experience really was only skin deep. And yet how or whether a writer can address parts of life that fall outside of his own lived experience was a problem Griffin took to heart; he embraced its complexity. Instead of actually coloring his skin black and chronicling the experience in journal form as he did, Griffin could have gone in other, easier directions. He could have continued with data analysis and "scientific research" as was his original plan (Griffin 1961, Preface). Or he could have cast his work, far less controversially, as a novel; he was, after all, already a successful novelist, and *Black Like Me* shares many structural and stylistic features with his two published novels, *The Devil Rides Outside* and *Nuni*.

He believed, however, that it was only through lived experience that one gained the deepest knowledge. "How else except by becoming a Negro could a white man learn the truth?" (Griffin 1961, 7). Perhaps the question slyly conceals a predetermined argument. He had already

promised the travelogue as a series of articles to the magazine *Sepia*, whose readership was largely Black. His pledge to himself, recounted in his first installment, that he would do nothing but "note the truth as exactly as I could, let the chips fall where they might" (Griffin 1960a, 12) reads as disingenuous given the venue and, as one 21st-century critic observes, the author's "rather portentous prose, which occasionally makes one doubt the credibility of what he is describing" (Manzoor 2011). Surely Griffin intended from the start that *Black Like Me* would be an exposé of Southern racism, even as the book benefited from its documentary authority. But that does not mean his experiences were not true or sincerely expressed. As the writer Lillian Smith wrote privately to Griffin, "You know the difference in knowing and knowing about. And you chose to know: which meant you must experience it yourself" (Bonazzi 2018).[6] Smith admired Griffin's sincerity, his commitment. In honoring both the universal and the particular, Griffin (maybe rashly, but also courageously) bit into a nut that would break the teeth of writers who followed.

The author of *Black Like Me* was a man of his time—not only politically, but aesthetically. If the book were not so notorious for its progressiveness and its racial transgressions, Griffin's genre-bending experiment might have earned him a place among writers of his generation, like Truman Capote or Norman Mailer, who pioneered the "non-fiction novel" (Bonazzi 2018, 9). Old modes of understanding and communicating felt passé; new forms reached for deeper, emotional truths—even when these disavowed shared rational knowledge. But analysis does not give way to imagination and fiction does not invade the space of fact without paying a price, extracted today in pseudo-memoirs, "fake news," and a general crisis of objective journalism. More tellingly, the proposition that one must live a truth to know it, to which Griffin daringly committed, set the author on a collision course with his other great passion, freedom of expression, though he did not live long enough to experience its full impact. In brief, personal experience cannot be the only source of authority if writers wish to communicate across lines of difference. Reason requires the freedom to speak beyond one's lived experience.

Or to borrow an epistemological framework from sociology, Insiders and Outsiders stand in differing relationships to group knowledge, approaching their understanding either from a closer or more distanced, a more subjective or more objective location. Taken to an extreme, neither Insiderism nor Outsiderism alone approaches full knowledge, though there are different ways of balancing them, more or less successful. Recognizing the problem, Griffin boldly erased the distinction by becoming both—by transitioning from an Outsider to an Insider and back again. But, in doing so, he gave tacit approval to the proposition that affords Insiders a monopoly on the understanding of their group.

In its strictest version, the proposition that only Insiders are qualified to speak about their group leads to "*group* methodological solipsism." Or, as Robert Merton describes this flawed logic, "proletarians alone can understand proletarians and presumably capitalists, capitalists; only Catholics, Catholics; Jews, Jews … only sociologists are able to understand their fellow sociologists" (Merton 1972, 14). Likewise, Griffin's claim to authority through personal experience—if mandated by publishers, readers, and reviewers—would ultimately starve every author of the ability to speak about otherness. White authors would have no grounds to speak about Black lives; men no understanding of women's experiences; native writers no sympathy for immigrants; the able-bodied no appreciation of disability.

In the sixties and seventies, the balance between Insiderism and Outsiderism was shifting. Not long after Griffin's *Black Like Me* white allies were pushed aside by a growing Black Power Movement. Black people were claiming the experience of oppression as uniquely their own. In 1968, when Grace Halsell passed as Black in Harlem, she was immediately challenged as inauthentic by a Black companion: "You can't have known the person you're trying to write about when he was a child of five, a child of ten—and all of the years, or all of the evils of the society than can oppress a man…" (Halsell 1969, 70). Griffin was aware of the dangers and paradoxes. He knew that he could push his claim to truth too far, and he understood that his value to the movement was tactical rather than intrinsic. By 1977, when he published an Epilogue to *Black Like Me*, he confessed deferentially but explicitly that, even as he spoke from some first-hand knowledge, he was an ambassador and not a principal in the fight for racial equality: "I do not represent myself as a spokesman for black people or for anyone else" (Griffin 1977b, Preface). As the civil rights movement gave way to demands for "Black power," Griffin followed along, acknowledging that "whites should stay out of the spotlight" and that leadership roles for white people in the movement to advance the interests of Black people could be experienced as "a deep insult" (Griffin 1977a, 192).

But Griffin possessed a powerful defense against the erasure of his right to speak the truth, in what amounted to absolute faith in the freedom of any individual to stand up to any group, whatever claims to lived truth that group might assert. As a converted Catholic and a seriously religious man, he held the sanctity of personhood as an *actual* article of faith. But this is a principle that does not require religious warrant, and Griffin did not invoke his faith when he defended it. He never conceded that his race disenfranchised him from speaking on behalf of the whole of humanity or that it meant the only part he or others like him could take was secondary or superfluous. He bristled powerfully at the idea that his skin color should be a disqualification, just as he had long resisted all forms of racial discrimination.

Griffin lamented the arrogance of students in the 1970s who made the "frivolous" demand that only Black professors teach Black subjects (Griffin 1977a, 193). He wrote even more directly in his personal journals:

> Too many whites disqualify themselves defensively in writing on racism for fear some black person (or some dumb white critic) will be critical. It is a sickeningly demeaning stance. If you latch on to a truth, it does not matter in the slightest what color you are. A book's value depends on its truth, not the ethnic, religious or racial qualifications of the author. What the hell is a 'white book' in any case?
> (Bonazzi 2018, 367)

This tone of outrage may feel dated. Today's credo holds that writers of color do possess some first rights to stories about their own communities, which white writers are expected to grant as the barest overture of good faith. Yet, in a relatively short period of time, we have forgotten how deeply held and widely repeated was the color-blind mantra as a principle from which all people could expect to benefit.

Lomax, the Black journalist who reviewed *Black Like Me* for the *Saturday Review*, shared Griffin's disdain for racial homogeneity and his respect for the freedom of each person to speak a truth unshackled from racial stereotypes. Lomax's single criticism of the book was its call for greater unity among Black people. "[O]nly an immature mind expects the Negro to be a monolith," he wrote, criticizing other Black men Griffin had met on his travels: "the fact that Negroes themselves deplore diversity of opinion is further evidence of the Negro's inability to see himself as an individual rather than as a race." Both men recognized divergence of viewpoints within and across racial groups as a sign of true freedom—in the "negative" sense of freedom from pressure and interference by groups that might impose a separate orthodoxy or claim a sole right of expression.

John Howard Griffin was an imperfect man and *Black Like Me* an imperfect book. Casual sexism jumps off practically every page. Re-encountering this passionate defender of equal rights from the vantage point of a 21st-century woman, I find his sexism surprising and alarming. Griffin was also a grandiose writer, engaged in a lifelong (mostly losing, though charmingly frank) struggle with his own ego. *Black Like Me* arguably reveals as much about its author's fears and doubts as a white man as it does about real Black lives (Lott 1993). Rereading his magnum opus on its 60th anniversary, however, offers valuable lessons and reveals how far down a diverging path we have recently traveled.

The original reception of *Black Like Me* was striking for its willingness to accept the author's good faith, to judge him on his own terms. For that we have today substituted an epistemology of suspicion, guaranteed to

uncover heresy, since purity of intention and perfect obedience to ortho-doxy are never possible. This isn't to argue that suspicion is never appro-priate or that a society shouldn't strive for the dignity of groups as well as the equality of persons. But even as he slipped the thin edge of identity politics underneath his own lesson, Griffin also taught that "freedom for" is no substitute for "freedom from," warning not to lean too hard on the leverage provided by that wedge lest we sacrifice the liberty that makes all else possible. That's a warning we would do well now to heed.

Notes

1 Department of English, Wellesley College, 106 Central St., Wellesley, MA 02481.
2 For example, Watson (2011). The 50th was not the first anniversary marked for this celebrated book; see De Witt (1977).
3 *Near Black: White-to-Black Passing in American Culture* (Dreisinger 2008) distinguishes among different varieties of "masquerade," "passing" and "trespassing" (5–6), but in the decade since Dreisinger's book, such distinctions have collapsed. For example, Helen Lewis surveys recent cases of "reverse passing," comparing them to Munchausen syndrome in a search for motivational links that blur the distinctions between cases (Lewis 2021). Ayanna Thompson's historically informed *Blackface* (in the Bloomsbury "Object Lessons" series) does not discuss "passing," but is absolute that the performance of blackness never belongs to white people (Thompson 2021).
4 An excellent survey of the relationship between concepts of positive and negative freedom can be found in Carpenter (2019). While there are many approaches to this distinction—under certain of which it appears to evap-orate—Carpenter affirms the distinction's continued philosophical rel-evance. He also confirms the link between "positive freedom" and the agendas of organized groups: "In its political form, positive freedom has often been thought of as necessarily achieved through a collective" (3). For the foundational consequence of the contrast Berlin drew between negative and positive liberty, see also Harris (2017, especially 354–61, 367–69); also the Isaiah Berlin virtual library (Hardy n.d.).
5 I take no stand on the literary merits of *American Dirt* or, for that matter, of *Black Like Me*. Many critics have offered persuasive arguments against *American Dirt*'s literary quality—e.g., it is stereotyped, the central con-flicts are simplistic, it is poorly constructed stylistically. Similar objections to *Black Like Me* can be made. My goal is to tease out issues related to expressive freedom and identity politics.
6 Smith herself had dealt a blow to Southern racism with her influential *Killers of the Dream*, favorably reviewed by Griffin.

References

Adalian, Josef. 2020. "*30 Rock* is Pulling Blackface Episodes from Streaming Platforms and TV Reruns." *Vulture*, June 22, 2020. https://www.vulture.com/2020/06/30-rock-blackface-episodes-removed.html

Berlin, Isaiah. [1958] 2017. "Two Concepts of Liberty." In *Liberty*, edited by Henry Hardy, 166–217. Oxford: Oxford University Press.

Bonazzi, Robert. 2010. "Afterword." In John Howard Griffin, *Black Like Me*, 195–200. New York: New American Library.

———. 2018. *Reluctant Activist: The Spiritual Life and Art of John Howard Griffin*. Fort Worth: Texas Christian University Press.

Butler v. Michigan, 352 U.S. 380 (1957). https://caselaw.findlaw.com/us-supreme-court/352/380.html

Calvert, Clay. 2012. "Of Burning Houses and Roasting Pigs: Why *Butler v. Michigan* Remains a Key Free Speech Victory More than a Half-Century Later." *Federal Communications Law Journal*, 64, no. 2: 247–74.

Carpenter, Ian. 2019. "Positive and Negative Liberty." In *Stanford Encyclopedia of Philosophy*. https://plato.stanford.edu/entries/liberty-positive-negative/

Cepeda, Esther J. 2017. "Publishers shouldn't confine Latino authors to 'just immigrant stories.'" *The Daily News*, August 13, 2020. https://tdn.com/print-specific/column/cepeda-publishers-shouldnt-confine-latino-authors-to-just-immigrant-stories/article_0e33446f-38fd-5d3f-8ae0-c372e04845cb.html

———. 2020. "The Discussion Around 'American Dirt' Must Stick to The Issue of Exclusion of Latinos In Publishing Industry." *Cepeda 2008-2020 Column Archive*, January 26, 2020. https://www.estherjcepeda.com/600words/2020/01/the-discussion-around-american-dirt-must-stick-to-the-issue-of-exclusion-of-lationos-in-publishing-in.html

Cereijido, Antonia. 2020. "Digging into 'American Dirt'." *Latino USA*, January 29, 2020. https://www.latinousa.org/2020/01/29/americandirt/

Cummins, Jeanine. 2015. "Murder Isn't Black or White." *New York Times*, December 31, 2015. https://www.nytimes.com/2016/01/03/opinion/sunday/murder-isnt-black-or-white.html

———. 2020. *American Dirt*. New York: Macmillan.

De Witt, Karen. 1977. "*Black Like Me*, 20 Years Later." *Washington Post*, October 30, 1977.

Dreisinger, Baz. 2008. *Near Black: White-to-Black Passing in American Culture*. Amherst: University of Massachusetts Press.

Griffin, John Howard. 1952. *The Devil Rides Outside*. Fort Worth: Smiths.

———. 1956. *Nuni*. Boston: Houghton Mifflin.

———. 1960a. "Journey into Shame." *Sepia* (April): 12–18.

———. 1960b. "White Man Who Turned Negro Is Praised and Damned as a Result of his 'Journey into Shame.'" *Sepia* (October): 11–18.

———. 1961. *Black Like Me*. Boston: Houghton Mifflin.

———. 1962. "Current Trends in Censorship." *Southwest Review*, 47, no. 3: 193–200.

———. 1977. *A Time to Be Human*. New York: Macmillan.

———. 2003. *Street of Seven Angels*. San Antonio: Wings Press.

———. 2004. *Scattered Shadows: A Memoir of Blindness and Vision*. New York: Orbis.

———. [1977] 2010. "Epilogue." In *Black Like Me*, edited by Robert Bonazzi, 165–94. New York: New American Library.

———. 2011a. "Painful Truths about the System." *Prison of Culture: Beyond Black Like Me*, edited by Robert Bonazzi, 55–61. San Antonio: Wings Press.

———. 2011b. "Privacy of Conscience." *Prison of Culture: Beyond Black Like Me*, edited by Robert Bonazzi, 3–8. San Antonio: Wings Press.

Groff, Lauren. 2020. "'American Dirt' Plunges Readers into the Border Crisis." *New York Times*, January 19, 2020. https://www.nytimes.com/2020/01/19/books/review/american-dirt-jeanine-cummins.html

Gurba, Myriam. 2019. "Pendeja, You Ain't Steinbeck: My Bronca with Fake-Ass Social Justice Literature." *Tropics of Meta*, December 12, 2019. https://tropicsofmeta.com/2019/12/12/pendeja-you-aint-steinbeck-my-bronca-with-fake-ass-social-justice-literature/

Halsell, Grace. *Soul Sister*. Greenwich, CT: Fawcett Crest, 1969.

Hardy, Henry. n.d. "The Isaiah Berlin Virtual Library." Accessed July 1, 2021. http://berlin.wolf.ox.ac.uk

Harris, Ian. (2017). "Berlin and His Critics." In *Liberty*, edited by Henry Hardy, 349–64. Oxford: Oxford University Press.

Lewis, Helen. 2021. "The Identity Hoaxers." *The Atlantic*, March 16, 2021. https://www.theatlantic.com/international/archive/2021/03/krug-carrillo-dolezal-social-munchausen-syndrome/618289/

Lomax, Louis. 1961. "Capital Gains in Shackled Men." *Saturday Review*, December 9, 1961.

Lott, Eric. 1993. "White Like Me: Racial Cross Dressing and the Construction of American Whiteness." In *Cultures of United States Imperialism*, edited by Amy Kaplan and Donald E. Pease, 474–95. Durham: Duke University Press.

Manzoor, Sarfraz. 2011. "Rereading: *Black Like Me* by John Howard Griffin." *Guardian*, October 27, 2011. https://www.theguardian.com/books/2011/oct/27/black-like-me-john-howard-griffin

McClendon, Robert. 2015. "Rachel Dolezal Wasn't Passing for Black, She Was Committing Racial Identity Theft." *Times-Picayune*, June 20, 2015. https://www.nola.com/opinions/article_b71bdb91-ac82-5dff-ac99-99f6c061e96f.html

Merton, Robert K. 1972. "Insiders and Outsiders: A Chapter in the Sociology of Knowledge." *American Journal of Sociology*, 78, no. 1 (July): 9–47.

Mill, John Stuart. [1859] 2006. *On Liberty and The Subjection of Women*. Edited by Alan Ryan. Harmondsworth: Penguin.

Milosz, Czeslaw. [1953] 1985. *The Captive Mind*. Translated by Jane Zielonko. Harmondsworth: Penguin.

PEN America. 2020. *"PEN America Responds to 'American Dirt' Controversy."* January 29, 2020. https://pen.org/press-release/pen-america-responds-to-american-dirt-controversy/

Stevens, Leslie, and Nicole Maurantonio. 2018. "Black Twitter Asks Rachel: Racial Identity Theft in 'Post-Racial' America." *Howard Journal of Communications*, 29, no. 2: 175–91. https://www.tandfonline.com/doi/abs/10.1080/10646175.2017.1354789

Terkel, Studs. [2004] 2010. "Foreword." In John Howard Griffin, *Black Like Me*, xi–xii. San Antonio: Wings Press.

Thompson, Ayanna. 2021. *Blackface*. New York: Bloomsbury Academic.

Watson, Bruce. 2011. "*Black Like Me*, 50 Years Later." *Smithsonian Magazine*, October, 2011. https://www.smithsonianmag.com/arts-culture/black-like-me-50-years-later-74543463/

Winfrey, Oprah. 2020. "Jeanine Cummins: *American Dirt*, Part 1." *Oprah's Book Club*, Apple TV+. 1:06:21. March 6. https://tv.apple.com/us/episode/jeanine-cummins-american-dirt-part-1/umc.cmc.3t6st2r1us26j3cmvdz4tn7v3

8 Democracy without the Government

The Importance of Local News to Free Speech

Alice Dreger[1]

This is primarily the story of what a group of us learned when we decided to come together, starting in 2014, to give to the people of our college town local nonpartisan news where we had almost none. Secondarily—though no less importantly—it turns out to also be a story of how, over seven years of pushing our community to bring itself the news, we learned the fundamental importance of freedom of the press to three other freedoms that are ensconced in the First Amendment: the freedom to speak, to protest, and to raise objections to the government without fear of reprisal.

Through the process of working together as citizens to bring the news, people of this community—East Lansing, Michigan—found and brought forward voices we didn't know we lacked. We uncovered "public" information about our lives that we didn't know existed. We also helped whistleblowers be heard, shined light on hundreds of millions of dollars of shady debt and questionable private-public deals, obtained hard evidence for what our Black residents and visitors were saying about racial bias in local policing, increased voting rates in local elections, and got some sewers fixed.

Because this is a story of how creating a local news brigade helped my town to promote a vocal, informed, and engaged citizenry, one insistent on its rights to access to our government, this is also by implication a cautionary tale of how dangerous the collapse of traditional, nonpartisan, watchdog journalism may be to our freedoms as Americans. As Margaret Sullivan of the Washington Post wrote in *Ghosting the News*, her recent book on the collapse of local journalism in America, "When local news fails, the foundations of democracy weaken. The public, which depends on accurate, factual information in order to make good decisions, suffers. The consequences may not be obvious, but they are insidious" (Sullivan 2020, 20).

I had not really ever intended to become the founder of a local newspaper nor to spend quite so much of my life as a local investigative news reporter and publisher. In 1995, I earned a Ph.D. in History and Philosophy of Science at Indiana University, and my academic historical

research led me, in turn, to working in history of medicine and on contemporary patients' rights. Specifically, I worked with members of the intersex rights movement to try to improve the social and medical treatment of people born with bodies that do not fit the standard definitions of male and female. Early on in that work, it became clear that the way to effect change—including in clinics—was through the media. That's where speech made a real difference. So, I started publishing op-eds with places like the *New York Times*, *Wall Street Journal*, and *Washington Post*, and I worked closely with national and international health and science journalists to bring the news of what we were trying to do: force the medical power system to tell patients and parents the truth about intersex diagnoses; to collect and publish honest data on outcomes of interventions; and to stop removing healthy reproductive and sexual tissue without the explicit consent of the patients themselves (Dreger 2016).

The importance of the news media to our cause could never be in doubt. Getting our work into the media was what enabled intersex adults and parents who felt they had been harmed by the clinical system to speak directly to large audiences. In spite of many intersex conditions being relatively rare, the media work allowed affected individuals who had been inadvertently shamed and isolated to find their peers—to be connected to support and advocacy groups. And it forced those in power to answer. While plenty of intersex people told their stories on individual blogs or websites of support networks, the news media was critically important to the intersex patient rights movement's *effective* free speech, protest, and demands for engagement and reform.

But starting a few years into the twenty-first century, it began to feel like we were living in some kind of sci-fi fantasy where aliens invade and quietly remove certain members of the population. In this case, it was health and science reporters who were suddenly vaporizing. Many disappeared from the profession without clear trace. Those who remained often told me that they could no longer dedicate large amounts of time to researching one story. They were now expected to be "content providers" at an increasingly frenetic pace as the market shifted rapidly from a news ecosystem in which people plunked down money to purchase specific periodicals to a strange new world in which page hits were what mattered. Instead of an organization being funded on the basis of its entire work, as happens with traditional subscriptions, the shift to ad-funded online news meant what mattered was fast, catchy news.

When talking about intersex rights, we were at least dealing with a sexual subject, which meant that reporters and their editors were generally still interested; sex always sells. But any story that required substantial original investigation, a learning curve, or a lot of editorial time to get right—that wasn't going to make it to print. That meant, for example, that when we uncovered evidence of an unethical drug intervention being deployed on pregnant women identified as being at risk of giving birth

to an intersex child, I struggled to find reporters who would cover the scandal (Dreger 2016). I remember quite vividly the time when I met with my own editor at his Washington, D.C., office at The Atlantic, when I was writing for that magazine's online Health section, and he told me that much as he appreciated my investigative historical work, I could not bring it to The Atlantic, because he did not have the resources to provide the lawyers and fact-checkers such work required. The magazine's offices were in the Watergate complex. The historical irony was not lost on me.

Concerns about the harms caused by the radical restructuring of the journalism ecosystem also arose from the research I did, starting in 2007, for the book *Galileo's Middle Finger: Heretics, Activists, and One Scholar's Search for Justice*, which traced out what happened to academic researchers whose work or words offended identity-politics activists. The book was published before the term "cancel culture" came into being, but that was essentially what the book tracked: attempts to destroy the reputations and even lives of "offensive" researchers (Dreger 2016). *Galileo's Middle Finger* documented how the decline of investigative journalism allowed activists to wield enormous power in controversies—to put forth patently false claims about researchers or their work and to dominate the dialogue, because of the lack of professional reporters to sort out the truth. The decimation of investigative science and health journalism was having a direct impact on academic research—a field that, when all is working well, tends to save or at least improve lives.

More troublingly still, while working on that book, I could see how pseudo-news organizations—online sites that were really something more like gossip rags—would take advantage of these controversies to drive traffic to their own sites. This, in turn, made the whole situation that much more dangerous for researchers who were then seen as embarrassing their institutions, universities which had developed their own obsessions with branding and marketing. It was not uncommon for researchers in trouble to call me to ask me to investigate and report on what was happening to them, in the hopes that they would be saved by fact-centered reporting on their plights. I could not possibly keep up.

Given all I was dealing with nationally, I would not have moved in mid-2014 to form a nonpartisan news organization for my primary-home community in East Lansing had I not been motivated by specific events where I felt the same lack of journalistic safety net, this time threatening me at home.

First came a real estate developer who was making a deal with the City of East Lansing to build a huge redevelopment project just down the hill from my historic-district house. My neighborhood president, a lawyer and writer named Ann Nichols, alerted me to this, and we became aware that some citizen watchdogs had discovered that the developer had a troubled track record. City leaders seemed to be risking our future and our taxes on this problematic deal. The local U.S. Today paper (the

Lansing State Journal) and the other local news outfits were occasionally reporting on the deal, but their reporters did no deep investigation into the details and the red flags; they tended to just publish fantasy architectural renderings and gloss over the latest iteration of the deal. City Council members were generally happy with the positive press and treated those of us who were critics as whiny suburban NIMBYs ("not in my backyard").

Attending City Council for the first time because of this redevelopment deal, I found myself shocked at how decisions were being made. East Lansing skews hard left—people call it "The People's Republic of East Lansing," a common joke about these kinds of college towns—yet many of the votes seemed to amount to what could be called corporate welfare—giveaways of tax breaks to big corporations. There was also a shocking lack of transparency with regard to documents that under the law I knew counted as "public." Because I had found myself having to sue the *federal* government under the Freedom of Information Act (FOIA) to obtain documents from the Food and Drug Administration (FDA) and Office for Human Research Protections (OHRP) for my research on that ethically problematic intersex fetal drug intervention, I was keenly aware of my rights to public records. To be denied that right by federal and local governments that appeared, on the surface, to be "blue" felt particularly insulting to me as someone who almost always voted with the Democrats. I learned later that, in fact, pretty much every government tries to block public access to certain records, though some more aggressively than others (Dreger 2018).

The year before taking the step of forming a nonprofit corporation for a news organization, I urged a labor-economist neighbor, Ruth Beier, to run for City Council, and she was elected to our five-member Council in November 2013. Our neighborhood wanted Ruth elected to help us with the troubled developer who was steadily vacating the once-occupied commercial buildings nearest our homes. (Perversely, blighting commercial property ultimately increases tax incentives for developers in Michigan.) But we also wanted Ruth to address what she, as a labor economist, recognized as the City's massive unfunded pension liability. The City had a debt nearing $200 million, a crushing liability which government accounting rules were at the time allowing our City leaders to sweep under the rug.

Then came a huge ice storm on Winter Solstice, 2013. Our power company, the Lansing Board of Water and Light (BWL), is owned by the neighboring City of Lansing, and under Michigan's laws, as a publicly owned utility, it is not subject to typical state-level regulation. As such, BWL had not bothered to trim most trees in our area in over a hundred years, and we live in a town full of old trees. The ice storm brought down most of the grid. A week in, as thousands of us were living with freezing temperatures and bursting pipes, BWL still had a tiny handful of crews working on the problem, with no reconnection in site. Ruth,

my spouse, and I organized and staged a protest. I called on the existing local media to cover that protest. There seemed to be no question that the media work—chiefly organized by me working from my intersex activism experience—was what it took to get outside utility crews called in to help. Without the media, I learned, it is nearly impossible to speak truth to the power company.

The ice storm misery was really the last straw: at that point, a group of us recognized that without a real news organization in East Lansing, we would continue to suffer from a clueless populace and a government and government-owned utility that felt insulated from the people's scrutiny—no less the people's protest or demands for redress. I calculated that, given my experience—doing investigative historical work on thorny controversies, working with national and international news organizations on reporting and op-eds, and helping to run the nonprofit Intersex Society of North America—I could figure out how to lead such a group.

Part of my inspiration in the founding of East Lansing Info—known locally as "ELi"—was the Arab Spring of 2010. During this period, anti-government protestors in Tunisia, Libya, Syria, Egypt, and beyond not only assembled and raised grievances, they also used cell phone technology to carefully document—as citizen reporters—what was happening. At the time I was working on establishing ELi, investigative journalist David Carr (then based at the *New York Times*) was actively talking about the Arab Spring as an example of "citizen journalism," the phenomenon of ordinary citizens combining modern technology and the traditional value of a free press (the right of the people to know what's going on) to bring factual news. In the words of Matthew Ingram, Carr believed in "the internet's ability to self-correct" despite "the valley of despair into which he thinks many newspapers have fallen" (Ingram 2012).

The continuing decline of local news in America has now been well documented, particularly by Sullivan at the Washington Post (Sullivan 2020) and by Penelope Muse Abernathy, Knight Chair in Journalism and Digital Media Economics at the University of North Carolina. Abernathy's research has shown that, from 2004 to 2018, the U.S.A. lost about 1,800 newspapers. By 2018, Abernathy found, "There are hundreds—if not thousands—of communities at risk of becoming isolated news deserts. There are almost 200 of the 3,143 counties in the U.S.A without any paper. An additional 1,449 counties, ranging in size from several hundred residents to more than a million, have only one newspaper, usually a weekly….The residents of America's emerging news deserts are often its most vulnerable citizens. They are generally poorer, older and less educated than the average American" (Abernathy 2018). Since that study was produced, the COVID-19 pandemic has only accelerated the rate of newspapers' demise (Hare 2021).

Researchers have found serious harm to communities that lack dedicated local news organizations. A trio of financial researchers—Pengjie

Gao, Chang Lee, and Dermot Murphy—reported in 2020 in the *Journal of Financial Economics* that the loss of a newspaper to a town has a direct financial impact on taxpayers. "Following a newspaper closure, municipal borrowing costs increase by 5-11 basis points, costing the municipality an additional $650,000 per [bond] issue. This effect is causal and not driven by underlying economic conditions." What's the causal chain? These researchers' "results indicate that local newspapers hold their governments accountable, keeping municipal borrowing costs low and ultimately saving local taxpayers money." Indeed, Gao et al. noted the issue goes beyond saving personal pocketbooks: "Related academic studies in the political economy space show that geographic areas with reduced local media coverage have less informed voters and lower voter turnouts…removing the incentives of local politicians to work hard on behalf of their constituencies" (Gao et al., 2020).

That lack of accountability was the problem we were facing in East Lansing when we came together to form a citizen-news brigade. At the time, there *was* an active local politics discussion forum, called Public Response, where some gadflies posted their findings. Many towns don't even have that. But the problem was that, at Public Response, the gadflies wrapped their research in vitriolic screeds, causing many who might otherwise engage to turn away.

I was convinced what we needed was something more like an old-fashioned newspaper—although online, to save money, and staffed—at least at first—chiefly by volunteers, again to save money. I had to agree with Carr that, while modern technology including the internet was the chief reason for local news' decline, the same technology could allow us to bring real news at a fraction of the traditional cost, freeing us from the weighty economics that were taking down many older news organizations. I understood why Carr said we could use our cell phones and computers to create an army of local news citizen-reporters and think of the present day as a "golden age for journalism" (Fresh Air 2011). And I felt strongly we had to try.

Our first Managing Editor at ELi was Dudley "Smitty" Smith, an engineer who had just retired from General Motors and was looking for a new project. (We were old friends.) Smitty and I put together our application to the Internal Revenue Service to become a 501(c)(3) non-profit charity. With the help of Thad Morgan, the same lawyer who had sued the federal government under FOIA for me, we created a non-profit Michigan corporation, registered to my home (as was the Intersex Society of North America for many years). The first Board of Directors included me, former East Lansing mayor and retired commercial banker Victor Loomis (a man rumored to be a rare East Lansing Republican), Michigan State University (MSU) law professor and First Amendment scholar Michael Lawrence, and MSU natural sciences professor Stephen Thomas, an expert in digital education. Website help was largely provided

by computer tech Lisa Lees, who volunteered her labor, as did many of us. Ann Nichols, the neighbor I had met because of the big redevelopment proposal, became Managing Editor after Smitty, and Ann and I ran ELi for many years before handing it off to younger people.

From the outset, we set up ELi to be a place where people could come for facts and not our opinions. We wanted it to be an explicit alternative to places that would feature or devolve into opinionated debates and snarky comments. ELi did not (and does not) publish comments, letters to the editor, or op-eds at its website or in its paper editions. The only "editorials" ELi runs are authored by the staff leadership and used to explain our work and our decisions about controversial issues. These columns are called "Your ELi" to make the point that ELi belongs to the people of East Lansing, not to any individual or for-profit corporation.

Besides bringing people the news, we set out from the start to use ELi to teach people their rights to government access and to teach them why they should want facts, even when the facts made them uncomfortable or angry. We worked to teach them that they should see corrections in a newspaper as a sign of *strength,* not weakness. (I still remember the woman who told me she trusted the *Lansing State Journal* more than ELi, "because they never publish a correction!") And we reminded people to tell the government, not just us, what they thought about our findings.

Because ELi is a recognized public charity, contributions to the work are tax deductible to the extent allowed by law. That promotes donations but also helps people understand our work as mission-based public service (cp. Konieczna 2018). In 2015, our first full calendar year of operations, ELi brought in about $37,500 in donations and expended about $32,500. The system has ramped up over the years and today most of the staff is paid rather than working voluntarily. In 2021, ELi brought in about $185,300 in donations from individuals and $15,000 from NewsMatch (a national philanthropic campaign), for a total income of just over $200,000. Expenses came to about $203,000. Consistently, 86–90% of expenses go to pay local people.

How big a population does this serve? East Lansing's population, according to the census, is just under 50,000. In fact, only about 20,000 of us live here year-round; the rest are MSU students. But ELi's readership is disproportionately the people ELi's founders felt needed the news the most: year-round residents and taxpayers, the people most likely to vote in local elections. Today, ELi is recognized as an extraordinary community asset. A local attorney who works with developers told me he gives his clients a special warning about working in East Lansing: that, because of ELi, they will be treated fairly but with exceptional public scrutiny (so they should not play silly games with renderings).

ELi provides nonpartisan information in elections, bringing information never before easily accessible to voters, including the voting records of incumbents on controversial issues, campaign finance analyses, and

answers to our readers' questions to the candidates. As we had hoped, the work of ELi has had a measurable impact on local democracy; votership in City Council elections (which occur in off-years in terms of federal elections) has risen, and candidates now know the election competition is going to go well beyond who has the prettiest mailer.

We believe ELi's reporting is likely what led in 2015 to the previously rare unseating of a mayor, specifically in an election where Ruth Beier (the person I had urged to run) debated that mayor on the issue of whether the City's unfunded pension debt represented a financial crisis. Voters decided it did, ousting the mayor who claimed an annual balanced budget was what really mattered, and ultimately (in 2018) passed a 12-year municipal income tax to try to deal with the pension debt.

Meanwhile, people of color in East Lansing had long reported the problem of being stopped by East Lansing police for "driving while Black," but it took ELi's years' long reporting on policing in East Lansing to finally obtain data on the issue. That data showed that Black people are significantly more likely than whites to be stopped, arrested, and subjected to use of force by East Lansing police officers. A few months before the murder of George Floyd by Minneapolis police officer Derek Chauvin, ELi broke the story tying together two local Black men's accounts of allegedly being subject to excessive use of force by the same white East Lansing officer, reporting that led to: the sudden Sunday-morning retirement of the police chief; extraordinary (and extraordinarily-well informed) protests of the type we had not seen here before; investigation by an independent prosecutor (who exonerated the accused officer); and ultimately development of a citizen's police oversight commission. This reporting was led by Christine Root, who later moved from working with ELi on policing and pensions to working in the volunteer local governmental commissions overseeing policing.

Over the years, it has not been uncommon for me to wake up to find an anonymous packet of information pushed through my front door mail slot. ELi has become a means local people feel they can use to have the people of East Lansing hear them and their concerns. ELi's reporter Andrew Graham brought the story, for example, of a man of Arab descent who was wrongly accused by an East Lansing police officer of raping a white woman. The case involved a member of City Council denouncing the police department for a police press release that she said essentially condemned the man as a rapist. Leaders of East Lansing's Islamic center formally thanked ELi for the work.

And lest it appear that ELi is anti-police, it is worth noting that representatives of the police rank and file have turned to our reporters when they have felt mistreated by the City leadership. For instance, after the police unions contacted us, ELi reporter Al Hargrave brought the unions' perspective on why officers deserve COVID-related funding that would otherwise go to actions like sprucing up City Hall and the community

center. More than one officer has been a source for ELi's reporting, reporting that has in turn reached decision-makers with information they might otherwise never have had.

City workers also turned to us in a case where nine wastewater treatment plant employees brought suit against the City for exposing plant workers to friable asbestos for seven straight years after an independent contractor notified the City of the significant danger in the plant. The suit also showed that a major mercury spill at the plant had been covered up, with the clean-up utterly botched, exposing workers and possibly also residents to the dangerous chemical. In the case of the problems at the wastewater treatment plant, I used FOIA to obtain about 900 pages of materials, and I covered the story for several years, tracking the story all the way up through when the City Manager fired Troy Williams, the lead whistleblower in the case.

Weighing in on the nine plant workers' case while ruling in the City's favor, the Michigan Court of Appeals wrote, "It is admittedly stunning that a maintenance supervisor and a plant superintendent would be so uninformed about how to handle the hazardous materials around which they and their employees work. As was the case with the WWTP's [wastewater treatment plant's] statutory violations involving asbestos containing material, authorities rightly cited and fined East Lansing for not having in place an emergency plan to handle [hazardous material] spills, not informing employees of the [major mercury] spill, and not properly cleaning the spill." It's worth noting that, while lawsuits may sometimes result in compensation for harm, often what really matters to those harmed is being seen, being heard, and having others stand up with them. That happens through the press.

This work has truly taught us the critical connections among those freedoms listed in the First Amendment: the free exercise of religion, freedom of speech, freedom of the press, "the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." Before this work, I had thought of these rights as discrete. Several years into my work for my community, I came to understand how the freedom of the press underlies all those other freedoms, as our news organization forms a nexus through which people are able to communicate and safely seek the help of the Fourth Estate when the government is failing or threatening—or even actively harming—them. A person may technically have the rights of the First Amendment, but if they can't figure out how to get their stinky sewer fixed after years of living in misery, it is a news organization like ELi that helps them understand how and why to organize peaceable protest, how to reach the decision-makers, and how to get help following the money that either will or won't go to rebuild those sewer catch-basins.

One of the most critical services we perform at ELi is fact-checking of rumors. The paradox of the present age is that while it feels very easy to

access "information," it can be very challenging to find out what is true. There's no good reason to believe that journalistic outfits of the days before the internet produced more accurate news reports, on average, than what is being produced today. But the explosion of readily available information sources presents us with a conundrum as we try to discern who and what to believe. People here regularly turn to ELi when they hear rumors of young women being kidnapped into vans and sex trafficked (not true), of bodies being found (sometimes true), or of corruption among government officials (blessedly rare around here).

ELi has also uncovered and even fomented political diversity that we never heard about before. We've made a point, with our Community Advisory Board, to bring on people who are politically right of center, among other local minorities, to make sure we're taking seriously the broad prospective. Our team has explicitly worked to hire relatively conservative reporters to make sure we try to balance the left-leaning nature of this town. I'm always pleased when readers tell me they just can't figure out ELi's politics. I tell them we are pro-democracy and pro-facts.

Given how I got here, it's probably not surprising that my own reporting for ELi has focused on big redevelopment deals, including public-private deals in which hundreds of millions of dollars have been diverted from the usual taxing authorities to enable private redevelopment. Perhaps the strangest real estate case I've had to report was a case in which City staff decided to auction off, to marijuana industry speculators, a million-dollar piece of public land on eBay without publicly announcing the auction. In another case, one in which I was doggedly tracking a troubling tax increment financing (TIF) and bond scheme, the developers mounted a dedicated website and press conference to denounce my reporting as "dangerous activism." ELi's Board of Directors responded with a sharply worded letter, and ELi readers sent extra donations (and a few bottles of liquor for me).

Meanwhile, the developer whose problematic track record originally drew me to City Council ultimately moved to sue me and ELi in 2021, after we reported that he had been federally indicted on eight white-collar charges, including mortgage and bank fraud. The district court judge ultimately assigned to the defamation case honored our request to have the case summarily dismissed—she agreed with our lawyer's argument that the plaintiffs did not point to any false claims made by me or ELi—but even after the developer pleaded guilty to one count of felony tax evasion in the case, he filed an appeal in the defamation case. (That is pending.) Some states have anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation which financially disincentivizes frivolous lawsuits brought against citizens who bring forward challenging material and claims. Unfortunately, Michigan is not such a state.

We have also been actively threatened or attacked by leaders in our City government. We reported on a federal fraud suit brought against

the City by a local watchdog, Phil Bellfy, and the Department of Justice over the use of public monies to build an expensive retaining wall on the private property of the law firm contractually hired as East Lansing's City Attorney. After numerous reports by ELi detailing the matter, the City Attorney wrote to threaten a possible lawsuit. (We did not back down, and he did not sue.)

I also reported at ELi my findings that the City's code on fire inspections for new construction was out of date and that the City was not following the law or keeping records of certain fire inspections. The City Manager used the City's website to claim the reporting was misleading, although our work held up to scrutiny. In fact, when the City obtained a new City Attorney (after the one who co-owned the retaining wall property was fired by a new Council), the Council was asked to amend the City's fire code to finally bring it up to date, and the City started keeping fire inspection records, essentially vindicating our reporting. It is worth noting that in the case of the 2017 Grenfell Tower fire in London, which killed over 70 people, before the fire happened, residents had been running a blog reporting on safety concerns, including about the potential for deadly fires. At least two of those residents, Meriem Elgwahry and Nadia Choucair, had been threatened with legal action for their reports. The two died in the fire, respectively, aged 27 and 33 (Osborne 2017). I am not suggesting East Lansing ever faced the same level of fire risk; I don't think it did. But London is not exactly a primitive city in terms of regulation and fire codes. We should all be wary of our government-led fire safety systems. Journalists save lives and sometimes risk their own. The Nobel Peace Prize Committee recognized that with the awarding of the 2021 prize to journalists.

When I founded ELi, I never expected that we would uncover the stories we have. East Lansing seemed to be a sleepy college town, awakened only occasionally by a big football game or a grand redevelopment scheme that never would actually get off the ground. But the truth is that if you have a newspaper, people will come to you with stories that ought to be reported. And simply paying attention to City Council, Planning Commission, School Board, and the weekly police reports will mean plenty of important news that would otherwise never go reported.

The ELi team has worked extremely hard to remain nonpartisan, to advocate only for values we believe everyone expects us, as their local news team, to advocate: governmental transparency and fairness by the government. To make sure people here agree with ELi's leaders that these are reasonable values, we have our Community Advisory Board, we poll our readers, and we hold public discussions on things like "what we value." We publish transparency reports of our income and expenses, and take complaints, suggestions, and questions seriously. In 2021 alone, we answered over 150 reader questions, thanks chiefly to Managing Editor Emily Joan Elliott.

At ELi, we have sometimes held long editorial meetings to discuss how to manage a topic in a nonpartisan fashion. For example, when Richard Spencer came to speak in East Lansing, renting a venue from MSU, we struggled with the question of how to describe his political position, ultimately landing on the phrase "white nationalist," a term we thought his supporters and detractors would both find accurate. When we have had one candidate in an election stand out—for example, when we learned that one School Board candidate had committed plagiarism on an application to serve on the Board, and when we found that one City Council member appeared to have violated local, state, federal laws with her campaigning—we have had long discussions on how to bring the news without intentionally helping or hurting any individual candidate. When we bring this hardest of hard news, we often provide a "Your ELi" column to explain our reasoning, always inviting readers to give us their thoughts.

We have pushed extremely hard on the issue of government transparency, helping our readers to understand that they have the right to access public records and public meetings. Our team filed so many Freedom of Information Act requests that, a couple of years ago, the City government decided to publish logs of all FOIA requests in an effort to shame us. But we were delighted at the publication of all FOIA requests, as it has provided us leads and sources. We've taught people how to use FOIA, and sometimes filed FOIAs for them, providing political cover. Since ELi's founding, transparency has been named by our readers as a perennial issue in City Council races, something we take as a sign that people here have come to understand their right to access and redress.

The primary goal of ELi—bringing the news—has obviously been achieved. But what I've always considered to be an equally important goal has also been achieved: that of engaging a wide swath of the community in vibrant discussions of the epistemology of democracy. For nearly eight years, ELi has formed a critical nexus of conversations—conversations we have sometimes purposely pushed—about what constitutes news, who should be reporting news, what makes a news report ready for publication, what constitutes adequate context and fact-checking, conflict of interest management, and who pays for news production. We have had over 150 members of the community act as reporters through ELi, all held to our standards. Hundreds more have participated in other ways, through volunteer service as advisors, as members of public discussions, as participants in surveys. We have had, in East Lansing, what I would call "dinner table media literacy," as high schoolers hired by us (and trained in our Summer Youth Journalism Program) have talked about their work with their family, and octogenarians reporting for us have shared their reporting with their children and grandchildren.

Other news operations around the U.S.A. have found a similar benefit to engaging local citizens in bringing the news. City Bureau in Chicago,

for example, trains and pays Chicagoans "to monitor local government and contribute to a communal pool of civic knowledge," helping empower people to engage with their governments (see citybureau.org/#who-we-are). I've shared experiences and materials with ELi-like operations being founded around the U.S.A. and Canada, and many of those groups express the same excitement about using local citizen-news start-ups as a way to bridge gaps and activate factually informed civic engagement.

Conventionally trained journalists looking at what we have done at ELi have sometimes found themselves befuddled or uncomfortable. The fact that we run an entire city's news operation on less than the City Manager's compensation package doesn't seem to bode well for the future of journalism in terms of living-wage jobs. And the idea that people without journalism degrees can be doing reporting also feels threatening. But much local reporting is simple and does not require elaborate training. It doesn't take much, for example, to teach someone how to report on the opening of a new business, how to bring a summary of what happened at the Arts Commission, or how to interview some local experts and report back on why we seem to have so many skunks in our yards this year.

The tougher assignments—the investigative work—is taken on by those of us with more relevant training and experience. ELi's most recent lead City Desk reporter, Andrew Graham, recently graduated from Syracuse University with a degree in journalism. (He grew up here and worked for us in the summers of his college days.) Christine Root, who has taken on much of ELi's reporting on the pension debt and the police department's records, has a master's degree in economics from American University and decades of experience working on African and African American activism, including as an archivist of racial justice movements. History and journalism are closely allied fields in terms of methodology, so I've used the skills of my original profession in my work as a journalist. The same is true for Emily Joan Elliott, who in early 2022 took over the helm of ELi from me. Emily earned her Ph.D. in Soviet history at MSU and often jokes to me that getting information out of the Soviet archives was a piece of cake compared to getting information about the annual deer culls from the City of East Lansing.

While ELi has never had an office and may have something of a Battlestar Galactica feel to it, the team prides itself on its professionalism and mission of community service. And I think professional journalists should understand that, far from ELi constituting a threat to their world, the work we do foments an appreciation of good journalism that ends up extending well beyond our City limits. Many donors to ELi have told me that, because we've spent years explaining to them why good journalism matters to democracy and why it costs money, they now subscribe and donate to other news organizations regionally, statewide, and nationally.

Said one to me, "I subscribe to the Washington Post now, because of ELi." Today, ELi is treated as a beloved community asset—and that matters because it means that the people here have come to believe that a free press is something they should cherish, protect, support, and be part of. While we may not look like traditional news in terms of our budgetary outlay or our staff, our work supports faith in journalism.

The greatest existential threat we continue to face, in my reckoning, is the dangerous blurring all around us of news and opinion, and the related use of what looks like journalism to carry out partisan political agendas. Being in Michigan, a swing state in presidential elections, we see the setting up here of what *look* like nonpartisan, nonprofit news organizations but that are, in fact, P.R. arms of the Democratic or Republican National Committee. These organizations actively draw readership and donations away from truly nonpartisan organizations like Bridge Michigan, which tirelessly watchdogs both sides of the aisle here.

And, at the national level, independent news organizations regularly mash together news and opinion—and even "sponsored content" (paid ads that look like independent journalism) —in ways that passively train news consumers to think all news is really opinion, and opinion is somehow news. CNN, for example, frequently has headlines featuring their own reporters as subjects, as if Jim Acosta challenging President Trump is the story of the day. (A reporter questioning an elected official ought to be seen by any news organization as the equivalent of doing the laundry.)

Social media exacerbates this problem as it encourages people to treat news as something to react to with thumbs-up, hearts, frowny-faces, and the like; news functions as a stimulant rather than an informant—a stimulant to precipitate reactions that are then used, by the social media data-collectors, to maximize the "free" platforms' profits by targeting ads. What we find at ELi is that over half of our readers are obtaining our news through Facebook—a figure consistent with other local news operations—rather than getting it directly from our website, paper editions, or email newsletters. Why does this matter? Because Facebook hyper-controls what our readers see of our work there. I recall vividly the day a neighbor ran into me and said, "It's a shame you're not publishing anymore." What had happened was that Facebook had decided she didn't "need" to see our material anymore, during one of Facebook's campaigns to "help" its users by bringing more "friends and family" posts and fewer news posts. Most people don't understand that social media platforms look like havens for free speech but, in undermining news organizations, in fact become places where responsible civic engagement may go to die, uninformed and shouting at the wind.

Nevertheless, an increasing number of Americans are using firewall-free social media platforms as regular sources of news, with the Pew Research Center finding that, by 2020, about a third of Americans were getting news that way (Shearer and Mitchell 2021). What those

people probably don't realize is the extent to which Facebook is managing what they will see. When Facebook came under fire for allowing racially discriminatory housing ads, for example, it set up algorithms to try to prevent more of such ads, and those algorithms made it extremely difficult for us to push out to our Facebook readers news we were bringing of potential housing discrimination in East Lansing. Frequently, when we have tried to bring information about elections or COVID-19 vaccinations, Facebook's bots have treated us as sources of potential disinformation or misinformation, effectively blocking our work from normal sharing channels. Add to this the substantial problem we face in telling ELi readers who use Facebook that we're raising money from readers; Facebook wants us to raise funds only through "Facebook fundraisers" so that the company can use those fundraisers to collect and hold the funds and to garner yet more information about our readers in the process.

Fundraising has been a perpetual challenge for our organization, as for any nonprofit news operation. Americans have tended to think of journalism as something like a public utility: when you want the news, you turn the knob, and you get it. As with the fresh water that comes of the taps and the generally reliable electrical current that comes through the sockets, most people have come to expect the ability to easily get fresh and reliable news—of major weather events, of their governments, of crime. I would argue that the fact that Americans get vividly angry with "the media" when they believe they've been fed inadequate or misleading information shows the degree to which they expect (and want) good journalism to be part of the basic environment.

But while most people expect to pay for the water and electricity and internet service that comes to their homes—if not directly, then through their rent payments—many do not seem to think that news provision is something for which they should have to directly pay the producers. They expect to be able to turn on their televisions, radios, phones, or computers and to obtain accurate news without a paywall. It is one reason why, rather than trying to use a subscription model—which seems hopeless—ELi has instead educated our community about why good journalism is a public service they ought to value as they value the local foodbank, homeless shelter, and rape crisis center. We explain that our model is based on the same basic premise—that people should take what they need and give what they can.

And those of us who do nonprofit news do find ourselves groveling for funding the same way the local food bank, homeless shelter, and rape crisis center do. But in a way, I think there is a benefit to this: it subtly reiterates the point that we are part of the public safety net that is not provided by the government (cp. Konieczna 2018). We are not an industry that operates best—at least not anymore—as a profit-making enterprise. Like education, like medicine, while it's perfectly fine to have

some private options, all people ought to have the right to access quality services whether or not they can afford to pay.

There has been a recent move, concomitant with the big federal funding coming in response to the pandemic, to look to ways to have the government fund local journalism. Congress has been considering the Local Journalism Sustainability Act which would provide a billion dollars in payroll tax credits for journalists employed by local news organizations (Edmonds 2021). I am one of the skeptics of this proposal. While the notion would be to make the funding subject to objective constraints—so that, in theory, once the law is passed, no one in government would be actively deciding which organizations would and would not be funded—it seems likely that in practice, government funding would mean government interference in the work of people who are supposed to be independent watchdogs of the government.

At ELi, beyond the money challenge, we have the human challenge—the problem of getting along with each other in East Lansing while we do the hard work of watchdogging. Sometimes things get pretty tense, and I wonder why I have brought strife to my own people. In a relatively small city like ours, there are always going to be complicated relationships if you have a relatively large, vibrant, public-service news operation. Ruth Beier, the friend and neighbor I talked into running for Council before we incorporated ELi ended up becoming mayor and complaining about ELi's work on the night she resigned without warning from Council in 2021 in the middle of a meeting. She resigned because new Council members—including one who had moved from being an ELi reporter to running for Council—had just voted to fire the long-time City Attorney, the one who had threatened to sue us. Before her resignation, Beier had taken to complaining that no other city our size has to contend with an ELi. I regularly replied: "You're welcome?"

The goal has to be to manage all this in a way that has integrity, if not comfort, and that maintains what the Founding Fathers seemed to understand was a key role of the press—to be "free" of the government, in order to defend the rights of the people that might otherwise be trampled.

After seven years, when I think of what ELi has achieved in this community, when I think about what it means to have a "Fourth Estate" in America, I think often of something my son Kepler Domurat-Sousa said to me around 2015, when he would have been about fifteen years old. When he said it, I had just come back from a meeting of big landlords and residents like me, whose homes border student-rental districts. The meeting occurred because the landlords had been trying to overturn the City's prohibition on making certain improvements to their properties, improvements homeowners worried might mean expansion of student rentals. Just before the meeting, City staff had inadvertently become our common enemy by failing to be transparent with us all about a key report. Aggravated, a group of us wanted to boycott the meeting. I

suggested that, instead, we avoid the official venue and convene instead at a local bar to talk without City staff—to talk face-to-face as property owners with common concerns and some points of debate.

Over drinks, the ranchers and the farmers ended up having a very productive meeting in which we came to understand much better the concerns of the "other side." When I got home, my son asked me how it went, and I told him that, without City staff trying to "moderate" the discussion, we'd had an extremely productive conversation. It felt like we'd finally moved forward on this issue. That was when he said this to me: "Sometimes democracy works best without the government."

It had never occurred to me to try to conceive of democracy *without* government. But as I thought about his remark over the years, I realized that one way to understand the First Amendment is to understand that perhaps the Founding Fathers had the same insight: that to be truly free, people must have the ability to function outside of the government, without the government, or—when necessary—in opposition to the government. To have a free press is to have a democratic space without (outside of) the government. It is to have free speech that is meaningfully informed, to have the ability to peaceably protest in an effective manner, and to be able to petition the government for a redress of grievances, including by voting in an educated fashion to install a new government.

If the people who ran the major national news organizations in America took their jobs as seriously as do the people who bring East Lansing the news, our democracy would be functioning far better and in a far safer fashion. To get that point of accountability, it will take more than corrective lawsuits against "journalistic" sloppiness, and more than regulation of profit-obsessed social media companies, and more than better ethics and transparency laws. It will take educating people at the local level about what news is, and why they should see honest and responsible local news as a critical safety net without which they don't want to live. It will mean teaching them why they should be living in the First Amendment, and doing so intentionally with people inclined to vote the other way.

Note

1 Contact the author via alicedreger.com/contact

References

Abernathy, Penelope Muse. 2018. *The Expanding News Desert*. Chapel Hill: University of North Carolina Press. https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf

Dreger, Alice. 2016. *Galileo's Middle Finger: Heretics, Activists, and One Scholar's Search for Justice*. New York: Penguin Press.

Dreger, Alice. 2018. "I am a liberal. But I know Democrats in office are no better than Republicans." *The Guardian*, May 28, 2018. https://www.theguardian.com/commentisfree/2018/may/28/news-journalism-politics-democrats-republicans

Edmonds, Rick. 2021. "A window of opportunity has at last opened for federal aid to support local journalism." *Poynter*, October 14, 2021. https://www.poynter.org/business-work/2021/a-window-of-opportunity-has-at-last-opened-for-federal-aid-to-support-local-journalism/

Fresh Air. 2011. "David Carr: The news diet of a media omnivore." *NPR*, October 27, 2011. https://www.npr.org/2011/10/27/141658047/david-carr-the-news-diet-of-a-media-omnivore

Gao, Pengjie, Chang Lee, and Dermot Murphy. 2020. "Financing dies in darkness? The impact of newspaper closures on public finance." *Journal of Financial Economics*, 135, no. 2 (February): 445–467.

Hare, Kristen. 2021. "More than 100 local newsrooms closed during the coronavirus pandemic." *Poynter*, December 2, 2021. https://www.poynter.org/locally/2021/the-coronavirus-has-closed-more-than-100-local-newsrooms-across-america-and-counting/

Ingram, Matthew. 2012. "David Carr on newspapers, Twitter and citizen journalism." *Gigaom*, September 14, 2012. https://gigaom.com/2012/09/14/david-carr-on-newspapers-twitter-and-citizen-journalism/

Konieczna, Magda. 2018. *Journalism without Profit: Making News When the Market Fails*. Oxford: Oxford University Press.

Osborne, Samuel. 2017. "Two women feared dead in Grenfell Tower were 'threatened with legal action' after questioning fire safety." *Independent*, June 18, 2017. https://www.independent.co.uk/news/uk/home-news/grenfell-tower-fire-london-dead-legal-action-campaign-fire-safety-mariem-elgwahry-nadia-choucair-radical-housing-network-a7795586.html

Shearer, Elisa and Amy Mitchell. 2021. "News use across social media platforms in 2020." *Pew Research Center*, January 12, 2021. https://www.pewresearch.org/journalism/2021/01/12/news-use-across-social-media-platforms-in-2020.

Sullivan, Margaret. 2020. *Ghosting the News: Local Journalism and the Crisis of American Democracy*. New York: Columbia Global Reports.

9 The Conservative Defense of Free Speech

Luke C. Sheahan[1]

9.1 Introduction

Free speech generally receives its most ardent support from those of a liberal or radical persuasion who push the bounds of acceptable speech, arguing from the position of individual rights and from the purported necessity of challenging social authority and transgressing social bounds. Conservatives are often been cast in the role of censor, curbing verbal excess and valuing social stability over individual expression. There is much to these stereotypes. Nonetheless, traditionalist conservatism may offer a corrective to certain blind spots in traditional defenses of freedom of speech. Concepts such as tradition and authority have been central to conservatism since Edmund Burke's famous attack on the French Revolution and they found a place in the thought of Louis de Bonald in the nineteenth century and Russell Kirk and Robert Nisbet in the twentieth. This paper suggests that some elements of conservatism often used to justify suppression of free speech may be an appropriate part of a broader strategy in a defense of free speech.

This chapter is not arguing that conservatism does better in understanding the role of free speech than does liberalism, nor that the concepts employed here could not (and have not) been used to defend censorship. Instead, this chapter points out aspects of traditional conservatism that have hitherto be underappreciated by free speech advocates and that might serve as tools in their arsenal rather than targets of their attack. To put it another way, the premise of this paper is not that conservatism or the elements discussed here would offer a better defense of free speech than liberalism *per se*. It suggests that the neglect of conservative concepts in the defense of free speech may leave vulnerable certain aspects of our understanding of free speech and it might narrow ideological support for free speech. In this way, certain conservative concepts may help to identify and shore up the standard defenses of free speech in a way helpful to all free speech advocates. It can do this in two ways: first, by providing arguments amenable to philosophical conservatives (a longstanding cadre of free speech critics) thus recruiting them

to the free speech side and, second, by deepening and nuancing standard liberal approaches to defending free speech.

9.2 Conservatism and the Liberal Case for Free Speech

In his highly influential book *The Conservative Intellectual Movement in America Since 1945*, George Nash describes the modern conservative movement as consisting of three groups: classical liberals or libertarians, traditionalist conservatives, and anti-communists. The second group, "[s]hocked by totalitarianism, total war, and the development of secular, rootless, mass society during the 1930s and 1940s ... urged a return to traditional religions and ethical absolutes and a rejection of the 'relativism' which had allegedly corroded Western values and produced an intolerable vacuum that was filled by demonic ideologies."[2] Thinkers associated with this way of thinking include Richard Weaver, Peter Viereck, Russell Kirk, and Robert Nisbet. They prioritized traditional social groups and ways of life against the disruptions of modern economic and political changes, especially those associated with the democratic and industrial revolutions.

The primary source of traditionalist conservative thought is Edmund Burke, especially his *Reflections on the Revolution in France* and his defense of the traditional English constitution against critics who held that it was outmoded and undemocratic. Central to Burke's thinking is the importance of British culture and history, the unwritten constitution, to the concrete institutions of British political society. Similarly, conservatives such as Russell Kirk drew from Burke's sense of the unwritten constitution to argue that the American written Constitution was itself a product of the unwritten constitution of the American colonial experience. Political order cannot be prescribed as if from a book, but must grow from roots planted long ago.[3] Other elements in Burke include "prejudices," by which he means the moral prejudgments that become instilled through habit upon which we all must rely to act virtuously. He appealed to tradition as his primary guide to the efficacy of elements of the unwritten constitution and moral prejudgments. Likewise, he saw that the social authority of non-state institutions were essential in limiting political power of not only King and Parliament, but of the new democratic government in France.

By the liberal defense of free speech, I primarily mean that made by John Stuart Mill in his classic *On Liberty*. Liberalism focuses upon individual expression and the effect of censorship on the individual. It also tends toward a progressive understanding of the usefulness of speech. The utility of free speech for liberals is the liberation of individuals from the "dead hand of the past." Individuals ought not to be constrained by what has been said and thought before, but have the freedom to challenge

those ideas and to speak out against traditional institutions. This contest between ideas leads to progress in knowledge as the best idea wins out in a "marketplace of ideas." Liberals like Mill have a radical tendency to see the ensuing disruptions caused by challenge to old ideas as irrefutably good. The term "orthodox" is an epithet. Orthodoxy in religion, politics, and philosophy is always (or almost always) a problem, a barrier to truth, and heresy always (or almost always) an improvement.

Traditionalist conservatism's relationship to free speech is the inverse of the liberal. Its adherents have been traditionally suspicious of free speech protections because of free speech's capacity to undermine existing institutions by permitting spurious challenges to them. Additionally, conservatives have suspected that individual expression, despite the assertions of liberals, brings little to the table. As Burke writes, "We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages."[4] From the conservative perspective, an individual's speech in itself is of little value when weighed against the cumulative total of what has come before. There is little reason therefore to prioritize protections for individual expression.

The counterbalance between conservatism and liberalism in general is best accounted for by Roger Scruton who argues that conservatism arose in tandem with liberal individualism, both as responses to the Enlightenment.[5] Liberal individualism reflected the Enlightenment faith in individual reason and conservatism responded by focusing upon the need to preserve traditional liberties and social authorities against the effects of the political and social revolutions spawned by Enlightenment thought.[6] Conservative concern over the intrusions of political power, even under the auspices of the democratic state and especially in the name of egalitarianism, are these deleterious effects upon the social order and subsequently (and ironically) upon individuals.[7]

For my definitions and content of conservative thought, I draw mainly from the work of Robert Nisbet and Russell Kirk, both of whom described themselves as traditionalist conservatives and both of whom wrote influential books on conservative thought.[8] Both also anchored their conceptions of conservatism in the work of the eighteenth century British statesman Edmund Burke and both are central to the postwar rise of intellectual conservativism.[9] By drawing from these thinkers, I hope to focus upon concepts distinctive to traditionalist conservative thought in a way that does not overlap with classical liberalism, especially as the two traditions are intimately intertwined in American political thought. Nisbet and Kirk were generally cognizant of differences between those traditions, even if they also saw them as allies at various times.[10] This paper examines four concepts distinctive to traditionalist conservatism and casts them in a manner favorable to free speech: the

American unwritten constitution, moral prejudgments, tradition, and authority.

9.3 The American First Amendment and the Unwritten Constitution

The discussion of free speech in the American context naturally centers on the First Amendment to the United States Constitution. Conservatives have been reticent to innovate in terms of liberal rights, especially the claim that the First Amendment protects freedom of speech and freedom of the press beyond what was required by the original public understanding of the Amendment. Hence the reference to "*the* freedom of speech, or of *the* press" rather than simply freedom of speech and press in the constitutional text.[11] The article "the" denotes legal doctrine, dictated at that time by English common law. Debates surrounding ratification of the Bill of Rights did nothing to counter that point.[12] Conservatives would read the First Amendment and the rest of the written constitution in light of the unwritten constitution, the cultural practices and moral habits already in place when the Constitution was ratified. Essential to the American unwritten constitution was the English inheritance, especially the common law.[13] Freedom of speech and of the press were limited in common law by a number of doctrines, not least of which was seditious libel. But freedom of the press as Americans understood it in practice was very different from freedom of the press as it was articulated in theory.[14]

Conservatives such as Kirk cited with relish to Leonard Levy's famous study on freedom of the press in the founding era where Levy concludes that Americans adopted in whole the English common law tradition of seditious libel.[15] Levy argues that permissive free speech or free press doctrines as we know them today were not part of the political theory of the founders. Those men were firmly entrenched in the English common law of William Blackstone whose understanding of a free press extended only to protection from prior restraint. Levy's historical account is essentially impregnable as far as it goes. There is little evidence that the American Founders challenged the common law understanding of free speech or press in any of their political writings.[16]

However, Levy updated his thesis in a second edition of the book. He still held that while the *theory* of free speech and free press did not change during or shortly after independence and seditious libel remained the operative doctrine in law. In *practice*, Americans had a much broader view of these rights than did the contemporary English. What would have been without a doubt seditious libel under the common law was permitted by American courts for the most part. Levy writes of the "nearly epidemic degree of seditious libel that infected American newspapers after Independence."[17] Newspapers excoriated American state

and national politicians with the same venom they had heaped upon the British government during the Revolution. Levy explains, "Some states gave written constitutional protection to freedom of the press after Independence, others did not. Whether they did or did not, their presses operated as if the law of seditious libel did not exist."[18]

Even notorious episodes of American censorship, such as the proscriptions of the Alien and Sedition Acts of 1798 were, from the perspective of English common law, libertarian. The Alien and Sedition Acts permitted truth as a defense and required intention to deceive for prosecution.[19] Under common law, truth was not a defense for seditious libel. It could actually exacerbate the charge. If what one said seditiously about the government was true, then its utterance would be all the more damaging to the government's honor and reputation and, by extension, to social stability.[20] Members of Congress, even while pursuing a censorious agenda, still enacted more protections for freedom of speech than the English common law required. Even with these concessions to freedom, the Acts were controversial because of their tendency to suppress criticism of the government.[21] While political opposition to the acts as represented in the Virginia and Kentucky Resolutions might be expected, even more significant to the conservative sense of the unwritten constitution is the popular outrage engendered against the acts.[22] Common law judges may have seen nothing to object to, but as John Adams later lamented, many Americans certainly did.[23]

The theory of permissive free speech and press would take time to catch up with the general practice of permitting a large degree of free expression. While seditious libel existed in theory, the common man's conception of seditious libel had a remarkably narrow definition. When prosecutors and judges tried to bring cases of seditious libel, Levy reports, "grand juries refused to indict; and petit juris refused to convict. Public pressure limited the legislators' practice of punishing those who criticized them."[24] Public pressure tended to support freedom rather than undermine it. The American press engaged in nearly unfettered expression, despite the legal potential of prosecution, and Americans out on the street made sure they got away with it much (if not all) of the time.

During this period, shortly after the ratification of the Bill of Rights, new theoretical justifications were developed to explain the practice of expressive freedom in the American context. James Madison's famous 1799 report on the Sedition Act for the Virginia legislature is a case in point.[25] He argues that the American republican form of government where the people are sovereign required free speech for the same reasons that free speech was required in the British system for members of Parliament. Prior restraint, a censorship technique not permitted by the common law, had the same effect as post-publication punishment: it silenced expression. For the same reason prior restraint is forbidden, the silencing of speech, so should subsequent punishment. Most saliently,

Madison argued that "[t]he American idea of freedom of the press … must be understood in light of the American practice and public understanding."[26] For Madison, the concrete freedom of the American press was far beyond what was required under common law. He argued that this "strong tradition of practical press freedom" implied a necessary development of legal protection from government censorship. Michael Kent Curtis writes of Madison's argument, "It is reasonable to conclude that ordinary Americans would have understood the guarantee of the First Amendment in light of the *practice* of press freedom."[27] The practice of press freedom was more expansive in colonial and post-Independence America than in England. Americans out on the street (the ones who would sit on juries to try seditious libel) would read protections for "*the* freedom of speech … [and] *the* press," not in terms of the legal theory of English common law, but it terms of the *practice* of the American press. The article "the" still implied doctrine, but the practical doctrine in America was very different from that of the English common law.

This history of free speech and free press recounted by Levy and Curtis indicate the extent to which support for free speech has roots deep in the American unwritten constitution. When the Supreme Court finally incorporates the right against the states in 1925 and even further when it officially abandons seditious libel in 1964,[28] it does break with previous legal *theory*. But Americans had long abandoned that theory in practice. Levy writes, "[T]he American experience with a free press was as broad as the theoretical inheritance was narrow."[29] Americans have culturally respected speech and press rights to a greater degree than elsewhere, even as the inheritance of English legal theory technically did not require or even support such respect. A large portion of the American public were with Madison in developing a peculiar support for free speech as an essential component of American liberty. Such an understanding of the historical depth of expressive rights in the American tradition might not only win hesitant conservatives to the side of free speech, but this conservative defense of the roots of free speech in the American unwritten constitution gives historical depth to the defense of free speech.[30]

9.4 Tradition and Social Change

Traditionalist conservatism puts at its center a "veneration of the old and traditional," as Robert Nisbet writes, "[N]o matter how obsolete a given structure or *modus vivendi* may be, there may be in it a continuing, still vital function that man profits from, psychologically or sociologically."[31] Conservatives cling to tradition and they are prone to relying on that tradition for the simple reason that it has proved itself to work, whereas whatever alternative is offered has no such pedigree. Furthermore, there may be wisdom hidden deep in the recesses of traditional practices that is not easy to discern, except in hindsight after the practice has been

irretrievably lost.[32] Russell Kirk explains, "[T]he essence of social conservatism is preservation of the ancient moral traditions of humanity. Conservatives respect the wisdom of their ancestors … they are dubious of wholesale alteration. They think society is a spiritual reality, possessing an eternal life but a delicate constitution: it cannot be scrapped and recast as if it were a machine."[33] There are reasons to think that conservatives should value free speech as a method to achieve slow, prudent change and that liberals should value the conservative reluctance to accept new ideas.

The conservative's attitude toward change is not a rejection of change per se, but a sense that, as Nisbet writes, "When it is not *necessary* to change, it is necessary *not* to change."[34] That, of course, means that when it is necessary to change, then change we must. Kirk writes, "[C]onservatism is not a fixed and immutable body of dogmata: conservatives inherit from Burke a talent for re-expressing their convictions to fit the time."[35] The continuity valued by conservatives is not an expectation of sameness age after age. Social stasis is impossible and therefore undesirable. Conservatives permit change, to a degree, but abhor wholesale alteration. Kirk writes in his sixth and final "canon of conservatism" in *The Conservative Mind*, "[C]hange may not be salutary reform: hasty innovation may be a devouring conflagration, rather than a torch of progress. Society must alter, for prudent change is the means of social preservation."[36] Conservatives often quote Burke approvingly who writes, "A state without the means of some change is without the means of its conservation."[37] The conservation of what the conservative values depends upon the ability of society to adapt permanent principles and ways of life to the times. For a tradition to remain alive it must, like a tree, continue to grow.[38]

It is easy to see how this understanding of tradition and change makes the conservative more sympathetic to censorship of both new ideas and severe critiques of established ideas and institutions. If change is made only when necessary, then spurious critiques may inspire unnecessary change and should be suppressed since the cost of imprudent changes could be catastrophic. New ideas, however plausible in theory, may be devastating in social fact. To balance the need for change with the need for stability and conservation, change must be possible, but difficult.

The question for the conservative is the method of change and the means of identifying necessary changes. Free speech could play an important role in both. A conservative devoted to maintaining a tradition could defend robust protections for free speech for several reasons. First, free speech is a good way to discover when change is necessary. Through discussion, problems can be brought to the fore. Second, free speech helps determine the content of change by permitting the presentation of various solutions to newly discovered problems. Third, free speech is a mechanism of slow social change as new ideas interact with

old ones, and critiques are absorbed over time in a slow process of discussion whereby society absorbs new ideas and practices. Protections for free speech and the ensuing debates would be a good means of ensuring that necessary changes can be voiced and that such proposals for change are vetted through a winnowing process, subject to criticism and resistance.

There is still risk in permitting such debates. Bad ideas can drive unnecessary and damaging change. But there is equal risk in censoring as well. One could suppress the ideas that would drive salutary change thereby suppressing the very change necessary for preservation.[39] Furthermore, even salutary change comes at a cost. There is always a tradeoff and even salutary tradeoffs come with costs, which raises the question of whether the change is worth it. Michael Oakeshott writes of the conservative disposition toward change,

> [The conservative] is aware that not all innovation is, in fact, improvement; and he will think that to innovate without improving is either designed or inadvertent folly. Moreover, even when an innovation commends itself as a convincing improvement, he will look twice at its claims before accepting them. From his point of view, because every improvement involves change, the disruption entailed has always to be set against the benefit anticipated.[40]

A free speech framework could operate as Burke's "means of [the state's] conservation," balancing the need for change with high standards for new ideas and criticism of old ones. Burke writes, "It is far from impossible to reconcile, if we do not suffer ourselves to be entangled in the mazes of metaphysic sophistry, the use both of a fixed rule and an occasional deviation."[41] The fixed rule is the conservative principle that one prefers old ideas, the tried and true, to new ideas, untried and likely false. But at the same time, the conservative can permit the occasional change, as long as the change has met high standards for implementation. Free speech, accompanied by high standards of critique derived from a disposition to preserve rather than to discard, would permit the sort of dynamic process whereby proper changes can be proposed and refined to something salutary, a net gain to society.

Perhaps the best way to meld free speech protections for individuals with a Burkean understanding of knowledge and change is to elaborate on Burke's principle on individual thought quoted at the beginning of the chapter. He writes, "We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages."[42] From this perspective, it would be reasonable to censor an individual to preserve that accumulated knowledge and wisdom. But the conservative

benefit of individual speech is precisely through the accumulation of its insight, as many minds contribute to an idea over many generations to produce what philosopher Hrishikesh Joshi calls the "epistemic commons," "the stock of facts, ideas, and perspectives that are alive in society's discourse."[43] Joshi argues that free speech is important because it permits individuals to contribute their own unique perspective and knowledge to the epistemic commons.

The great danger of censorship, from Joshi's perspective, is that it distorts the body of knowledge or, the conservative might say, the tradition. Where an individual may dissent or speak against the epistemic commons, he may or may not be right. The dialectic between individuals and the common body of knowledge can take place over time. If the individual is wrong, the expression of individual opinion shapes the commons in a way that accounts for that dissent and develops answers to it as a sort of philosophical antidote to that criticism in the commons at large. If the individual is right (or partially right), that dissent can be absorbed over time as individual insights are brought to bear upon the whole and the whole responds by absorbing the individual insights. The same is true of Burke's tradition. The individual may bring little to the "bank and capital of nations and of ages," but it is the contributions of many individuals over many generations that have, through many individual deposits, share by share, created that bank and capital. Free speech protections permit individuals to continue to make such deposits, even if at times it seems they are endangering the whole.

I have said throughout that necessary to the conservative embrace of free speech are the high standards for expressions of new ideas. Oakeshott writes, "[I]nnovation entails certain loss and possible gain, therefore, the onus of proof, to show that the proposed change may be expected to be on the whole beneficial, rests with the would-be innovator."[44] The conservative penchant for refraining from prematurely discarding old ideas, and to holding to them even when they are old, is a helpful corrective to the liberal and especially the radical disposition toward change. Individuals certainly get much wrong, which is why the conservative, following Burke, puts her bet on the tradition. But expression of the wayward dissenter from the conservative perspective is only a problem if there is a social tendency to follow the lone dissenter rather than the bulk of the tradition. Ilana Redstone and John Vallasenor explain this tendency as an "unassailable idea" that is damaging discourse in higher education and it certainly applies in broader society. This liberal tendency is a reflexive impulse to view "any action to undermine or replace traditional frameworks or power structures [as] by definition a good thing."[45] Redstone and Vallasenor write as liberals, but nonetheless point out the fallacy of seeing whatever alternative offered to the traditional one as inherently better. They write, "One can rightly condemn [social and historical] ills while at the same time recognizing

that not all initiatives undertaken with the goals of combatting them will be effective."[46] The conservative would go further and say that the proposed changes very well could be more destructive or oppressive than whatever ills they mean to combat.

If the conservative errs by holding new ideas to unreasonably high standards of veracity compared to old ones, it serves as a corrective to liberals and radicals who are too quick to dismiss the veracity of old ideas. The conservative tendency to resist change, to apply high standards for new ideas compared to the tried and true, would counter this potentially (even by liberal standards) destructive tendency to embrace every challenge to traditional frameworks. In other words, free speech liberals have reasons to desire that conservatives bring their high standards for change to the debates.

A helpful lens through which to understand this part of the argument is Gerald Gaus's account of a complex normative system as the basis for a moral constitutional order. He argues that such a system will contain both "a party of order or stability, and a party of progress or reform."[47] Rather than searching for a fundamental order to society that would prefer either a liberal or a conservative order, we should instead adopt "a justified moral constitution" as "a shared, public, moral framework that all can live with."[48] Furthermore, both liberals and conservatives are necessary to social health because the relations between these two political and philosophical dispositions create a more stable and just society over the long haul than does a society composed predominantly of conservatives or liberals respectively. Gaus writes,

> Consider a society such as B_{DIV}, divided between those who are critical of the existing constitution, searching for ways to improve it, and those who place high value on stability and so are very reluctant to move in a new equilibrium. Contrast this to societies B_{CON}, an orderly society whose members all value stability, and society B_{LIB}, a society of reformists whose members all place high value on achieving what they see as the best constitution. There is strong reason to think that under a range of environmental conditions, B_{DIV} will outperform B_{CON} and B_{LIB} in the sense of better maintaining justified social relations over a sustained period.[49]

The reason for this is that "getting the precise trade-off rate (between stability and change) correct is a complicated matter."[50] We need both sides because neither is likely to assess justly the other position. Conservatives will underestimate the need for change and be prone to ignoring necessary changes and liberals will underestimate the value of stability and tend to embrace unnecessary and destabilizing changes.

The liberal case for free speech tends to rest upon a faith that progress will come from the interaction of ideas. As I said, the tendency for

liberal free speech advocates is to rest their case for free speech on the faith that it will yield beneficial changes. Liberal free speech advocates should welcome conservatives to the discussion, valuing the high standards they bring to the testing of new ideas, which, in turn, helps to make good on the liberal promises for free speech. Free speech permits the dialectic between these two groups to arrive at an equilibrium that, while imperfect, will be both more just and stable. The conservative disposition counters and balances potential excess of support for new ideas in the marketplace of ideas and encourages, in Burke's words, the "action and counteraction which, in the natural and in the political world, from the reciprocal struggle of discordant powers, draws out the harmony of the universe."[51]

9.5 Pre-Judgment and Virtuous Habits

The conservative defense of tradition and suspicion of change corresponds to a defense of internalized practices exemplified by the term "prejudices" in Burke's famous passage in *Reflections on the Revolution in France*. Burke writes,

> [P]rejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence. Prejudice is of ready application in the emergency; it previously engages the mind in a steady course of wisdom and virtue and does not leave the man hesitating in the moment of decision skeptical, puzzled, and unresolved. Prejudice renders a man's virtue his habit …. Through just prejudice, his duty becomes a part of his nature.[52]

Burke, writing in the eighteenth century, is not using "prejudices" in the way we use it today, as a pre-judgement against persons usually based upon immutable characteristics and generally the impetus behind invidious (and, depending on the circumstances, illegal) discrimination. A term that better conveys Burke's meaning today is "moral pre-judgment." Burke argues that these pre-judgments are valuable because they allow a person to respond with moral action in real time, without needing to contemplate and question every impulse. They produce what we may call "virtuous habits." If an action is good, then it is best if the impulse be made a virtuous habit, a prejudgment that one ought to do the virtuous thing in these or similar circumstances. That way, virtuous actions are not left to the chance impulse of the individual, but become hardy parts of his character.[53] For free speech to thrive, it requires persons of certain habits.

In their respective treatises on conservatism, both Nisbet and Kirk make Burke's prejudices central to their conceptions of traditionalist conservatism. Nisbet writes that Burke's "'prejudice' is a distillation of whole way of knowing, of understanding, and of feeling."[54] Generally,

the concept is applied to the understanding of a plethora of principles and practices permeating society. Rather than challenge and think each one through, the conservative begins with acceptance of the prevailing belief, an inclination toward continuity and stability. One can praise virtuous ways of acting, but if they are to become routine, a person must internalize them as habits, ways of acting that, while not strictly natural, becomes natural for us through continuous practice.

Nisbet contrasts this concept of "virtuous habits" with Burke's opponents in the French Enlightenment who "put a premium on pure reason, on strict deduction of the kind found in geometry, and held up the light of individual truth-seeking against what was inscribed in tradition and experience."[55] Against individual reason, Burke's virtuous habits were the "understanding and knowledge that is *common* among individuals in a nation, not something that is the special preserve of an intellectual elite."[56] Conservatives have in mind the accruing of wisdom over generations that becomes epitomized in a pre-rational, unconscious sensibility or inclination toward a particular way of action in particular circumstances. It is not that this knowledge is irrational, it is that it makes functional sense in a way that may be difficult for a single individual to grasp. Hence the conservative's suspicion of Enlightenment reason's challenge to traditional prejudgments and virtuous habits. Virtuous habits are moral knowledge, accumulated wisdom. For conservatives, virtuous habits are where moral traditions become moral actions. To reject categorically these sorts of habits is a rejection of a form of moral knowledge.

Human beings adopt virtuous habits through the socialization process. Roger Scruton writes, "Knowing what to do in company, what to say, what to feel—these are things we acquire by immersion in society. They cannot be taught by spelling them out but only by osmosis, yet the person who has not acquired these things is rightly described as ignorant."[57] There is no way around them. For the conservative, habits that prevail for a long period of time likely (but not necessarily) do so because they are necessary to humane, civilized society. Rather than discarding such habits, the conservative studies "to discover the latent wisdom which prevails in them."[58]

From this account of virtuous habits, one sees how the concept may bolster the case for censorship in at least two ways. First, from the conservative perspective, the inherited knowledge and its reasons hidden away in a virtuous habit are almost certainly superior to the purported reason of the individual. The traditional view is probably right and the individual view, to the extent it deviates from it, probably wrong. Therefore, in the interest of truth, it would make sense to censor those who challenge this tradition or otherwise undermine it. Second, that tradition is complex and multifaceted, such that it will be difficult to grasp its contours, to defend it in a way that makes sense to individuals. This does not mean that the traditional view or practice is irrational, but

that it is supra-rational, containing reasons that are beyond individual comprehension. At the same time, the individual reason, as inadequate as it may be, may give reasons against virtuous habits that seem plausible to the individual mind simply because the individual reason is unable to grasp the bigger picture in all its multifarious complexity.

John Stuart Mill famously critiques what we are calling here virtuous habits in *On Liberty*, arguing that such prejudices are an impediment to knowledge because they close the mind to challenge and additional information. He gives four reasons to permit prejudices to be challenged. First, the new view could be true (and the old false). Second, the new view could contain a portion of the truth. Censorship would cost the prevailing view from being improved by even that kernel of truth. Third, even if the prevailing view is entirely correct, those who adhere to it benefit from having the view challenged and having to defend it. Through this process they come to know the truth at a much deeper level, it becomes for them a living truth when it has stood the test of reason. Fourth, this rational grasp of one's own opinion helps to keep it alive, to keep it from being merely a formal profession.[59]

A major barrier to the realization of Mill's argument is the personal dimension to why someone would resist challenges to prejudgments underlying their virtuous habits. Perhaps Mill is right and a particular habit is not moral or belief is not true and it should be set aside. But from those assumptions derive a person's deepest held beliefs and practices and therefore give great comfort, regardless of their validity. What would make somebody be willing to let go of that position? Mill argues that such a decision would rise from a recognition of one's own infallibility. This means the recognition of the potential fallibility of the prejudices one holds. In short, Mill argues for the ancient virtue of humility. Human beings should acknowledge the limitations of their own reason, guided as it is by their own experience and learning, and be willing to take into account the arguments of others against their own views.[60]

Here the conservative concept of virtuous habit has a helpful role to play in Mill's argument. What is it that would make a person—in the heat of argument, when a belief he has held for his whole life that is essential to his self-conception is under attack—hear out his critic? It is the prejudgment rooted deep in the psyche and made into a habit that it is a person's duty to seek the truth, even when it is most uncomfortable. This devotion to truth must be bound to the disposition of humility, not as an intellectually recognized potential that one is wrong, but as a habit of action that insists on openness toward contrary views. This virtuous habit resists the impulse to reject out of hand or even censor views that undermine one's own. This habit is based on a prejudgment that when one's ideas or practices are challenged, one is willing to meet the challenge rather than to avoid it, and to force a change of one's mind if the evidence and arguments call for it.

Kirk writes, "[P]rejudices and prescriptions and presumptions are the instruments which the wisdom of the species employs to safeguard man against his own passions and appetites."[61] They are a means whereby civilized society can maintain the practices necessary to humane existence. The human disposition to lash out emotionally or, in the context of free speech, to censor or otherwise to refuse to consider contrary views would be the sorts of things constrained by the virtuous habit toward free speech. The humility for which Mill argues depends for its efficacy upon deeply ingrained prejudgments of how one is to act. Burke writes, "Prejudice renders a man's virtue his habit …. Through just prejudice, his duty becomes a part of his nature."[62] The duty to hear out an opponent, to refuse to seek censorship, if it is to be reliably part of our social practices, must be a virtuous habit, a routinized way of acting. Kirk writes, "Prejudice is pre-judgment, the answer with which intuition and ancestral consensus of opinion supply a man when he lacks either time or knowledge to arrive at a decision predicated upon pure reason."[63] When confronted with a situation, one has a pre-judgment on how to act. If a person challenges your beliefs, you listen and argue your case, open to the possibility that you are wrong and with a will to change your mind.

A good example of what a prejudgment for free speech looks like comes from the story behind the famous Norman Rockwell painting "Freedom of Speech." Rockwell recounts a town hall meeting in New England that he attended. The citizens of the town were discussing building a new school. One man stood and registered his opposition to the proposal and gave his reasons. Everyone else sat silently and listened intently to his point of view. They did not reason about whether they should hear him out, they just did it. They were instilled with the virtue of humility, which had become a habit, a prejudgment, that one gives dissenters a fair and respectful hearing. Rockwell's praise was not to the courage of the dissenter, but to the unquestioning willingness of the others to hear him out. So impressed was Rockwell with this prejudgment for free speech, this virtuous habit of giving the dissenting view a hearing, that he memorialized it in his famous painting.

9.6 Authority and Authorities

Mill writes at the beginning of *On Liberty*, "The struggle between liberty and authority is the most conspicuous feature in the portions of history with which we are earliest familiar."[64] He goes on to describe military and political authority due to "inheritance or conquest" and to the historical oppression it has wrought. Later in the book, he argues for a limit on social authority over the individual. There he is primarily concerned with the illegitimate interference of society as a whole over individuals. The target of his ire is the capacity of society to coerce individuals to do, say, or think in a way contrary to their voluntary will. Here we are primarily

concerned with ways in which society might censor individual speech. This could take the form of legislation, but it could also take the form of social pressure through loss of employment, shunning, and the like.

Conservatives have generally lauded social authority. From this perspective, there are social powers that rightly restrain the individual, sometimes through censorship. Burke writes, it is good that "the inclinations of men would frequently be thwarted, their will controlled, and their passions brought into subjection."[65] Kirk praises local censorship boards that forbid the distribution and printing of obscene material and criticizes the Supreme Court for its permissive obscenity jurisprudence.[66] Like tradition and prejudgments, conservatives see social authority as necessary to restrain the individual passions and appetite. But, as Robert Nisbet notes, the conservative praise for authority is really support for a plurality of authorities, the variety of non-state institutions that exert authority over the individual, such as family, school, religious organization, local community, fraternal association, employer, and the like.[67] Nisbet's understanding of social authorities has applications for the protection of freedom of speech that has received some recognition in Supreme Court case law.[68]

For Nisbet, freedom and authority are closely linked. Nisbet points to Burke's defense of the American colonists, Catholics in Ireland, and Hindus in India as a defense of "the freedom of human beings to live by their own customs and traditions."[69] In essence, for conservatives, freedom is the ability to live under authority. Conservatives emphasize corporate freedom, the freedom of social groups to exert authority over their members. Such a conception of authority clearly militates against free speech for individuals in an importance sense. These corporate structures, family, guild, corporation, and the like, would have authority to silence individual members. In contemporary society, the modern version of these institutions can censor members in various ways. They can refuse to recognize them at meetings, fire them, and otherwise exclude them from group membership. But there is a way that an understanding of authority so central to Nisbet's conservatism may protect freedom of expression, even from the very social pressures that so concerned Mill.

Since each group may enforce its own orthodoxy, there are a variety of viewpoints that may be expressed through a plethora of groups. For members who believe in the group's ideology, they are strengthened to speak on its behalf precisely by the moral, psychological, and material support the group provides on behalf of that viewpoint through the exercise of its social authority. This means that the viewpoints of the group, held by many of its members, would be forcefully expressed in society. It also means that the authority of society as a whole, social pressure that so concerned Mill, is splintered among competing groups. To put it another way, groups might engage in censorship within their group, but individuals may exit (voluntarily or involuntarily) and join groups that share their views. In this way, pluralistic social authority strengthens

minority viewpoints, gives them force and form for expression in society. Individual freedom of expression may be an important protection, but the conservative insight is that individual expression is insignificant, feeble and likely to fold without social reinforcement. But social reinforcement requires the exercise of authority within a group to suppress other viewpoints, that the viewpoint of the group—and those members who agree with it—might resound all the clearer.[70]

The Court obliquely recognized this understanding of the link between authority and speech in its doctrine of "expressive association." First articulated in *Roberts v. United States Jaycees* (1984), the Court argued that freedom of speech is often exercised collectively, therefore it requires the ability to exclude members from the group who oppose or would mar the expression of the group's message. The Court wrote, "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together."[71] The Court's concern is preserving space for groups to cultivate viewpoints and to express them accurately to the rest of society. This means that dissenting individuals may be silenced by the group, discouraged from speaking through threat of expulsion, which might, as Mill points out, result in the loss of their voice. The Court writes in a later case, "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[72] Dissenting persons disrupt the ability of individuals to have their voices cultivated within a group of likeminded individuals. By providing freedom for a vast array of such groups, individuals can find their place and an amplification of their voice.

The Court's recognition of a group's ability to exclude individuals who depart from the group's orthodoxy, which is a suppression of the individual's speech, is a reflection of the conservative value of social authority. The utility of this value for speech is the way in which viewpoints can be amplified through group expression, but also the way in which individual speech can be protected from broader social disapproval by finding sanction within a group. Given the conservative emphasis upon social rather than political authority, these social groups should be immune from political interference in the way the Court has described. If they are, then they form pockets of social protection for individual speech. Individuals are less likely to fold under pressure, as Mill worries, if they have a social group around them that supports their views. For the individual, social authority can be a means of protection for expression and freethinking. If that authority is dispersed among a variety of social groups, then a variety of individuals will have available the social shelter of authority of these expressive associations.

9.7 Conclusion

Burke writes, "Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them."[73] If, as Levy and Curtis indicate, free speech and press are American traditions, prejudices in the Burkean sense, then the conservative impulse should be to embrace them. From this perspective, the liberal practice of explaining and defending free speech is a Burkean conservative enterprise insofar as it requires defending long-standing American practices. Liberal free speech advocates are employing their sagacity to understand the "latent wisdom" of permissive free speech policies as an integral value in the American system of ordered liberty. Conservatives should join them.[74]

Notes

1 Duquesne University, Dept. of Political Science, 503 College Hall, 600 Forbes Drive, Pittsburgh, PA 15282.
2 Nash (2006, xx).
3 Kirk 1974, 9-10. Kirk's project in this book is to describe the unwritten American constitution in terms of Jewish, Greek, Roman, Christian, and British influences as they were absorbed into American society in the colonial period.
4 Burke (1987, 76).
5 Scruton (2017, 1, 55–6).
6 See Peter Viereck's distinction between evolutionary conservatism of Burke, with its defense of traditional and counterrevolutionary conservatism, which is more authoritarian (Viereck 1956, 11–2).
7 See Nisbet (2010).
8 See e.g., Nisbet (1986) and Kirk (1985).
9 See e.g., Nash (2006, xx) and Regnery (2008, 47–9).
10 For example, see Nisbet (1998).
11 Kirk (1997, 194–5).
12 See George Carey and Wilmore Kendall (1970, 133–36).
13 Kirk is especially insistent upon these points. See for examples: Kirk (1997, 47–60); Kirk (2003, 393–440); Kirk (1993, 29–46); and Kirk (1990).
14 I discuss the unwritten constitution and the history of freedom of the press in Sheahan (2019, 26–9).
15 See: Levy (1963) and Kirk (1993, 37).
16 Levy writes in the preface that Supreme Court Justice Hugo Black (a strong free speech advocate) assigned a law clerk to find historical errors in the book and he was unable to do so after three months of research (Levy 1985, xviii).
17 Levy (1985, x).
18 Levy (1985, x).
19 Curtis (2000, 77–9).
20 Levy (1985, 7, 297).
21 Levy (1985, 297–8).
22 Curtis (2000, 75–6).
23 Curtis (2000, 71).
24 Levy (1985, 46).

25 Curtis (2000, 94–7).
26 Curtis (2000, 96).
27 Curtis (2000, 96) (emphasis added).
28 *New York Times v. Sullivan*, 376 US 254 (1964).
29 Levy (1985, x).
30 I hasten to point out that this does not mean that there are not good reasons to think free speech is good. One need go no further than other essays in this volume to find those arguments. Rather this point is directed at a particular argument advanced by traditionalist conservatives against expanded free speech protections.
31 Nisbet (1986, 43). Emphasis in original.
32 The conservative conception here is akin to Gerald Gaus's understanding of Complex Adaptive Systems. See Gaus (2019a, 2019b, 967–1012).
33 Kirk (1985, 8).
34 Nisbet (1986, 42). Emphasis in original.
35 Kirk (1985, 7–8).
36 Kirk (1985).
37 Burke (1987, 19).
38 Kirk (2003, 9–10).
39 Kirk obliquely recognizes this point as he argues that conservatives do not want a body of law laid down forever like the Spartans nor do they want to suppress proposals for change like the Locrians who executed those who tried to change the laws. Kirk (2003, 9–10).
40 Oakeshott (1962, 411).
41 Burke (1987, 19).
42 Burke (1987, 76).
43 Joshi (2021, 2).
44 Oakeshott (1962, 411).
45 Redstone and Vallasenor (2020, 10).
46 Redstone and Vallasenor (2020, 10–1).
47 John Stuart Mill, quoted in Gaus (2016).
48 Gaus argues that there are a number of shared principles upon which conservatives and left-liberals can agree (2016, 259). These are "a robust regime of equal basic personal liberties, a constitutional democracy, a private-property market order, and a commitment to state provision of basic needs and services." (Gaus 2016, 264). There will be wide interpretative and policy disagreements regarding them, of course. But pretty much everyone on both sides of the ideological divide can accept them.
49 Gaus (2016, 280).
50 Gaus (2016, 282).
51 Burke (1987, 31).
52 Burke (1987, 76–7).
53 Vices, of course, may become part of one's character through the same process. For Burke and other conservatives, the antidote to vices acquired through habit are virtues acquired through habit. Further discussion of this important point is beyond the scope of this essay.
54 Nisbet (1986, 44).
55 Nisbet (1986, 44).
56 Nisbet (1986, 45).
57 Scruton (2017, 49).
58 Burke (1987, 76).
59 Mill (1978, 51).
60 Mill (1978, 16–7).
61 Kirk (1985, 37–8).

62 Burke (1987, 76–7).
63 Kirk (1985, 38).
64 Mill (1978, 1).
65 Quoted in Nisbet (1986, 49).
66 Kirk (1990, 201–215).
67 Nisbet (1986, 49–50). Robert Nisbet, *The Social Philosophers: Community & Conflict in Western Thought* (New York: Thomas Y. Crowne Co., 1973), 406–18.
68 Elsewhere I have criticized this connection as an inadequate account of freedom of association. See Sheahan (2020, 81–130). Although it is legitimate insofar as it does apply to expressive groups, I simply argue that such protections should extend to non-expressive groups as well. Sheahan (2020, 145–6).
69 Nisbet (1986, 49).
70 Sheahan (2020, 131–6).
71 *Roberts v. United States Jaycees*, 468 U.S. 624 (1984).
72 *Boy Scouts of America v. Dale,* 530 U.S. 640, 648 (2000).
73 Burke (1987, 76).
74 For an example of a prominent traditionalist conservative unabashedly supporting free speech and connecting it to religious and conservative values, see Rod Dreher, *Live Not By Lies: A Manual for Christian Dissidents* (New York: Sentinel Press, 2020), 103–5.

References

Burke, Edmund. (1987) *Reflections On the Revolution in France*, ed. by J.G.A Pocock, Indianapolis, IN and Cambridge: Hackett Publishing Company.

Carey, George, and Kendall, Wilmore. *The Basic Symbols of the American Political Tradition*, Washington, DC: Catholic University of America Press, 1970.

Curtis, Michael Kent. (2000) *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History*, Durham, NC and London: Duke University Press.

Dreher, Rod. (2020) *Live Not By Lies: A Manual for Christian Dissidents*, New York, NY: Sentinel Press.

Gaus, Gerald. (2019) "What Might Democratic Self-governance in a Complex Social World Look Like?" *San Diego Law Review*, Vol. 56, No. 4 (November–December).

Gaus, Gerald. (2016) "The Role of Conservatism in Securing and Maintaining Just Moral Constitutions: Toward a Theory of Complex Normative Systems," *NOMOS: American Society for Political and Legal Philosophy*, Vol. 56, pp. 256–92.

Gaus, Gerald. (2019) "Morality as a Complex Adaptive System: Rethinking Hayek's Social Ethics," in *The Oxford Handbook of Ethics and Economics*, New York, NY: Oxford University Press.

Joshi, Hrishikesh. (2021) *Why It's Ok to Speak Your Mind*, New York, NY and London: Routledge.

Kirk, Russell. (1985) *The Conservative Mind: From Burke to Eliot*, 7th ed., Washington, DC: Regnery Publishing, Inc.

Kirk, Russell. (1990) *The Conservative Constitution*, Washington, DC: Regnery Gateway.

Kirk, Russell. (1993) *America's British Culture*, New Brunswick, NJ and London: Transaction Publishers.

Kirk, Russell. (1997) *Rights and Duties: Reflections on Our Conservative Constitution*, Dallas, TX, Spence Publishing Company.

Kirk, Russell. (2003) *The Roots of American Order*, Wilmington, DE: ISI Books.

Levy, Leonard W. (1963) *Freedom of Speech and Press in Early American History: Legacy of Suppression*, New York, NY: Harper Torchbooks.

Levy, Leonard W. (1985) *Emergence of a Free Press*, Chicago, IL: Ivan R. Dee.

Mill, John Stuart. (1978). *On Liberty*, ed. by Elizabeth Rapaport, Indianapolis, IN and Cambridge: Hackett Publishing Company.

Nash, George. (2006) *The Conservative Intellectual Movement in America Since 1945*, Wilmington, DE: ISI Books. Originally published by Basic Books, 1976.

Nisbet, Robert. (1973) *The Social Philosophers: Community & Conflict in Western Thought*, New York, NY: Thomas Y. Crowne Co.

Nisbet, Robert. (1986) *Conservatism: Dream and Reality*, Minneapolis, MN: University of Minnesota Press.

Nisbet, Robert. (1998) "Uneasy Cousins," in *Freedom and Virtue: The Conservative/ Libertarian Debate*, ed. by George W. Carey, Wilmington, DE: ISI Books.

Nisbet, Robert. (2010) *The Quest for Community: A Study in the Ethics of Order and Freedom* (New York, NY: Oxford University Press, 1953. Republished in 1962 by Galaxy Books, New York under new title: *Community and Power*. Reissued in 1969 under original title: *The Quest for Community*. Reprinted by Institute for Contemporary Studies, San Francisco with a new preface in 1990, and by ISI Books, Wilmington with a new introduction in 2010.)

Oakeshott, Michael. (1962) "On Being Conservative," in *Rationalism in Politics and Other Essays*, Indianapolis, IN: Liberty Fund Books.

Redstone, Ilana and Vallasenor, John. (2020) *Unassailable Ideas: How Unwritten Rules and Social Media Shape Discourse in American Higher Education*, New York, NY: Oxford University Press.

Regnery, Alfred S. (2008) *Upstream: The Ascendance of American Conservatism*, New York, NY: Simon and Schuster.

Scruton, Roger. (2017) *Conservatism: An Invitation to the Great Tradition*, New York, NY: All Point Books.

Sheahan, Luke C. (2019) "The Chartered Rights of Americans: A Kirkian Case for the Incorporation of First Amendment Rights," *Humanitas*, Vol. XXXII, Nos 1&2.

Sheahan, Luke C. (2020) *Why Associations Matter*, Lawrence, KS: University Press of Kansas.

Viereck, Peter. (1956) *Conservative Thinkers: From John Adams to Winston Churchill*, New Brunswick, NJ: Transaction Publishers.

Cases

Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000).

New York Times v. Sullivan, 376 US 254 (1964).

Roberts v. United States Jaycees, 468 U.S. 624 (1984).

Index