

SMALL TALK:  
THE SOCIALITIES OF SPEECH IN MODERN DEMOCRATIC LIFE  
Chloé Bakalar  
A DISSERTATION  
in  
Political Science  
Presented to the Faculties of the University of Pennsylvania  
in  
Partial Fulfillment of the Requirements for the  
Degree of Doctor of Philosophy  
2014

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SMALL TALK: THE SOCIALITIES OF SPEECH IN LIBERAL DEMOCRATIC LIFE

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*For my parents.*

## ACKNOWLEDGMENT

In the many years that I have spent working on this project, I have been fortunate to count on many individuals and institutions for their support.

At the University of Pennsylvania, I owe a tremendous amount of gratitude to my dissertation committee for their insight, guidance and unflagging support. First and foremost, I am afraid that no amount of thanks could adequately convey the depth of my appreciation for my mentor, advisor and dissertation supervisor, Rogers M. Smith. He was the reason I came to study at Penn, and he is one of the most important reasons that I made it through in the end. He has changed the way I think about democracy, citizenship and constitutionalism—which, as he understands it, encompasses basically everything—and has profoundly influenced the direction that this dissertation finally took. I feel incredibly fortunate to have had such an attentive, compassionate and thoughtful advisor. And without his intellectual and personal support, none of this would have been possible. I would also like to thank the two other members of dissertation committee, Nancy J. Hirschmann and Jeffrey Green. Nancy led my first real course on political theory, and has stood by me ever since. She has altered my thinking about gender and liberalism in ways that I can only hope I have suitably expressed in this project. More importantly, the kindness, consideration and care that she has shown me over the years not only made this project possible, but also set the standard for the kind of person I would like to become. Nancy has applauded me in my successes and reassured me in failures, and I will be forever grateful to her. Jeff has also been a friend and an invaluable resource throughout my entire graduate career. The papers and readings for his courses helped me develop the ideas that eventually evolved into this project. And with every draft of this dissertation, he has provided me with creative, thought-provoking comments and critiques. I am honored to have all three members of my dissertation committee in my life and my corner.

I am also grateful for the many other Penn faculty members whose teachings and insights have made this project possible. Sigal Ben-Porath, John Lapinski, Matthew Levendusky, Ian Lustick and Adolph Reed all contributed to my understanding of American politics and political theory in ways that not only made me a better scholar, but also a better person. And at Columbia University, which so graciously hosted me as an exchange scholar from 2009 to 2010, I would like to thank Jean L. Cohen, Nadia Urbinati, Benjamin I. Shapiro and Dorian Warren, each of whom worked with me on projects and seminar paper that were eventually absorbed by this dissertation.

A significant debt of gratitude belongs to the University of Pennsylvania's Political Science Department and the Woodrow Wilson National Fellowship Foundation, both of which provided vital fellowship support during the writing of this dissertation. I would also like to thank all of the presenters, committee members, fellows and other participants associated with the Penn Program on Democracy, Citizenship and Constitutionalism (DCC). Many of the workshops, conferences and informal gatherings that I was able to take part in as an administrator to the Program have profoundly influenced the direction of this project.

I would also like to thank the friends that I have made in my time at Penn. Not only did they help to make the University a warm and collegial place to study, but they also provided me with some of the most engaging and informative social speech experiences that a person could ever want. Murad Idris, especially, took me under his wing when I first arrived and had no idea what I was doing. He has read more drafts of my writings than I had any right to ask of a friend, and has never failed to provide insightful, useful feedback. I am deeply in his debt. Likewise, David Bateman, Stephan Stohler and Matthew Mongiello supplied many of my most enjoyable and intellectually formative social experiences at Penn. I cannot thank them enough for the critiques and suggestions they offered regarding early conceptions and drafts of this project. And to Chelsea Schaefer, my trusty officemate and fellow DCC Administrator, I would like to extend my gratitude for always brightening my visits to Philadelphia. I would also like to thank the

members of my cohort, Eric Trager, Jon Argamon, Chris Russell, Tim Junio and Mara Ostfeld, each of whom has gone through this process with me and has, in some way, helped me to come out on the other side.

Most of all, I would like to thank my family for supporting me throughout this long and arduous process. My parents, Marvin and Bianca, my brother, Jeremy, and my sisters, Andrea, Sophie, Chelsea, Charlotte and Brigitte, have never given up on me, even when it looked like I may never finish. And indeed, I might not have ever completed this project if not for their patience and encouragement. I would also like to thank my aunt, Francesca Canadé, whose own academic career has served as an inspiration to me, and who has shown me immeasurable kindness and support during the writing of this dissertation. Finally, I would like to thank my best friend, Jonathan Danziger. He has been with this project every step of the way, from inception to completion, and has never failed to lovingly add his own two cents. My work and my life would be much poorer without his influence.

This dissertation truly belongs to these colleagues, friends and family, each of whose social interactions and communications with me served as the inspiration for this project.

## ABSTRACT

## SMALL TALK: THE SOCIALITIES OF SPEECH IN MODERN DEMOCRATIC LIFE

Chloé Bakalar

Rogers M. Smith

While a substantial portion of political theory addresses the issue of public, formal communication—particularly in terms of its effects on democratic citizenship—there has been comparatively little scholarship that considers the political impact of informal, non-public speech. In this project, I present a theory of “social speech” that fills in this gap, thereby providing a richer understanding of politics and the lived experience of liberal democratic citizenship. I develop this new theory in four stages. First, I begin by critiquing contemporary political theory’s singular focus on public, political speech, as exemplified by deliberative democratic and Anglo-American legal theorists. Second, I look to the forefathers of liberal political speech theory (i.e. John Milton and John Stuart Mill) in order to rediscover a classical political theory of social speech. Third, building off of this foundation, I establish my own political theory of social speech, which identifies several mechanisms that explain how informal, everyday communication may affect liberal democratic citizenship and political outcomes in both positive and negative ways. Specifically, I argue that social speech: 1) develops the character traits that make for better or worse democratic citizens; 2) contributes to social capital and trust (based on mutual interests, hopes and objectives); 3) provides training for and information about one’s unique political culture; and 4) forges the affective ties that determine the borders of imagined political communities. Finally, I test my theory of social speech through empirical observations and assessments of three common social speech situations: Internet speak, safe space speech and social hate speech. These case studies prove that social speech actually does affect democratic citizenship and political outcomes in accordance with the four mechanisms outlined in my theory of social speech. And because these effects may be positive or negative, depending on both the form and

content of social communication, I conclude that there is a real need for political theory to develop understandings of social speech that could inform public policies to encourage democratically advantageous social speech and discourage democratically harmful social speech.



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## CHAPTER 1

## INTRODUCTION TO SOCIAL SPEECH

*“Now, that man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech. And whereas mere voice is but an indication of pleasure or pain, and is therefore found in other animals (for their nature attains to the perception of pleasure and pain and the intimation of them to one another, and no further), the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and unjust.”*

- Aristotle, *Politics, Part I*<sup>1</sup>

*“Men live in a community in virtue of the things which they have in common; and communication is the way in which they come to possess things in common.”*

- John Dewey, *Democracy and Education*<sup>2</sup>

Humans are social beings. While we may exist as either private individuals or public actors at various moments, most people in the modern era spend the majority of their waking lives communing and communicating with others in the space in between – the social. However, while there is a great deal of political theory that has addressed public, formal communication—particularly in terms of its effects on democratic citizenship—there has been comparatively little scholarship that considers the political impact of informal, non-public speech. In this project, I explore this informal, everyday communication—what I have deemed “social speech”—with the intention of proving that it actually does serve important political ends. Namely, social speech is one of the most important influences in the development of an individual's capacity for better or worse liberal democratic citizenship.

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<sup>1</sup> Aristotle, *Politics, Part I*. Accessed at: <http://classics.mit.edu/Aristotle/politics.html>.

<sup>2</sup> John Dewey, *Democracy and Education* (Radford, VA: Wilder Publications, LLC, 2008), pp. 9.

Contemporary political theorists have generally appeared reluctant to consider casual interactions when developing their political theories of speech, even going so far as to imply that this kind of speech is not actually political. Deliberative democratic and American legal theorists, in particular, tend to limit “meaningful” political speech to that communication, which is formal, reasoned and aimed at a higher, public good, thereby excluding social speech. And as Jane J. Mansbridge explains, within “the discipline of political science, the subfield of political theory, and the subculture of certain activist groups, the label ‘political’... has a legitimating function for objects of study, a normative function in bringing into play criteria of judgment specific to political things, and a valorizing function in marking a particular activity as ‘serious.’”<sup>3</sup> Thus, for contemporary political theorists to say that social speech is not political, they are also suggesting that it either does not matter (i.e. trivial) or is not of public value (i.e. private). And by extension, they are implicitly marginalizing those ideas and peoples who are most associated with social speech. In other words, by not addressing the realities of these groups, political theory is saying that their speech isn’t as good or important as others.

Katherine Cramer Walsh has suggested that contemporary political scientists tend to devalue everyday communication for two reasons. “First,” she writes, political scientists “generally believe that democracy hinges on deliberation, but the political talk that arises as a by-product of casual interaction does not fit prevailing definitions of this venerable act. As such, it has slipped through the cracks of recognition of objects worthy of serious study.”<sup>4</sup> In other words, democratic political theory’s current preoccupation with the informed, reasoned, conscientious discussion lauded by deliberative democratic theorists has caused many to overlook those forms of speech that do not live up to the grand ideals of deliberation. Second, Walsh points out that, while political scientists “have evidence that the transmission of information among members of

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<sup>3</sup> Jane J. Mansbridge, “Everyday Talk in the Deliberative System,” in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed.) (New York: Oxford University Press, 1999), pp. 214.

<sup>4</sup> Katherine Cramer Walsh, *Talking about Politics: Informal Groups and Social Identity in American Life* (Chicago: The University of Chicago Press, 2004), pp. 2.

the public matters for their individual opinions... we have little faith that members of the public actually engage in meaningful political talk.”<sup>5</sup> This skepticism about the quality of actual public discourse has led many political scientists to turn to theories of communication that are more structured.

The result of these two factors, Walsh explains, is that most contemporary political science scholarship about speech has been concerned only—or at least, primarily—with formal deliberation. Political scientists tend to limit themselves to researching overtly political speech, which occurs in a formal institutional setting, among public persons. Thus, with few exceptions (e.g. Mansbridge, Walsh), political science scholarship and political theories of speech have failed to incorporate social speech. And to the extent that casual, everyday talk is actually studied, it is almost exclusively done so in settings manufactured by the researcher, providing the opportunity to discuss its existence, but not its content or potential effects.<sup>6</sup>

But the apparent lack of interest in social speech in the political science discipline does not mean that this form of communication is truly unworthy of academic study. Building off of feminist theory, I would say that, not only is it true that the personal is political, but the social is political as well.<sup>7</sup> Indeed, throughout this project, my goal will be to prove that, by influencing the scope and quality of liberal democratic citizenship, social speech does serve a legitimate and powerful political purpose.

### **I. The need for a political theory of social speech**

While social speech has always existed—and has, therefore, always affected political outcomes—I believe that there is currently a pressing need for an explicitly social political theory

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<sup>5</sup> Ibid.

<sup>6</sup> See *ibid.*, pp. 3.

<sup>7</sup> See, for example, Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton: Princeton University Press, 2002), pp. 23.

of speech. I attribute this need to two recent trends: one in political theory; one in communication.

The first trend involves a particular attitude towards political theory. The recent rise in the popularity of deliberative democratic theory has signaled a move towards more abstract political theories of speech, which focus entirely on how people *should* speak or how they *would* deliberate in an ideal world under perfect conditions of rationality, information and respect. Unfortunately, these theories ultimately have little relevance to the practice of communication. When we examine the ways in which people really do communicate with one another, we find that they do not tend to behave according to the paradigms described by deliberative democratic theories – neither in terms of content nor style.

First, even a cursory survey of human communication will reveal that it is not generally concerned with great political, philosophical or scientific issues. Instead, when individuals talk with one another, it is usually in order to discuss the mundane and the trivial. As Joseph Epstein explains, for most people,

Other people is the world's most fascinating subject. Apart from other people, there can only be shoptalk, or gab about sports, politics, clothes, food, books, music, or some similar general item. Talk is possible about the great issues and events and questions, both of the day and of eternity, about which most of us operate in the realm of mere opinion and often don't have all that much—or anything all that interesting—to say. How long, really, does one wish to talk, at least with friends, about the conditions for peace in the Middle East, the probable direction of the economy, the existence of God? For most of us, truth to tell, not very long.<sup>8</sup>

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<sup>8</sup> Joseph Epstein, *Gossip: The Untrivial Pursuit* (New York: Houghton Mifflin Harcourt, 2011), pp. 5.

In this passage, Epstein addresses a truth that many people would rather not admit – while the world now contains innumerable (and previously unfathomable) opportunities to discuss the grand questions of mankind with a diverse and geographically far-flung community of our own choosing, most of us would rather be discussing celebrity gossip, sports or what we ate for dinner. In other words, the content of most communication is decidedly less political and public spirited, and unquestionably more private and social.

Second, not only does the content of most speech differ from what is generally assumed by ideal deliberative democratic theories, but so too does the style of speech. Ideal speech theorists tend to assume that individuals communicate using rational, informed, respectful speech. Speech, which does not adhere to the values of impartiality, publicity and autonomy, is often excluded from such theories. However, while most individuals do incorporate some reason, information and civility into their arguments, they are also likely to feature passion and subjective feelings. This “emotional speech” bears little resemblance to the ideals of much political theory.

Ultimately, it is important for political theorists to keep in mind that the vast majority of people are not public figures. They do not enter the halls of Congress to debate issues of constitutional significance, nor are they broadcast nightly on the news, informing the world of the price of oil or the newest tax initiatives. For most people, politics are not their highest priority. Instead, their lives are driven by more immediate concerns, like putting dinner on the table, deciding where to send their children to school and agonizing over who won the World Cup. So when individuals do have the time to socialize with friends, family, colleagues and acquaintances, it is these latter concerns that tend to dominate. (In fact, it is often considered rude to address political issues in social settings.)

The gap between deliberative democratic theory and the practice of speech means that a substantial portion of political theory is now cutting itself off from lived experience. As a result, these theories cannot easily or effectively be transferred to workable public policies. So while I

agree that there is certainly a need for “ideal theory” in the political science discipline, I also believe that, in order to remain relevant, we must develop political theories that relate to the world as it actually works. And fortunately, I am not alone in this opinion. The move towards more empirical and quantitative research in political science indicates that the discipline, as a whole, may be growing more receptive to political theories of speech that aim to explain something about the way people actually *do* communicate, and what that means for the political sphere.

The second trend, which suggests that this might be a good time to address social speech in political theory, involves the expansion of social speech. While social speech exists at all times and in all places—indeed, it predominates in communication, serving as the primary means by which private individuals communicate within their homes, out at pubs, etc.—it has become increasingly ubiquitous in the current day and age. As Robert D. Putnam explains in *Bowling Alone*, social activities make up a substantial portion of human existence. During the last quarter of the twentieth century, he estimates, Americans, on average,

... attended church services and visited with relatives nearly every other week; ate dinner out, sent a greeting card to someone, and wrote a letter to a friend or relative about once every three weeks; played cards about once a month and entertained at home just about that often; attended a club meeting about every other month and had a drink in a bar almost that often; gave or attended a dinner party, went to the movies, and attended a sporting event roughly every two or three months; worked on some community project and played some team sport roughly twice a year; and wrote a letter to the editor every other year.<sup>9</sup>

And the pervasiveness of social speech is especially notable, Putnam argues, when it is compared to the frequency with which Americans perform traditional political acts. The average American, he explains, gets together with friends about twice as often as she works on

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<sup>9</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster Paperbacks, 2000), pp. 97.

community projects, and she sends a greeting card to a friend about thirty-five times for often than she sends a letter to the editor.<sup>10</sup>

Thus, the picture Putnam paints of American life is one in which individuals are extremely socially engaged. While they may be less likely to take part in traditional political actions than they once were, Americans are spending a great deal of their time interacting with one another socially.<sup>11</sup> The reasons for this are, of course, many and varied. However, I would argue that there at least two primary factors that have pushed Americans towards more social speech.

The first factor involves the significant income gaps that currently plague the United States. As a number of political scientists and economists have noted, the late twentieth century has been one of the most inegalitarian periods in American history. A recent study by the Congressional Budget Office (CBO) found that, in the United States, between 1979 and 2007, the share of income going to higher-income households rose by about ten percentage points, while the share going to lower-income households fell by several percentage points. This diverging of fortunes is even starker when one looks at the difference between the top one percent of households, whose income grew by 275 percent over that same period, and the bottom 20 percent, whose income only grew by 18 percent.<sup>12</sup> And since 2007, these trends appear to be going strong. In a now infamous study by Thomas Piketty and Emmanuel Saez, the two economists estimated that, in 2012, the top one percent of American earners saw their incomes rise by 19.6 percent, while the other 99 percent experienced only a one percent increase in their

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<sup>10</sup> Ibid., pp. 97-98.

<sup>11</sup> Note that Putnam believes that Americans are becoming less social, and that he laments this perceived decline. See *ibid.*, pp. 107-108.

<sup>12</sup> See Congress of the United States, Congressional Budget Office, "Trends in the Distribution of Household Income Between 1979 and 2007. Available at: <http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-25-HouseholdIncome.pdf>.



incomes.<sup>13</sup> Indeed, the authors argue, not since the Gilded Era have Americans seen such substantial material inequalities.<sup>14</sup>

This current gap between the “have’s” and the “have not’s” has meant that social speech has come to play an especially important role in the lives of the latter. Throughout history, social speech has provided a vital outlet for politically marginalized groups, who also tend to be more typically associated with the private or domestic sphere to which they have often been confined (i.e. women, minorities, etc.). And I argue that the greater the distance between the least and most affluent members of a society—and thus, the greater the gap in political power and influence—the more important social speech becomes. Not only do members of marginalized groups find solace in retreating into the social sphere during times of substantial inequality, but within this arena, they also find a space in which to engage in alternative political actions. And this is true at least up until the point where inequality becomes so severe that it spurs mass political unrest and, even, revolution.

The second primary factor that has influenced the growing prevalence of social speech is technological. As the Internet has made its way into more and more homes, and people are increasingly accessing social networking sites in order to interact with a wider circle, the informal, everyday communication, which is indicative of these social spaces, has come to play a larger role in the lives of average citizens. In other words, online communication has changed the way people talk to one another. Because it favors informal, affective speech about seemingly trivial matter, that kind of social speech has become an increasingly dominant aspect of human

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<sup>13</sup> Emmanuel Saez, “Striking it Richer: The Evolution of Top Incomes in the United States (Updated with 2012 preliminary estimates).” Available at: <http://elsa.berkeley.edu/users/saez/saez-UStopincomes-2012.pdf>. See also Thomas Piketty and Emmanuel Saez, “Income Inequality in the United States, 1913-1998,” in *Quarterly Journal of Economics*, Vol. 118, No. 1 (2003), pp. 1-39 (Tables and Figures updated to 2012, September 2013). Available at: <http://eml.berkeley.edu/~saez/TabFig2012prel.xls>.

<sup>14</sup> Ibid.

interaction. And as the norms of online communication bleed into offline communication, we can only imagine that social speech will come to play an even larger role over time.

But regardless of what is driving the rise in social speech, the important thing to keep in mind is that this kind of communication makes up, by far, the greatest portion of most people's waking lives. And as social beings, many people would also admit that it constitutes one of the most important aspects of their existence, influencing everything from what they eat to how they vote. Thus, it seems reasonable to expect that social speech should receive special attention from political theorists who aim to explain and guide human behavior.

## **II. Social speech in contemporary political theory:**

Although, in general, the political theory community has not adequately considered social speech and its political implications, there are a handful of scholars who have begun to address the concept. Most notably, Mansbridge's "everyday talk," Putnam's "schmoozing" and Walsh's "casual interactions" all address variations of social speech from within the discipline of political science. As such, they each served as a powerful inspiration for the political theory of social speech that I present in this project.

First, in Mansbridge's essay, "Everyday Talk in the Deliberative System," she defines her "everyday talk" in much the same way as I imagine social speech, by juxtaposing it against more traditional models of deliberative speech:

What I will call 'everyday talk' does not meet all of the criteria implicit in the ordinary use of the word 'deliberation.' It is not always self-conscious, reflective, or considered. But everyday talk, if not always deliberative, is nevertheless a crucial part of the full deliberative system that democracies need if citizens are, in any sense, to rule themselves. Through talk among formal and informal representatives in designated

public forums, talk back and forth between constituents and elected representatives or other representatives in politically oriented organizations, talk in the media, talk among political activists, and everyday talk in formally private spaces about things the public ought to discuss—all adding up to what I call the deliberative system—people come to understand better what they want and need, individually as well as collectively.<sup>15</sup>

This passage suggests that Mansbridge means to shift away from political theory's current focus on ideal deliberation, and to include more informal interactions within the rubric of meaningful political speech. Even speech that is not perfectly deliberative, she writes, is an important part of democratic self-governance. Indeed, it is through this "everyday talk in formally private spaces" that society decides what issues are important.<sup>16</sup>

While the idea of everyday talk is an excellent first step to a political theory of social speech, I argue that it does not quite go far enough. While Mansbridge attempts to incorporate the informal social sphere into her account of the democratic process, she is still overly tied to the institution of public speech. This is evidenced by the passage above, in which, of her five examples of meaningful speech that do not fit the deliberative model, she includes four that are still clearly traditionally political. Even the final example of private, everyday talk is limited by the caveat that it must consider the "things the public ought to discuss."

Putnam goes one step further than Mansbridge does, in challenging the primacy of ideal deliberation and elevating the role of less formal speech in the democratic process. In his landmark studies on social and political life in the contemporary United States, Putnam directly

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<sup>15</sup> Jane Mansbridge, "Everyday Talk in the Deliberative System," pp. 211.

<sup>16</sup> "In everyday talk and action the nonactivists test new and old ideas against their daily realities, make small moves—micronegotiations—that try to put some version of an idea into effect, and talk the ideas over with friends, sifting the usable from the unusable, what appears sensible from what appears crazy, what seems just from what seem tendentious. In their micronegotiations and private conversations, nonactivists influence the ideas and symbols available to the political process not only aggregatively, by favoring one side or another in a vote or in a public opinion survey, but also substantively, through their practice. They shape the deliberative system with their own exercise of power and reasoning on issues that the public ought to discuss" (*ibid.*, pp. 214).

examines the social interactions that, at first glance, may seem entirely foreign to the political sphere. In essence, he finds that participation in voluntary civil associations builds the individual skills and social capital necessary for effective democratic governance. Importantly for the purposes of this project, Putnam's findings are not limited to participation in community political groups. While he does not believe that the more informal, organic interactions between private citizens—what he calls “schmoozing”—are as politically influential as more structured, political organizations, he does explicitly state that they matter.<sup>17</sup> “To be sure, informal connections generally do not build civic skills in the ways that involvement in a club, a political group, a union, or a church can,” he writes, “but informal connections are very important in sustaining social networks.”<sup>18</sup> By helping individuals build emotional connections and trust within a community, Putnam believes, casual, social speech contributes to the social capital necessary for a well functioning representative, participatory government.

Likewise, Walsh presents a way of understanding the political impact of casual interactions (i.e. social speech) in her book, *Talking about Politics*. Walsh claims that casual interactions, even more than political behavior, shape individual citizens' social identities.<sup>19</sup> As she explains, social identity is developed through an updating process, in which prior identities come into contact with and absorb information gathered through small group conversation. These social identities then become the lenses through which participants evaluate their political environments and their places within them. “Social identities are not just one component of our worldviews,” Walsh writes.<sup>20</sup> “Instead, we see the world *through* ideas of where we place ourselves in relation to others.”<sup>21</sup>

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<sup>17</sup> For an explanation of “schmoozing,” see Putnam, *Bowling Alone*, pp. 94-95.

<sup>18</sup> *Ibid.*, pp. 95.

<sup>19</sup> See Walsh, *Talking about Politics*, pp. 8.

<sup>20</sup> *Ibid.*, pp. 3.

<sup>21</sup> *Ibid.*

Thus, Walsh is arguing that casual social encounters serve two related political functions. First, these group interactions encourage and enable individuals to delineate between their relevant community and the outside world. In other words, they indicate which people are “us” and which people are “them.” Second, the process of comparing oneself to others in face-to-face conversation helps participants understand what is appropriate for them, as members of these in-groups. As Walsh explains, informal talk is not just about exchanging information; rather, “the fundamental, politically relevant act is the communication of information about the kind of people individuals perceive themselves to be and the collective of group and community boundaries.”<sup>22</sup>

Both Putnam and Walsh’s acknowledgements of the importance of everyday, social interactions represent vital validations of the political role of social speech. Putnam argues that schmoozing is one element in the process of building social capital, and Walsh claims that casual encounters teach citizens the boundaries between the relevant “us” and “them.” However, while I agree with both of these accounts, I do not believe that they are the *whole* story. In this project, I will argue that social speech actually serves multiple functions at the same time, including (but not limited to) building social capital and defining community boundaries.

### **III. Defining social speech:**

In this project, I build upon the theories of Mansbridge, Putnam and Walsh (as well as many other political and social scientists) in order to develop my own political theory of social speech, which provides a comprehensive explanation for how quotidian, social conversations between average citizens can shape liberal democratic citizenship and political outcomes. But before I can begin with my theory, I must first explain exactly what it is that I mean by the term “social speech.”

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<sup>22</sup> *Ibid.*, pp. 42.

First, by speech, I am signifying conscious communication in any form. This may include spoken words, written words, symbolic actions, texting, tweeting and non-verbal cues, such as eye rolling or smirking. What matters most for this understanding of speech is that multiple individuals are communicating with one another – that they are engaging in a social act.

Second, when I add the signifier “social,” I am referring to both the content and context of speech. In terms of the former, social speech is extremely inclusive: it encompasses those subjects that are considered personal and appropriate to casual conversations between friends, family, acquaintances and colleagues. Thus, although subjects that directly deal with public issues may sneak in (e.g. griping about taxes), the majority of social speech focuses on areas of interest that have traditionally been considered too trivial, sentimental, emotional, etc. for political analysis.

It is also worth noting that the content of social speech may affect its form. Often, the topics addressed through social speech are better expressed with the use of such tools as rhetoric and story telling, rather than through formal, rational deliberation. Thus, these rhetorical tools are prominently featured in social speech, especially as compared to their usage in other forms of communication.

In terms of context, social speech can be distinguished from purely political, public speech in that it takes place outside of the traditional public sphere, in what may be considered civil society. In other words, social speech exists in the social – the space between the state and the individual. In his essay, “Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary,” Alan Wolfe describes the social as one part of the trichotomy (also including the public and the private) that constitutes contemporary human existence:

Terminology being contentious here, let me formulate the trichotomy this way: there is a *private* sector in which we appropriately judge behavior by whether it maximizes individual freedom or self-interest; a *public* sector in which we make decisions that are

meant to apply equally to everyone in the society (even as we recognize the near impossibility of doing this); and a realm of distinct *publics*. These publics—by which I mean families and kinship networks, associations, ethnic and racial groups, linguistic communities, and other similar communities of interest, identity, and belief—are on the one hand collective: they are guided by shared norms, can impose sanctions on members, and try to perpetuate themselves as groups at the cost of overriding individual preferences. But—hence the plural—such publics are not authoritative for the entire society; there are too many of them. It is for this reason that they are, on the other hand, partially private: they can protect individual members against intrusive state intervention from outside, express particularistic rather than universalistic needs, and allow the individual members within the group to develop their personal identities (and self-confidence) more fully.<sup>23</sup>

These multiple “publics,” as Wolfe refers to them, are the loci of social speech. And because social speech occurs within the space between the public and the individual, it is necessarily distinct from the communication that takes place within these two spheres.

Thus, social speech is decidedly *not* the kind of official speech that occurs within institutions such as Congress, town halls and political programs on television. Instead, social speech is that communication, which takes place throughout civil society, in intimate and semi-private locations, such as coffee shops, sports bars, the Internet and even within the home. It may involve communication that occurs in the course of any voluntary collective activity. Examples may include anything from book clubs to athletic leagues to online message boards.

Table 1.1 provides a visual representation of what is meant by social speech. If speech occurs among individuals in the social sphere—or civil society—and refers to intimate, personal

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<sup>23</sup> Alan Wolfe, “Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary,” in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy*, Jeff Alan Weintraub and Krishan Kumar (eds.) (Chicago: The University of Chicago Press, 1997), pp. 196-197.

topics (the upper left-hand corner), it is an example of social speech. This is also the case for speech that occurs among private citizens in the social sphere, but may involve more traditionally political topics, such as elections, immigration, taxes, etc. (the upper right-hand corner). Finally, speech that takes place in the political sphere but does not involve issues of public importance (the lower left-hand corner) also constitutes social speech. After all, it is only when political actors are speaking in their official capacity that their speech can be considered public. When they communicate with one another as private citizens (e.g. creating goodwill and building camaraderie), they are engaging in social speech, regardless of their physical location. Examples of such speech might include Senators catching up with one another over coffee or the president inviting Congressmen to play basketball at the White House.

Social Speech (Table 1.1):

		Content	
		Social	Political
Context	Civil society	✓	✓
	Public sphere	✓	×

In sum, social speech is the activity that most of us call to mind when we think of what it means to be communicating. It is the way that we communicate with friends, neighbors, colleagues and even strangers. The only kind of speech that could not be considered social speech is that which takes place in the public sphere and considers solely issues of traditional public importance. But as I explain throughout this project, that kind of speech represents only a very small portion of human interaction. And it is often very difficult to locate. Indeed, for the most part, purely public speech tends to bleed into social speech, making it impossible to know where public speech ends and social speech begins.



As Nina Eliasoph explains in her essay, “Making a Fragile Public: A Talk-Centered Study of Citizenship and Power,” the fluid nature of most communication means that individuals tend to naturally incorporate both more social and more publicly oriented topics into their conversations.<sup>24</sup> In her study of the “backstage” interactions of an activist group, Eliasoph explains how members “nimble transformed seemingly private topics of conversation into public ones and back again.”<sup>25</sup> She describes how a conversation about home décor can transition into a debate about the political implications of buying Navajo rugs from a reservation, and how a discussion about buying a new car could become a debate about “Freon, air condition, and ozone depletion.”<sup>26</sup> And similar examples abound in all corners of the world. For the most part, there is no clear line separating political speech from social speech.

#### **IV. Locating social speech:**

While social speech may take place in any location, there are certain venues where it has had a particularly notable influence. The Internet, for example, has been repeatedly decried by political and cultural theorists for the informal, unreflective nature of the communication that takes place within it. Similarly, safe spaces, although much older than Internet speak, have traditionally been extremely conducive to social speech. Indeed, safe spaces have often been defined in the Black feminist and LGBT literatures as homes for casual, unpracticed communication. Finally, hate speech serves as one of the most politically influential vehicles of negative social speech.

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<sup>24</sup> Nina Eliasoph, “Making a Fragile Public: A Talk-Centered Study of Citizenship and Power,” in *Sociological Theory*, Vol. 14, No. 3 (November, 1996), pp. 262-289. See also Walsh, *Talking about Politics*: “Much political interaction occurs not among people who make a point to specifically talk about politics but emerges instead from the social processes of people chatting with one another. When people report with whom they talk about politics, they tend to mention the people they are most likely to interact with about anything” (pp. 35).

<sup>25</sup> Eliasoph, “Making a Fragile Public,” pp. 275.

<sup>26</sup> *Ibid.*

In this section, I briefly review these three spaces in which social speech not only occurs, but dominates. I will address these areas in more depth in Chapter Six, explaining the exact mechanisms by which the social speech that takes place in each of these venues comes to affect liberal democratic citizenship and political outcomes. However, for now, in order to illustrate the concept of social speech, I will simply describe what such communication looks like in these three, very disparate instances.

To begin, the Internet—and, specifically, social networking—is among the newest and, perhaps, most revolutionary venues for social speech. As the Internet has grown in size and reach, it has become an increasingly important tool for communication. With the technology to go online becoming more affordable and accessible every day, people from all demographics have begun to forgo face-to-face contact, and instead, use their computers and mobile devices to “speak” to one another.<sup>27</sup>

And it is already clear that the manner in which most of these individuals are speaking to one another is decidedly social. For the average user, the Internet fosters a private style of speech, which encourages her to contribute largely personal or intimate information (witness the popularity of the blogosphere) and to do so in a less formal style (witness the new language of abbreviations and emoticons). The overall effect is a prevalence of social speech online.

The empirical evidence bears this out. In *The Myth of Digital Democracy*, Matthew Hindman studies Web usage patterns, and shows that Internet traffic is significantly more likely to involve intimate or social topics than political ones.<sup>28</sup> Even researchers who are optimistic about

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<sup>27</sup> In 2010, Facebook (the most popular social networking site) had an audience, in the United States, of nearly 153.9 million users. MySpace had 50 million users, LinkedIn had 26.6 million users and Twitter had 23.6 million users. These numbers have only increased in the following years. See Sarah Radwanick, “U.S. Digital Year in Review: A Recap of the Year in Digital Media,” comScore (February 2011). Available at: [http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/2010\\_US\\_Digital\\_Year\\_in\\_Review](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/2010_US_Digital_Year_in_Review).

<sup>28</sup> See Matthew Hindman, *The Myth of Digital Democracy* (Princeton, NJ: Princeton University Press, 2009), pp. 60-61.

the possibility of citizens engaging in meaningful political discussions online admit that this is still a relatively rare phenomenon, and one that might be due to the very structure of the Internet, which tends towards the superficial and impersonal.<sup>29</sup> Indeed, when given the choice—and what is the Internet if not a plethora of choice?—people have repeatedly shown that, when they are logged on, they prefer to talk about the latest gossip rather than world events and philosophical treatises. So while the Internet may contain countless sources for political information and discussion, the communication that occurs via electronic devices is only rarely in clear pursuit of political purposes.

Next, safe spaces represent a second venue in which one can find a preponderance of social speech. While political theory typically associates safe spaces with the Black—and especially the Black female—community, these can actually develop wherever and whenever there are groups that are politically, economically and/or socially discriminated against. In general, safe spaces are defined as places where members of marginalized groups can assemble to communicate with one another, outside and apart from the mainstream (e.g. the home, religious institutions, community organizations, etc.). They may be physical locations that were designed to host these kinds of gatherings, or they may emerge wherever people come together.<sup>30</sup> In either case, these “kitchen table” discussions enable participants, not only to affirm their own identifies, but also to challenge hetero-orthodox values and develop their own moral codes and ideologies.<sup>31</sup>

Within safe spaces, speech tends to differ significantly from the reasoned, informed ideals of deliberative democratic theory. Instead, safe space communication tends to be much

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<sup>29</sup> See, for example, Vincent Price, “Citizens Deliberating Online: Theory and Some Evidence,” in *Online Deliberation: Design, Research, and Practice*, Todd Davies and Seeta Pena Gangadharan (eds.) (Chicago: University of Chicago Press, 2009), pp. 41.

<sup>30</sup> Lisa Dodson, “At the Kitchen Table: Poor Women Making Public Policy,” in *Women and Welfare: Theory and Practice in the United State and Europe*, Nancy Hirschmann and Ulrike Liebert (eds.) (New Brunswick, NJ: Rutgers University Press, 2001), pp. 186-187.

<sup>31</sup> See Patricia Hill Collins, *Black Feminist Thought* (New York: Routledge Classics, 2009), pp.

more organic, often consisting of humor and shared narratives about issues of personal importance, such as family, work and entertainment. Thus, in terms of content, safe space speech could be considered mostly social. And as Patricia Hill Collins explains in *Black Feminist Thought*, communication in safe spaces is also mostly social in its style. Safe space speech emphasizes dialogue, an ethics of caring and personal responsibility, she writes, all of which are indicative of social speech.<sup>32</sup>

Finally, while hate speech is not a “location” of social speech in quite the same way that Internet speak and safe spaces are, it is an important form of social speech. While many Americans typically associate hate speech with only its overtly political, public form, hate speech actually occurs at all levels of human interaction. Indeed, when one understands hate speech as verbal or written harassment, based on ascriptive characteristics, it becomes clear that such communication often takes place in the social sphere. Over the last several decades, official, state-sponsored messages of animosity and segregation may have abated in liberal western democracies, but it is still not uncommon to hear messages of hate towards marginalized groups coming from within social spaces, such as places of business, popular culture, sporting events and even university campuses.

Indeed, even when hate speech does take place in the formal, political arena, it is still essentially social. Attacks on one’s race, ethnicity, religion or gender, whether they occur in public or private settings, are decidedly intimate. They strike to the core of how an individual may define herself. As Mari J. Matsuda explains, “[r]acist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.”<sup>33</sup> So wherever hate speech takes place, it is experienced as a personal affront, as opposed to a merely political attack. And it is

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<sup>32</sup> Ibid., pp. 279-285.

<sup>33</sup> Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw (eds.) (Boulder, CO: Westview Press, Inc., 1993), pp. 23.

largely for that reason that many of the world's liberal democracies have chosen to criminalize hate speech, whether it takes place publicly or socially.<sup>34</sup>

## V. Theory outline:

Now that I have explained *why* a theory of social speech is important, *who* is currently looking at it, *what* I mean by the term and *where* these actions are taking place, I would like to explain *how* I think it is that social speech comes to affect liberal democratic citizenship and political outcomes in both positive and negative ways. In this section, I will provide a brief outline of the four mechanisms by which I believe social speech comes to affect the political world:

1. Social speech helps individuals build the character traits that make for better or worse democratic citizens.
2. Everyday interactions contribute to social capital and trust (based on mutual interests, hopes and objectives).
3. Social communication provides training for one's unique political culture, informing individuals about what it means to be a good or bad citizen in the context of their political communities.
4. Social speech leads to the affective ties that enable individuals to understand the borders of their communities.

As I explain throughout this project, each of these mechanisms may have positive or negative implications for democratic governance, depending on both the form and the content of the social speech in question.

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<sup>34</sup> See, for example, United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3940.html>

First, I argue that social communication helps individuals develop the character traits that will eventually determine what kinds of liberal democratic citizens they become. All aspects of an individual's life contribute to the development of her personality; however, because of its intimacy, inescapability and interactivity, social speech is especially likely to impact character development. And where social speech is constructive, encouraging and informative, that impact is likely to be positive. Specifically, good social speech ought to result in the development of a virtuous and active character. As Vincent Blasi argues, this means that individuals are likely to possess qualities such as "inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, courage to confront evil, aversion to simplistic accounts and solutions, capacity to act on one's convictions even in the face of doubt and criticism, self-awareness, imagination, intellectual and cultural empathy, resilience, temperamental receptivity to change, tendency to view problems and events in a broad perspective, and respect for evidence."<sup>35</sup> And while these character traits may not be sufficient for good democratic citizenship, they are necessary in societies that expect their citizens to be involved, compassionate and passionate.

Social speech not only results in good democratic character, however. When social speech is mean, exclusive and discourteous, it is likely to lead to the development of personality traits that are undesirable from the perspective of liberal democratic citizenship. Specifically, individuals tend to respond to negative social speech by becoming either aggressive, isolationist or insecure/meek. These qualities not only make it unlikely that an individual will choose to engage in the political sphere, but they also ensure that she will be less successful, should she choose to do so.

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<sup>35</sup> Vincent Blasi, "Free Speech and Good Character: From Milton to Brandeis to the Present," in *Eternally Vigilant: Free Speech in the Modern Era*, Lee C. Bollinger and Geoffrey R. Stone (eds.) (Chicago: The University of Chicago Press, 2002), pp. 84.

Second, by engaging in social speech, I argue that people are simultaneously creating conditions of trust and building social capital. When individuals interact with one another, they (ideally) develop positive feelings of trust, respect and empathy, which can then be expanded to apply to the community more broadly. And it does not matter how small or seemingly insignificant an interaction may be – every social act is one more drop in the bucket of social capital. And as Putnam explains, social capital is essential to the productive and efficiency of liberal democratic states. In “Social Capital and Public Affairs,” he describes how social capital facilitates cooperation, serves as a template for future cooperation and contributes towards norms of generalized reciprocity.<sup>36</sup>

Unfortunately, that is only part of the story. While all kinds of speech contribute to social capital, not all instances of speech contribute *positively* to social capital. Specifically, when the content of social speech is mean, exclusionary or derogatory, it not only fails to bring about conditions of trust, respect and empathy, but it may even diminish those values in society. Furthermore, even when social speech is positive and inclusive, it does not always apply equally across demographic groups.

Third, I argue that casual, social interactions train individuals for their unique political cultures, serving as informal schools of civic education. In these everyday conversations individuals learn (and also contribute towards the understand of) what is possible, important, right and feasible within their given societies. In other words, using Andrew Perrin’s language, people develop their democratic imaginations.<sup>37</sup> The democratic imagination serves as a kind of repertoire or lens, through which individuals understand and process their political environments. And to the extent that social speech contributes to the development of this lens, it is both necessary for and determinative of political action.

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<sup>36</sup> Robert Putnam, “Social Capital and Public Affairs,” in *Bulletin of the American Academy of Arts and Sciences*, Vol. 47, No. 8 (May, 1994), pp. 5-19.

<sup>37</sup> See Andrew Perrin, *Citizen Speak: The Democratic Imagination in American Life* (Chicago: The University of Chicago Press, 2006).

Social speech provides cultural and political training in a more literal sense as well. Not only do individuals learn what is desirable and practical through everyday conversation, but these forums also provide people with opportunities to learn and practice the skills necessary for effective participation in public affairs. Cooperation, compromise and clear expression are all tools that can be developed through social speech, and are absolutely essential in the political sphere.

However, these positive benefits of social speech will only occur where such communication is democratic, egalitarian and amicable. Where social speech is hateful, unequal or restrictive, the participants' democratic imaginations are likely to develop in a much more limited fashion. Rather than establishing pride in one's community and a desire to engage in democratic politics, this kind of democratic imagination may lead to seclusion and shame. Such negative social communication is also likely to provide poor training for liberal democratic politics.

The fourth and final mechanism that I believe connects social speech to liberal democratic citizenship and political outcomes is its tendency to define communities. When citizens participate in this kind of speech, they are highlighting their commonalities and mutuality. As a result, they build emotional connections to one another, thereby simultaneously and unconsciously forging the boundaries of their communities. In other words, social speech provides the foundation for determining a line between the "us" and the "them."

And there are definite benefits to this community building. First, on an individual level, humans tend to be happier and more fulfilled when they feel like they are members of cohesive, identifiable community. Second, on a political level, people are more likely to participate in democratic self-governance and pursue communal ends when they understand themselves as belonging to a community. As Mansbridge shows in her study of Selby, VT, this occurs as a result of both positive and negative pressures.<sup>38</sup> Engagement with others on an intimate or social

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<sup>38</sup> Jane J. Mansbridge, *Adversary Democracy* (Chicago: University of Chicago Press, 1983).



level, she argues, makes citizens more excited about participating in local politics,<sup>39</sup> encourages a minimum of decency while engaging in politics,<sup>40</sup> and facilitates the political process.<sup>41</sup>

But, unfortunately, that is not always the case. Indeed, the development of an in-group necessitates the appearance of an out-group. And while drawing a line between in-groups and out-groups can go a long way in establishing cohesion, love and solidarity among in-groups, it may also breed negative feelings towards members of out-groups. Even within the in-group, a friendship model of government highlights the fact that not all people are friends. Some members of a community are always going to feel rejected or marginalized by the group and, as a result, will be excluded from the political decision making process.

Taken together, I argue that these four mechanisms explain much—if not all—of the political impact of social speech. By contributing towards democratic character development, social capital, political/cultural training and boundary forging, informal everyday conversations help determine both the quality and scope of liberal democratic politics. That is why it is so important that political scientists come to understand and appreciate social speech. Indeed, while social speech is often considered a merely individual good or right, it is also a political value.

## **VI. Dissertation Outline:**

The goal of this project is to design a new theory of speech to complement and fill in the gaps left behind by more traditional political theories—which only emphasize the overtly political—and to provide a richer understanding of the lived experience of the average democratic citizen. I approach these tasks from four directions: 1) critiquing contemporary political theory's singular focus on public, political speech; 2) rediscovering a classical political theory of social

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<sup>39</sup> *Ibid.*, pp. 9.

<sup>40</sup> *Ibid.*, pp. 46.

<sup>41</sup> *Ibid.*, pp. 50.

speech; 3) developing a new theory of speech that emphasizes the power of social speech to influence democratic character traits, build social capital, train citizens in their unique political cultures, and create the emotional ties that bind communities together; and 4) providing empirical observation of the political effects of social speech situations.

I begin, in Chapters Two and Three, by addressing the deficiencies (from the point of view of social speech theory) of the two most popular contemporary schools of free speech thought: deliberative democratic theory and Anglo-American legal theory, respectively. Both schools, I argue, are clear examples of political theory's current privileging of public, political speech. In the case of deliberative democratic theory, although individual deliberative democrats vary widely in their understandings of how restrictive and idealistic their public spheres should be, they all promote visions of deliberation that emphasize rationality, information, politeness and public significance. And in the case of Anglo-American legal theory, the Supreme Court is generally either fighting to defend speech that enables democratic self-governance (in the tradition of Alexander Meiklejohn) or that is likely to bring about progress and truth (in the tradition of Adam Smith, Louis Brandeis, John Stuart Mill, Wilhelm von Humboldt, etc.).

Thus, in both deliberative democracy and Anglo-American legal theory, politically meaningful speech is only imagined as a very narrow sphere of communication – it involves issues of public importance and takes place in public arenas. This “valuable” speech therefore tends to be much more formal than that, which takes place during casual, everyday interactions. For the most part, deliberative democratic and Anglo-American legal theorists tend to valorize speech that is reasoned, informed and objective, over and above speech that is passionate and evocative. In doing so, however, I argue that these abstract, idealistic theories not only fail to capture the majority of communication, but they also implicitly marginalize those peoples that are associated with more emotional speech.

Next, in Chapter Four, I examine the modern political thought that is credited with forming the foundation of deliberative democratic and Anglo-American legal theory. Specifically, I take a second look at the two most oft-quoted classical theorists of free speech and the so-called fathers of the American and Western European free speech traditions: John Milton and John Stuart Mill. Although contemporary political and American legal theorists often explicitly ground their theories of freedom of speech on limited readings of Milton and Mill, which emphasize the value of public, political speech in promoting progress and/or democratic self-governance, they are actually omitting a central theme for both authors. While the value that both Milton and Mill place on political speech about public ends certainly influences their justifications in favor of increased freedom of expression, they each also have a clear understanding of the importance and power of informal communication in the social sphere.

For Milton, I explain, this translates into an appreciation of the central role that social communication takes in character formation. It is only when one is able to experience all ideas, good and evil, and then freely choose the good that she can be considered to possess the kind of virtuous character necessary for individual salvation and good government. This process may occur in the political sphere, but more often than not, it appears that Milton expects it to take place through everyday communications and expressions.

Likewise, I show that Mill also understands the role that social interactions play in forming, not only the types of citizens that participants become, but also, through them, the institutions within which those citizens exist. This idea can be found in Mill's most popular work on freedom of speech, *On Liberty*, but it becomes even more obvious when his works are read as a whole. Mill believes that an atmosphere of freedom of speech, where various ideas are free to engage in open debate, is valuable, not only because it is more likely to lead to the discovery of political truths, but, more importantly, because such an environment tends to breed the kinds of citizens necessary for a well-functioning participatory government aimed at social progress and the discovery of truths (of all kinds). A society that values freedom of speech does not find truth

and progress simply because there are more ideas available to choose between, he argues; rather, it achieves these ends because it fosters individual traits such as rationality, inquisitiveness, distrust of authority/custom and selflessness, which lead to a more vibrant intellectual and political community. Members of such a community are, in turn, more willing and able to engage in free and open debate. In this way, a policy of freedom of speech both creates good citizens and is reinforced by those very citizens.

In Chapter Five, I draw upon these readings of Milton and Mill in order to present my own political theory of social speech (outlined above). In that chapter, I explain the four major (interrelated) mechanisms that I believe connect social speech to democratic citizenship and political outcomes: 1) Informal communication is a mechanism for creating the kind of character traits (e.g. inquisitiveness, distrust of authority, initiative, courage) that make good democratic citizens; 2) This form of communication builds social capital and trust (based on mutual interests, hopes and objectives), which makes politics run smoother; 3) Private and social interactions train us for our political culture, teaching us the rules of the game and how to be good citizens particular to our communities; and 4) More than any other kind of speech, intimate speech ties us to one another emotionally and helps us build the cognitive borders of our communities. My goal for this chapter is to show that, while the content and form of social communication may technically be apolitical and non-public, these interactions do server very important political functions.

Chapter Six provides an empirical representation of the theory presented in Chapter Five. In this chapter, I examine the three locations of social speech, which I discussed above—Internet speak, safe spaces and hate speech—in order to illustrate how the four mechanisms actually interact in real life. I begin by addressing Internet speak and social networking, in both positive and negative forms. On the positive side, I show how participation in online social networking leads to greater political participation. On the negative side, I show how mean, divisive online speech (e.g. cyberbullying) causes victims to lose agency and to feel like outsiders in their

communities. Next, I look at the “safe spaces” literature, in order to show how time spent in these social arenas offers members of marginalized groups the opportunity to, not only have their voices heard and their opinions respected, but also to challenge oppression and affirm one another’s humanity. On the other hand, I acknowledge that, to the extent that safe space interactions are overly exclusionary, they may further cement differences and breed antagonism between the “us” and the “them.” Finally, I consider the case of hate speech. While I concede that hate speech may be somewhat politically useful as a societal “pressure valve,” I argue that, when it takes place in the social sphere, hate speech is likely to lead to psychological and physical harms. These harms are not only detrimental to the individuals who are affected by hate speech, but also to society as a whole. By both limiting the capacities of targets of hate speech to develop good democratic citizenship characteristics, and also dividing communities and decreasing social trust, social hate speech contributes to a weakening of liberal democratic states.

Finally, in Chapter Seven, I explore and suggest policy options that might harness the democratic power of social speech, while also limiting its potential negative outcomes. While this project focuses on an activity that provides the foundation to all liberal western democracies—speech and communication—my purpose is not simply to defend greater protection for the liberal value of freedom of speech. Rather, the goal of this project is to explore and demonstrate the democratic potential of a sphere of human interaction—social speech—that, until now, has largely been overlooked by political and legal theorists. And when one looks closely at social speech, it truly does appear to serve some important political functions. As political theorists and practitioners come to better understand social spaces, the speech that occurs within those spaces and the mechanisms that tie social communication to political outcomes, they will also have a better idea of how to regulate and promote speech in a positive fashion.

More often than not, this will mean promoting a campaign of public awareness in order to alert the average citizen to the significance of social speech, and to encourage her to approach

her everyday communications with the same purpose and deliberateness as she would any other democratic political activity. Wherever possible, the goal should be to allow social pressures to regulate social speech, by encouraging that, which is positive, and delegitimizing that, which is negative. However, self-regulation and promotion of new norms towards social speech is not always going to be feasible or adequately effective to exact the kinds of changes necessary to encourage positive social speech and discourage negative social speech. In those cases, I argue, a combination of state, corporate and private actors may be called upon to construct the social into the best possible conduit for democracy.

## CHAPTER 2

CRITIQUE OF CONTEMPORARY THEORIES OF FREEDOM OF SPEECH:  
DELIBERATIVE DEMOCRATIC THEORY

*“The facts about deliberation in American settings, at least as I have gathered them, show that what happens when American citizens talk to each other is often neither truly deliberative nor truly democratic.”*

- Lynn M. Sanders, *“Against Deliberation”*<sup>42</sup>

*“Asking the question whether deliberation is a good thing is a bit like asking the question whether a saw is a good tool. If you are making shelving, it is, but not if you are trying to repair a watch.”*

- Ian Shapiro, *The State of Democratic Theory*<sup>43</sup>

Contemporary political and legal theorists have often seemed reluctant to incorporate casual conversations and interactions into their theories of freedom of speech. When social speech is mentioned at all, it is usually only to dismiss it as apolitical, and therefore, not worthy of official recognition. This is especially true of two of the most prominent schools of speech theory: deliberative democratic theory and Anglo-American legal theory.

In this chapter, I explore deliberative democratic theory’s treatment of social speech. (I address Anglo-American legal theory in Chapter Three.) I focus on deliberative democratic theory because I believe it currently represents one of the most influential strains of thought in contemporary political theories of speech. While deliberative politics has been a major theme

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<sup>42</sup> Lynn M. Sanders, “Against Deliberation,” in *Political Theory*, Vol. 25, No. 3 (Jun., 1997), pp. 349.

<sup>43</sup> Ian Shapiro, *The State of Democratic Theory* (Princeton, NJ: Princeton University Press, 2006), pp. 41.

within political theory at least as far back at Aristotle, it has gained significant traction in recent years, ever since Habermas connected it to the idea of popular sovereignty.<sup>44</sup> Since then, as John S. Dryzek explains, the influence of deliberative democratic theory has only increased, as democratic theory has moved away from focusing on more traditional political topics, such as voting, constitutional rights and self-governance.<sup>45</sup> “The deliberative turn,” he writes, “represents a renewed concern with the authenticity of democracy: the degree to which democratic control is substantive rather than symbolic, and engaged by competent citizens.”<sup>46</sup> And this concern for democratic authenticity does not appear to be abating any time soon. Thus, to the extent that deliberative democratic theory neglects a certain kind of communication (i.e. social speech), that omission may have serious consequences for how political theorists think about that speech.

In this chapter, I address the lack of attention paid to social speech by deliberative democratic theorists in two parts. First, I provide a brief survey of the literature that highlights differences between deliberative democratic theorists, while also pointing to several overarching themes within the school of thought. In the second half of this chapter, I advance a critique of deliberative democratic theory from the perspective of a theory of social speech. This critique centers on two oft-cited limitations to deliberative democracy: 1) its abstractness; and 2) its deliberateness.

My first critique is that deliberative models are not sufficiently concerned with the way people actually live. Throughout this project, I argue that political theory needs more than formal models of ideal speech. In order to best understand and harness the political potential inherent in communication, political theorists need to consider the ways in which people actually do speak to one another. Deliberative democratic theory, unfortunately, is too idealized and removed from

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<sup>44</sup> See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press), pp. 8-9.

<sup>45</sup> John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (New York: Oxford University Press, 2002), pp. 1.

<sup>46</sup> *Ibid.*



lived experience to explain much about how speech could be structured to result in a positive impact on liberal democratic citizenship.

Second, I argue that, as an ideal theory, deliberative democracy is overly structured and rigid. As a result, it is not adequately inclusive of the myriad forms that speech may take. Although there is variation from theorist to theorist regarding what exactly constitutes ideal deliberation, in general, these models emphasize rationality, perfect information, equality, symmetry and conscientiousness. Thus, deliberative democratic theories are usually unable to incorporate the more casual forms of speech that tend to permeate social speech (i.e. such as story-telling, greeting or rhetoric).<sup>47</sup> And by dismissing them, deliberative democratic theorists have severely limited their possible field of study. More importantly, they have done so in a way that disproportionately penalizes certain demographic groups. Informal speech patterns tend to characterize many of the same demographic groups, which are already disadvantaged in the political process (i.e. black, female, lower income). By telling those who are less skilled or natural at formal deliberation that they are communicating “wrongly,” deliberative democratic theorists are not only making it more difficult for them to have their voices heard and preferences adopted, but we are also telling them that they are political inferior.

Several deliberative democratic theorists have already taken note of these critiques, however, and they have attempted to address them by developing modified visions of deliberation, which are meant to accommodate a wider and more realistic range of speech. I end this chapter by addressing these revised deliberative democratic theories.

But before I begin, it is important to note that I do not mean to launch a general attack on deliberative democratic theory. I am not arguing, as several critics have, that deliberation is

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<sup>47</sup> See *Ibid.*, pp. 68-70.

either impossible or undesirable.<sup>48</sup> Nor do I mean to say that the limitations inherent in deliberative democratic theory means that it is without merit or utility. In this chapter, I merely make the much more limited claim that, insofar as it has been unable to incorporate social speech, deliberative democratic theory offers only an incomplete representation of the relationship between communication and politics. For what it aims to do, however—which is to present a procedural model of democratic legitimacy that requires free, reasoned deliberation between equals, who are all orientated towards achieving a consensus that is in the public good—deliberative democracy has greatly contributed to both democratic and communicative theory.

#### **IV. Review of deliberative democracy:**

All deliberative democratic theorists begin with the belief that democracy is about more than a simple aggregation of private opinions. Instead, they claim, there is something significant to be gained through the free and open discussion of ideas and attitudes. Unlike John Stuart Mill, who worried that average citizens would struggle to discover truth and republican virtue without the influence of geniuses or social constraints, deliberative democratic theorists believe that, given adequate time, information and interest, the public should be able to talk its way into democratically justifiable policies.<sup>49</sup> Through the exchange of reasoned, fact-based arguments between free and equal citizen, they argue, differences can be ironed out, consensus can be reached and a truly public opinion can emerge.

The consensus that ideally results from deliberation should not be mistaken for truth, however. While deliberation might produce truth, it does not necessarily do so. What is

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<sup>48</sup> See Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1942); Richard Posner, *Law Pragmatism and Democracy* (Cambridge, MA: Harvard University Press, 2004).

<sup>49</sup> See the discussion of John Stuart Mill in Chapter Four.

important for deliberative democrats is only that an argument is accepted through some proper form of discourse.

Thus, deliberative democracy can be considered a *proceduralist* model of legitimacy. In other words, the goal of deliberative democratic theorists is to design the conditions of deliberation in such a way that they ensure democratic legitimacy. And once their procedural limitations have been met, deliberative democratic theorists generally consider the outcomes of deliberation to be democratically justifiable. More than that, as Seyla Benhabib explains, deliberative democratic theorists often assume that their procedures of deliberation will “assure some degree of practical rationality.”<sup>50</sup> The act of deliberating tends to provide participants with information,<sup>51</sup> helps them to order their preferences by forcing them to engage in critical reflection,<sup>52</sup> and contributes towards an “enlarged mentality,”<sup>53</sup> all of which is thought to ensure, not only legitimate, but also democratically favorable outcomes.

In general, there are two types of limitations that deliberative democrats tend to place upon deliberation: location-based and content-based. First, nearly all deliberative democratic theorists agree that, before ideal deliberation can occur, there must exist an appropriate space for it—a public sphere—where participants can raise and discuss issues and opinions. This deliberative democratic space is distinct in two respects. First, public spheres are unique because, within them, discussion occurs apart from and opposed to the state (except in the case of parliaments). Second, they have their own set of rules to entry. In deliberative democratic

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<sup>50</sup> Seyla Benhabib, “Toward a Deliberative Model of Democratic Legitimacy,” in *Democracy and Difference: Contesting the Boundaries of the Political*, Seyla Benhabib (ed.) (Princeton, NJ: Princeton University Press, 1996), pp. 71.

<sup>51</sup> “Deliberation is a procedure for being informed” (Ibid.).

<sup>52</sup> “It is actually the deliberative process itself that is likely to... [lead] the individual to further critical reflection on his already held views and opinions” (Ibid.).

<sup>53</sup> “The process of *articulating good reasons in public* forces the individual to think of what would count as a good reason for all others involved. One is thus forced to think from the standpoint of all involved whose agreement one is ‘wooing’” (Ibid.).

theory, the public sphere usually requires that all entrants be free, equal and capable of forming/acknowledging rational opinions.

The second limitation that deliberative democratic theorists tend to place upon deliberation is content-based. I find that, as a general rule, ideal deliberation must meet at least three requirements. First, any opinions must be well informed and factually based. Second, deliberation must be balanced and comprehensive, presenting all reasonable sides of an argument. Third, any communication must be both expressed and also received with respect and civility. Once these conditions are met, however, individual deliberative democrats allow for a wide array of discussion within the public sphere, ranging from the more to the less overtly publicly oriented. Jürgen Habermas, for example, has a relatively liberal understanding of the scope of discourse that is appropriate for deliberation. What matters to him is that deliberation is thoughtful and represents heterogeneous viewpoints, and thus, he believes the public sphere is able to accommodate subjects that are not traditionally deemed public (i.e. economic issues). James S. Fishkin and Robert C. Luskin, take a similar stance, presenting a set of criteria for deliberation that, in their own words, does “not require any particular style or quality of thought, much less the acceptance of any given premises.”<sup>54</sup> Joshua Cohen, Amy Gutmann and Dennis Thompson, on the other hand, require that deliberators reason based on philosophical principles that everyone could be expected to accept.<sup>55</sup>

In this section, I briefly review these four schools of deliberative democracy—Habermas, Cohen, Gutmann/Thompson and Fishkin, et al.—which represent some of the most prominent and influential deliberative democratic theories to date. By emphasizing both the continuities and also the differences between these theorists, I am able to characterize the wide range of deliberative democratic theory. I am also able to show that, despite the existence of so many

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<sup>54</sup> James S. Fishkin and Robert C. Luskin, “Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion,” in *Acta Politica*, Vol. 40 (2005), pp. 285

<sup>55</sup> See below.

conceptions of deliberation, deliberative democratic theorists, in general, are capable of paying only minimal attention to social speech.

A. Jürgen Habermas – *The ideal bourgeois public sphere*

Habermas begins one of his most famous treatments of speech, *The Structural Transformation of the Public Sphere*, with a historical analysis of the rise and fall of the bourgeois public sphere.<sup>56</sup> He explains that this transformation occurs in two movements: 1) monarchical feudal society to liberal bourgeois public sphere; and 2) liberal bourgeois public sphere to modern mass social welfarism. In the first movement, the ideal deliberative space emerges – the new bourgeois public sphere of eighteenth century Europe. The second movement accounts for its downfall, which was rendered all the more tragic because it resulted in a newly representational culture.

According to Habermas, the first transformation of the public sphere began in Western Europe and the United States in the late seventeenth and eighteenth centuries. Before that time, he explains, European politics were defined by theatricality and imagery. Monarchs portrayed their power to the people through grand courts, demonstrations, costumes, etc. In other words, power was represented *before* the people. The people responded to these displays of power and opulence as passive spectators; they were there to observe the magnificence of the king, but not to play any active role in the state.<sup>57</sup>

However, as Habermas explains, by the eighteenth century, the feudal regimes characterized by monarchical forms of government began to give way to more liberal, bourgeois

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<sup>56</sup> See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Thomas Burger (trans.) (Cambridge, MA: The MIT Press, 1991),

<sup>57</sup> See *ibid.*, pp. 1-14.

constitutional systems.<sup>58</sup> The concurrent arrivals of capitalism and liberalism enabled Europeans to break away from the “representational” culture of the previous age. These new doctrines created clear limits between the public state and the private sphere, valorized equality and popular consent, and provided the technology to include private citizens in a public dialogue. And not only did these technological advances make information accessible to a wider audience, but the print media that developed alongside capitalism also ushered in a new way of examining the world. Rather than seeing themselves as mere receptacles of information, private citizens were encouraged to critically reflect upon public issues.<sup>59</sup>

Ultimately, Habermas believes that these developments paved the way to deliberation and the establishment of the bourgeois public sphere. He claims that many private individuals of the eighteenth century, encouraged by the new participatory norms and technologies, began to privately read about the issues of the day and consider the opinions presented within the pages of their newspapers. In doing so, they would approach the material analytically and thoughtfully, forming their own opinions about what they had read. They would then wish to share these opinions by deliberating with their peers, who had also previously engaged in private reflection. These deliberative exercises were characterized by mutual respect and openness to hearing the informed, considered arguments of others. Indeed, in this deliberation, the value of an individual’s argument was all that mattered; status ceased to be relevant, and conversation was conducted between *de facto* equals. As Habermas writes, the bourgeois public spheres

... preserved a kind of social intercourse that, far from presupposing the equality of status, disregarded status altogether. The tendency replaced the celebration of rank with a tact befitting equals. The parity on whose basis alone the authority of the better

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<sup>58</sup> See *ibid.*, pp. 14-26.

<sup>59</sup> See *ibid.*, pp. 24-25. It should be added that this popular form of media also enabled the bourgeois citizen to experience more of the world than he was able to at any prior time. Through the stories he read in the newspaper, his physical limitations melted away. He could read about faraway places and events that might never have trickled down to him in the feudal era.

argument could assert itself against that of social hierarchy and in the end can carry the day meant, in the thought of the day, the parity of 'common humanity' ('*bloss Menschliche*')<sup>60</sup>

With the possibility of such rational deliberation came a need for a space in which it could take place – the bourgeois public sphere. As Habermas explains, deliberators sought to delimit spaces for discussion that were not tied to any state institutions. And newspapers, coffee houses and reading clubs arose to fill this niche, becoming places where private citizens could come together vis-à-vis the state. Newspapers and journals made information accessible, and the reading clubs, salons and coffee houses that then developed offered a place where people could go to discuss what they had read and their thoughts about it. Thus, private individuals “soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor.”<sup>61</sup>

By participating in deliberation within the bourgeois public sphere, Habermas believes, individuals not only confronted the state, but they also came to constitute a real public – one that could develop and express a true public opinion.<sup>62</sup> However, it is important to note that, at the same time, participants also retained a sense of themselves as private citizens. It was only by coming together that they formed a public and, therefore, public reason (or *öffentliches Rasonnement*).<sup>63</sup> This public reason could then serve as a counter-balancing force to state power.

Building off of this supposedly historical precedent of the bourgeois public sphere of the eighteenth century, Habermas builds his own model of ideal deliberation in *The Structural*

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<sup>60</sup> Ibid., pp. 36.

<sup>61</sup> Ibid., pp. 27.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

*Transformation of the Public Sphere*.<sup>64</sup> “However much the *Tischgesellschaften*, *salons*, and coffee houses may have differed in the size and composition of their publics, the style of their proceedings, the climate of their debates, and their topical orientations,” he argues, “they all organized discussion among private people that tended to be ongoing; hence they had a number of institutional criteria in common.”<sup>65</sup> Specifically, Habermas claims that the ideal deliberation represented in these bourgeois public spheres contains five aspects:

1. People entering the public sphere must be well informed of the issues at hand.<sup>66</sup>
2. Participants must have previously considered their opinions and developed reasoned arguments in support of them.<sup>67</sup>
3. Participants must be open only to reasoned, rational arguments from others.<sup>68</sup>
4. Deliberation must take place apart from and *vis-à-vis* the state.<sup>69</sup>
5. The public sphere must be inclusive of all ideas and persons.<sup>70</sup>

Thus, Habermasian ideal deliberation can be summarized as *informed, considered, open* and *inclusive* deliberation between private persons, acting *vis-à-vis the state*. And as the venue for this kind of communication, the ideal bourgeois public sphere enables the formation of a public and public opinion.

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<sup>64</sup> It is important to note that Habermas significantly modifies his ideal of the public sphere in his later works. See, for example, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, William Rehg (trans.) (Cambridge, MA: The MIT Press, 1998). However, since it is his treatment of deliberation and the public sphere presented in *The Structural Transformation of the Public Sphere* that is most often cited in deliberative democratic theory, I am limiting my analysis to that work.

<sup>65</sup> Habermas, *The Structural Transformation of the Public Sphere*, pp. 36.

<sup>66</sup> Habermas writes that, from the outset, the “stratum of ‘bourgeois’... was a reading public” (Ibid., pp. 23).

<sup>67</sup> See *ibid.*, pp. 24-25.

<sup>68</sup> See *ibid.*, pp. 36.

<sup>69</sup> “The inhibited judgments were called ‘public’ in view of a public sphere that without question had counted as a sphere of public authority, but was now casting itself loose as a forum in which the private people, come together to form a public, readied themselves to compel public authority to legitimate itself before public opinion. The *publicum* developed into the public, the *subjectum* into the [reasoning] subject, the receiver of regulations from above into the ruling authorities’ adversary” (Ibid., pp. 25-26).

<sup>70</sup> See below.



Of course, the ideal bourgeois public sphere, from which Habermas' theory of ideal deliberation is derived, never actually existed. In particular, there was never a time during which all individuals were welcome to participate in deliberation. And as Habermas writes, "[t]he public sphere of civil society stood or fell with the principle of universal access. A public sphere from which specific groups would be *eo ipso* excluded was less than merely incomplete; it was not a public sphere at all."<sup>71</sup> In other words, for a public sphere to exist, it cannot exclude anyone. Unfortunately, all public spheres have had barriers to entry built right in.

For example, the eighteenth century coffee houses and pubs that Habermas lauded contained at least two significant barriers to entry. First, the bourgeois public sphere required some degree of both education (literacy, at the very least) and also property ownership. As Habermas explains, even during the heyday of the bourgeois public sphere, the new "public remained rooted in the world of letters... education was the one criterion for admission—property ownership the other."<sup>72</sup> Although these preconditions did not necessarily exclude the lower classes and the poor from deliberation, they did so *ipso facto*. "De facto," Habermas writes, "both criteria demarcated largely the same circle of persons; for formal education at that time was more a consequence than a precondition of a social status, which in turn was primarily determined by one's title to property. The educated strata were also the property owning ones."<sup>73</sup> In other words, because both education and property ownership were highly correlated with upper class status, the bourgeois public sphere tended to consist mostly of those individuals who were already in a privileged social position before its advent.

Second, although the bourgeois public sphere was open to all, in theory, it often excluded participants based on ascriptive characteristics (e.g. race, sex), in practice. Deliberation may have been open to most free white men, but throughout history, women, slaves, immigrants and

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<sup>71</sup> *Ibid.*, pp. 85.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

racial/ethnic minority groups have been systematically excluded from the public sphere.<sup>74</sup> And this was just as true during the era of Habermas' ideal bourgeois public sphere. As Nancy Fraser explains in her paper, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," as late as the eighteenth century, women and non-citizens were still barred from the public sphere. These omissions on the basis of sex and property ownership, she argues, completely undermine the concept of a public sphere.

Furthermore, even those who were allowed entry to the bourgeois public sphere were not actually all treated as equals, whose worth rose or fell with the value of their intellectual contributions. Habermas' public sphere is built on an oral bias – by definition, deliberative democracy demands that participants be able to share their ideas with others. However, people are not all equally capable of doing so. The most eloquent orator and the loudest speaker have distinct advantages over other participants, even if they do not have the better arguments. Thus, deliberation tends to preference those who speak with greater ease and authority.<sup>75</sup>

While he is aware of these deficiencies, Habermas is not overly concerned by the exclusive nature of the bourgeois public sphere. What is important, he writes, is not that people have been excluded in practice, but that barriers to entry are theoretically attainable by all. Once economic and social conditions evolved so that everyone had an equal opportunity to attain the private autonomy, which had previously characterized only the educated and property-owning classes, he explains, the public sphere was essentially safeguarded.<sup>76</sup> Of course, this does not address the concern (discussed below) that the bourgeois public sphere's requirement for reasoned, impersonal, well-informed deliberation necessarily discriminates against and disadvantages those groups that are not as practiced in such formal communication, namely, women, minorities, the poorly educated and the less wealthy.

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<sup>74</sup> Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Social Text*, No. 25/26 (1999), pp. 112.

<sup>75</sup> I discuss this critique at length later in this chapter, in Critique #2.

<sup>76</sup> Habermas, *The Structural Transformation of the Public Sphere*, pp. 86.

Nevertheless, despite these exclusionary tendencies, Habermas continues to admire the bourgeois public sphere, and laments the changes that took place within it during the early nineteenth century, when “the reasoning publics of the bourgeois-liberal democracies were transformed into the consuming publics of mass democracies.”<sup>77</sup> He blames this shift on several related developments, all of which stemmed from the entrée of the masses into the public sphere and the deterioration of the distinction between public and private. These include: 1) the flourishing of the social welfare state; 2) consumer culture; and 3) the new commercial media (i.e. the press, cable television and national broadcasting).<sup>78</sup> Taken together, these three elements transformed individuals from the informed, reasoned, respectful deliberators of the eighteenth century into the nineteenth century consumers, whose communication tended towards social speech.

First, the social welfare state not only added to the expectations that private citizens placed upon their states, but it also changed the way that they related to government. “Citizens entitled to services relate to the state not primarily through political participation but by adopting a general attitude of demand—expecting to be provided for without actually wanting to fight for the necessary decisions,” Habermas explains.<sup>79</sup> In other words, entitlement has led citizens to feel like they do not need to play as active a role in political decision-making and public opinion formation as they previously did. Thus, their communicative energies could be spent on other topics.

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<sup>77</sup> Hans-Jorg Trezn, “Digital Media and the Return of the Representative Public Sphere,” in ARENA Working Paper (online), No. 6 (April 2009), pp. 3.

<sup>78</sup> Several later accounts have credited these same forces with the destruction of civil society more general. For example, James Carey focuses on the effects of capitalism and consumer culture, concluding that the ideal public sphere is necessary if people are to be culturally and socially independent. See James W. Carey, “The Press, Public Opinion and Public Discourse,” in *Public Opinion and the Communication of Consent*, Theodore L. Glasser and Charles T. Salmon (eds.) (New York: Guilford Publications, 1995), pp. 373-402. Likewise, Robert Putnam blames the end of civil society on television, which he claims takes up too much of our time and encourages passivity. See Robert D. Putnam, “Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America,” in *PS: Political Science and Politics*, Vol. 28, No. 4 (December, 1995), pp. 664-683.

<sup>79</sup> Habermas, *The Structural Transformation of the Public Sphere*, pp. 211.

Second, the move towards a more consumer culture meant that average citizens grew distracted from political affairs and issues of public importance. The preoccupation with consumer goods meant that conversation tended to move away from ideal deliberation about public goods, and towards “the exchange of tastes and preferences.”<sup>80</sup>

Finally, unlike the newspapers and journals of the eighteenth century, Habermas argues that the commercial mass media has served to disengage private citizens and discourage deliberation. “In comparison with printed communications the programs sent by the new media curtail the reactions of their recipients in a peculiar way,” he writes.<sup>81</sup> “They draw the eyes and ears of the public under their spell but at the same time, by taking away its distance, place it under ‘tutelage,’ which is to say they deprive it of the opportunity to say something and to disagree.”<sup>82</sup> In other words, the commercial mass media has encouraged people to merely accept what they hear and not to consider themselves part of the public discussion. To be sure, debate still exists in this new era, but private citizens watch it – they do not engage in it. Because deliberation occurs between “experts” who are scripted and separated from the public by a television screen or radio speaker, it takes on the form of a spectacle.<sup>83</sup> Not only are they taught to trust these expert opinions, but even if they were to maintain some analytical sense, disagreement is futile as there are few means of airing grievances.

Furthermore, Habermas believes that, like the introduction of the social welfare state and consumer culture, new media technologies have had the effect of lowering standards of communication. He argues that this occurs in two respects. First, profit-seeking principles

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<sup>80</sup> Ibid., pp. 171.

<sup>81</sup> Ibid., pp. 170-171.

<sup>82</sup> Ibid., pp. 171.

<sup>83</sup> “Today, the conversation itself is administered. Professional dialogues from the podium, panel discussions, and round table shows—the rational debate of private people becomes one of the production numbers of the stars in radio and television, a salable package ready for the box office; it assumes commodity form even at ‘conferences’ where anyone can ‘participate.’ Discussion, now a ‘business,’ becomes formalized; the presentation of positions and counterpositions is bound to certain prearranged rules of the game; consensus about the subject matter is made largely superfluous by that concerning form” (Ibid., pp. 164).

suggest that a commercialized mass media enterprise will try to maximize its appeal to the greatest possible audience. This implies a lower overall standard than that attained by the letter-reading participants in the bourgeois public sphere. Second, because private persons are not engaged in the public discourse, they are left to discuss matters of minor importance. Because the experts are separate from the public, individuals no longer desire to come together to discuss grand philosophical ideas, public policies or current events; instead, they talk to their peers about “tastes and preferences.” Thus, the public sphere has become the sphere of culture – an apolitical space.

Taken together, these three developments—the social welfare state, consumer culture and the commercialized mass media—have destroyed the public sphere. Instead of the informed, considered, open deliberation that may have taken place between private persons in the bourgeois public sphere, Habermas believes that the new public consists merely of empty vessels that do not think critically about their world, but simply accept expert opinion. The private act of reading the newspaper and formulating ideas and critiques has been lost. As a result, when private individuals join together, they no longer have anything significant to discuss – all that is left to them is social speech. And thus, Habermas believes, true public opinion has been lost.

*B. Joshua Cohen – The ideal deliberative procedure*

Unlike Habermas, Joshua Cohen is less concerned with the history of deliberation and the public sphere; instead, he takes a more overtly methodological approach to deliberative democracy. A student of John Rawls, Cohen has developed a comprehensive theory of deliberative democracy, beginning from the Rawlsian belief that a well-ordered democracy “involves *public deliberation focused on the common good*, requires some form of *manifest equality* among citizens, and *shapes the identity and interests* of citizens in ways that contribute

to the formation of a public conception of common good.”<sup>84</sup> Unlike Rawls, however, Cohen doubts that these three features are the “natural consequences of the ideal of fairness.”<sup>85</sup> Rather, he suggests that “they comprise elements of an independent and expressly political ideal that is focused on the first instance on the appropriate conduct of public affairs—on, that is, the appropriate ways of arriving at collective decisions.”<sup>86</sup> In order to approach this ideal, Cohen argues, political theorists should stop trying to reflect ideal fairness in political arrangement, and should try, instead, to “mirror a system of ideal deliberation in social and political institutions.”<sup>87</sup>

It is in the service of this goal that Cohen develops his theory of ideal deliberative democracy, which he first presents in his 1989 article, “Deliberation and Democratic Legitimacy.” He begins by defining the general concept of deliberative democracy. “The notion of a deliberative democracy,” he writes, “is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens.”<sup>88</sup> He adds that members of such a community are both committed to resolving collective choice problems through the use of public reasoning, and also to judging the legitimacy of their political institutions based on their capacity to host free public deliberation.<sup>89</sup>

Next, Cohen outlines what he calls, the “formal conception” of deliberative democracy, which is characterized by five main features:

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<sup>84</sup> Joshua Cohen, “Deliberation and Democratic Legitimacy,” in *Deliberative Democracy: Essays on Reason and Politics*, James Bohman and William Rehg (eds.) (Cambridge, MA: MIT Press, 1997), pp. 69.

<sup>85</sup> *Ibid.*, pp. 70. “Taking the notion of fairness as fundamental, and aiming... to model political arrangements on the original position, it is not clear why, for example, political debate ought to be focused on the common good, or why the manifest equality of citizens is an important feature of a democratic association. The pluralistic conception of democratic politics as a system of bargaining with fair representation for all groups seems an equally good mirror of the ideal of fairness” (*Ibid.*, pp. 70-71).

<sup>86</sup> *Ibid.*, pp. 71.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, pp. 72

<sup>89</sup> *Ibid.*

1. "A deliberative democracy is an ongoing and independent association, whose members expect it to continue into the indefinite future."<sup>90</sup>
2. Members of the democratic association agree that free deliberation among equals is the basis of legitimacy. Thus, they share "a commitment to coordinating their activities within institutions that make deliberation possible and according to norms that they arrive at through deliberation."<sup>91</sup>
3. While all members of a deliberative democracy share "a commitment to the deliberative resolution of problems of collective choice," such a community is also pluralistic in that it does not require "some particular set of preferences, convictions, or ideals."<sup>92</sup>
4. "Because the members of a democratic association regard deliberative procedures as the source of *legitimacy*, it is important to them that their terms of their association not merely be the result of their deliberation, but also be *manifest* to them as such."<sup>93</sup>
5. Members of a deliberative democracy "recognize one another as having deliberative capacities."<sup>94</sup>

Having presented these five main features of deliberative democracy, Cohen then uses them to frame an ideal *process* of deliberation, or the "ideal deliberative procedure."

Deliberation, Cohen argues, consists of three aspects. First, there is the need to determine an agenda. Second, there is the need to propose various reasoned solutions to the issues on the agenda. Third, there is the need to end by agreeing on a solution. Different democratic models, Cohen claims, can be understood by how they determine these procedures. However, outcomes can be deemed democratically legitimate, he argues, *only* if "they could be

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid., pp. 73.

<sup>94</sup> Ibid.

the object of a free and reasoned agreement among equals.”<sup>95</sup> Starting from that assumption, Cohen presents an ideal deliberative procedure, which contains four elements:

1. Ideal deliberation is free.
2. Ideal deliberation is reasoned.
3. Participants in ideal deliberation are equal, both formally and substantively.
4. Ideal deliberation aims at achieving a rationally motivated consensus.

First, Cohen asserts that ideal deliberation is free in two ways. It is free to the extent that participants are not bound by “the authority of prior norms or requirements,” but are, instead, beholden only to the product of their deliberation and the preconditions of that deliberation.<sup>96</sup> Ideal deliberation is also free in that participants understand its results to be a legitimate basis for action. In other words, participants must believe that the fact that a decision was arrived at through deliberation provides “a sufficient reason for complying with it.”<sup>97</sup>

Second, Cohen argues that ideal deliberation is reasoned in the sense that participants must state their rationales for advancing, supporting or criticizing a proposal.<sup>98</sup> In doing so, ideal deliberative actors accept that their arguments will be either rejected or accepted based solely on the value of the reasons that they present. Echoing Habermas, Cohen argues that an individual’s personal power or social position must be irrelevant to ideal deliberation – all that should matter is the force of her argument. It is important to note that Cohen’s ideal deliberation specifies that reasons must actually be presented. For a proposal to be accepted, he argues, it is not enough that a good reason *could* be presented in support of it, but it must actually *be* presented.<sup>99</sup>

Third, Cohen states that the parties to ideal deliberation are equal, both formally and substantively. By formal equality, he means that individuals are not singled out, but are all

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid., pp. 74.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.



equally subject to the same rules governing deliberation. “Everyone with the deliberative capacities,” he writes, “has equal standing at each stage of the deliberative process. Each can put issues on the agenda, propose solutions, and offer reasons in support of or in criticism of proposals. And each has an equal voice in the decision.”<sup>100</sup> By substantive equality, on the other hand, Cohen is referring to the requirement that societal inequalities do not seep into the deliberative arena. In other words, the distribution of power and resources must not affect an individual’s ability to take part in and meaningfully affect the deliberative process.<sup>101</sup>

Finally, Cohen’s ideal deliberation is aimed at achieving a rational consensus on the public good. The goal of ideal deliberation, he writes, is “to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals.”<sup>102</sup> Cohen admits, however, that consensus may not always be possible within pluralistic societies. Where “there are distinct, incompatible understandings of value, each one reasonable, to which people are drawn under favorable conditions for the exercise of their practical reason,” it may, in many cases, be difficult to achieve widespread agreement.<sup>103</sup> In these instances, he argues, political decisions must be made through majority rule.<sup>104</sup>

However, since first publishing “Deliberation and Democratic Legitimacy” in 1989, Cohen has made one significant modification to his ideal deliberative procedure. Whereas, in its

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<sup>100</sup> Ibid.

<sup>101</sup> Ibid., pp. 74-75. See also Jack Knight and James Johnson, “What Sort of Political Equality Does Democratic Deliberation Require?” in *Deliberative Democracy: Essays on Reason and Politics*, James Bohman and William Rehg (eds.) (Cambridge, MA: MIT Press, 1998), pp. 293; Jane J. Mansbridge, *Beyond Adversary Democracy* (Chicago: University of Chicago Press, 1983).

<sup>102</sup> Cohen, “Deliberation and Democratic Legitimacy,” pp. 75.

<sup>103</sup> Joshua Cohen, “Procedure and Substance in Deliberative Democracy,” in *Deliberative Democracy: Essays on Reason and Politics*, James Bohman and William Rehg (eds.) (Cambridge, MA: MIT Press, 1997), pp. 408.

<sup>104</sup> Cohen insists that the need to fall back on majority rule does not “eliminate the distinction between deliberative forms of collective choice and forms that aggregate nondeliberative preferences. The institutional consequences are likely to be different in the two cases, and the results of voting among those who are committed to finding reasons that are persuasive to all are likely to differ from the results of an aggregation that proceeds in the absence of this commitment” (“Deliberation and Democratic Legitimacy,” pp. 75).

previous iteration, Cohen refers to the requirement that reasons in ideal deliberation actually be “persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals,” in his more recent writings, he argues that acceptable public reasons are simply those that “others can reasonably be expected to acknowledge as reasons.”<sup>105</sup> In other words, rather than requiring that consensus be achieved through real universal public reason, Cohen now argues that it is sufficient that a reason be theoretically acceptable to all. And in a community of equals, the only reasons that all citizens can reasonably be expected to acknowledge are those framed in terms of the common good.

Adding in this recent modification, Cohen’s theory of ideal deliberative procedure can be summed up as follows. Individuals must come together as legal and substantive equals in order to express and receive well-reasoned, theoretically rational arguments. As a community, they must work with the goal of reaching consensus, and upon doing so, they must then be willing to live in accordance with the results of the deliberative procedure.

Thus, Cohen’s ideal deliberative procedure consists of both procedural and content restrictions. As such, it may be considered a fairly narrow conception of what constitutes deliberation – it excludes the vast majority of everyday speech. And as far as Cohen is concerned, these limitations are unproblematic. Although he acknowledges the importance of other types of talk (e.g. public discussion) for democracy, Cohen insists that ideal deliberation must be narrowly construed in order to provide guidelines for how best to structure democratic institutions so that they might best embody the five features of the formal conception of deliberative democracy.<sup>106</sup> Because ideal deliberative procedure is only meant to serve as a

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<sup>105</sup> Ibid.; Joshua Cohen, “Reflections on Deliberative Democracy,” in *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press, 2009), pp. 330.

<sup>106</sup> “The aim in sketching this procedure is to give an explicit statement of the conditions for deliberative decision making that are suited to the formal conception, and thereby to highlight the properties that democratic institutions should embody as far as possible” (Cohen, “Deliberation and Democratic Legitimacy,” pp. 73).

theoretical construct (i.e. a standard for evaluating democratic institutions and procedures of collective decision-making), it is, therefore, not designed to be either inclusive or even realistic.

*C. Amy Gutmann and Dennis Thompson – Four aspects of deliberation*

Amy Gutmann and Dennis Thompson present a similarly restrictive vision of what constitutes deliberation. Sounding much like Cohen, the authors define deliberative democracy as “a form of government in which free and equal citizens (and their representatives) justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching decisions that are binding on all at present but open to challenges in the future.”<sup>107</sup> Breaking down this definition, presented in *Why Deliberative Democracy?*, Gutmann and Thompson are arguing that there are four necessary aspects to deliberation:

1. Reason-giving
2. Accessible
3. Binding
4. Dynamic or provisional

First, the *reason-giving* aspect of deliberative democracy is extremely important for Gutmann and Thompson. In a democracy, they argue, it is essential that both public actors and private citizens use reasons to justify their decisions to one another.<sup>108</sup> These reasons cannot be arbitrary (i.e. “merely procedural” or “purely substantive”), however. Instead, reasons “should appeal to principles that individuals who are trying to find fair terms of cooperation cannot

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<sup>107</sup> Gutmann and Thompson, *Why Deliberative Democracy?* pp. 7.

<sup>108</sup> “Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return” (Ibid., pp. 3).

reasonably reject.” In other words, as in Cohen’s theory of the ideal deliberative procedure, Gutmann and Thompson require that deliberators develop and pursue only those justifications that they believe could be adopted by other free and equal citizens, who are equally inclined towards deliberation. The reason for this is twofold. First, this reason-giving requirement facilitates the process of reaching a mutually agreed upon decision, which is aimed at the public good. Second, as Gutmann and Thompson explain, individuals should not be treated as “passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives.”<sup>109</sup> Demanding that the reasons used in deliberation appeal to every one acknowledges and reinforces mutual respect. Thus, by insisting that the reasons used in deliberation be acceptable to all, Gutmann and Thompson ensure that deliberation not only produces a justifiable result, but in doing so, participants also value one another as autonomous, worthwhile ends.

Second, the Gutmann and Thompson demand that the reasons presented in deliberation must be *accessible* to all. “To justify imposing their will on you,” Gutmann and Thompson write, “your fellow citizens must give reasons that are comprehensible to you. If you seek to impose your will on them, you owe them no less.”<sup>110</sup> In effect, this reciprocity requirement means that reasons must be public in two respects. First, like Cohen, the authors assert that reasons must actually be shared during deliberation. It is not enough for an argument to have a strong justification in theory; rather, that argument must be clearly expressed.<sup>111</sup> Second, Gutmann and Thompson argue that deliberation must be public in terms of its content. If an argument cannot be understood by all, then it is not appropriate within deliberation.<sup>112</sup>

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid., pp. 4.

<sup>111</sup> “First, the deliberation itself must take place in public, not merely in the privacy of one’s own mind (Ibid.).

<sup>112</sup> “A deliberative justification does not even get started if those to whom it is addressed cannot understand its essential content” (Ibid.).

Third, Gutmann and Thompson argue that deliberation must be aimed at reaching a binding conclusion. In other words, deliberation is not just group speculation – it is talking with a distinct purpose. “The participants do not argue for argument’s sake,” the authors write, “they do not argue even for truth’s own sake (although the truthfulness of their arguments is a deliberative virtue because it is a necessary aim in justifying their decision). They intend their discussion to influence a decision the government will make, or a process that will affect how future decisions are made.”<sup>113</sup> Thus, the authors clearly distinguish deliberation from other, less goal-oriented forms of communication. Other types of speech may serve political purposes, Gutmann and Thompson concede, but unless they are purposely and self-consciously aimed at achieving political ends, they are not equivalent to deliberation.<sup>114</sup>

Finally, Gutmann and Thompson address what they consider to be an oft-neglected aspect of deliberation – its dynamism. The authors argue that deliberation is always an ongoing endeavor. “Although deliberation aims at a justifiable decision, it does not presuppose that the decision at hand will in fact be justified, let alone that a justification today will suffice for the indefinite future,” they explain.<sup>115</sup> Instead, deliberation is more like a never-ending dialogue, “one in which citizens can criticize previous decisions and move ahead on the basis of that criticism.”<sup>116</sup> This is important for two reasons. First, Gutmann and Thompson point out that deliberation—and the people who engage in it—is fallible. Even when the outcome of deliberation is correct, there is no guarantee that it will remain so over time. Thus, it is important that all deliberative issues be subject to reassessment. Second, the authors acknowledge that not all deliberative outcomes will take the form of consensus. When there is disagreement, it is important that those who lose in out in deliberation feel like they will have opportunities to

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<sup>113</sup> Ibid., pp. 5.

<sup>114</sup> See Dennis Thompson, “Deliberative Democratic Theory and Empirical Political Science,” in *Annual Review of Political Science*, Vol. 11 (2008), pp. 502.

<sup>115</sup> Gutmann and Thompson, *Why Deliberative Democracy?* pp. 6.

<sup>116</sup> Ibid.

readdress the issue in the future. If it were not for that guarantee, deliberative losers might be less likely to abide by the outcomes of deliberation.

To summarize, Gutmann and Thompson argue that deliberation must be: 1) based upon shared reasons, which are both acceptable by and accessible to all; and 2) aimed at achieving a binding result, which is open to future reconsideration. And this deliberation, they argue, is democratic insofar as it is both inclusive and also enables political decisions to become a function of the collective judgment of the public.

Thus, Gutmann and Thompson claim that deliberative democracy is able to serve at least four distinct purposes: 1) promoting the legitimacy of collective decisions; 2) encouraging public-spirited perspectives on public issues; 3) promoting mutually respectful processes of decision-making; 4) helping correct mistakes made through collective actions.<sup>117</sup> Not all kinds of deliberation are equally successful at achieving these goals, however. By comparing several branches of deliberative democratic theory, Gutmann and Thompson present six features that they believe constitute the best form of deliberative democracy:

1. Deliberation should be both instrumental (in that it enables citizens to arrive at the most justifiable political decisions) and also expressive (in that it symbolically validates the ideal of popular consent), albeit not always at the same time.<sup>118</sup>
2. Deliberative democratic theory ought to contain procedural and substantive principles, both of which should be “treated as morally and politically provisional.”<sup>119</sup>  
In other words, both sets of principles must be subject to periodic revision and an ongoing process of deliberation.
3. Deliberation should have more of a pluralist than a consensualist goal.<sup>120</sup>

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<sup>117</sup> Ibid., pp. 10-12.

<sup>118</sup> Ibid., pp. 21-23.

<sup>119</sup> Ibid., pp. 26.

<sup>120</sup> Ibid., pp. 26-29.

4. Because of time constraints and the large number of citizens in contemporary democracies, deliberation ought to be more representative than participatory.<sup>121</sup>
5. Deliberative should be made to apply to primarily the state, but also (to a lesser degree) to civil society.<sup>122</sup>
6. Deliberation should involve both foreign and domestic issues.<sup>123</sup>

The fifth feature on this list suggests that the Gutmann/Thompson model of deliberative democracy is limited, not only in terms of its procedure—reason-giving, accessible, binding, dynamic—but also in terms of its location and content.

As Gutmann and Thompson point out, there has been significant disagreement among deliberative democratic theorists regarding the proper location for deliberation. While Habermas only requires deliberation within institutions that are core structures of a constitutionally organized democracy, others—such as Cohen—argue that deliberation could be extended to a number of civic associations, including corporations, labor unions, professional associations and even families.<sup>124</sup> For their part, Gutmann and Thompson tend to align themselves with the latter group of deliberative democratic theorists. In order to have a well-functioning system of deliberative governance, they point out, citizens must first learn how to deliberate. And the private sphere provides individuals with opportunities to practice talking in ways that better enable them to engage in political deliberation.<sup>125</sup> Thus, Gutmann and Thompson believe “that deliberation is desirable in many institutions of government and civil society, and especially in those institutions

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<sup>121</sup> Ibid., pp. 30-31.

<sup>122</sup> Ibid., pp. 31-36.

<sup>123</sup> Ibid., pp. 36-39.

<sup>124</sup> See Jürgen Habermas, “Deliberative Politics,” in *Democracy*, David Estlund (ed.) (Oxford: Blackwell, 2002), pp. 114-115; Cohen, “Deliberation and Democratic Legitimacy.”

<sup>125</sup> “Because deliberative politics works best when citizens do not experience it as an alien activity, some substantial continuity between everyday and political life is desirable. As democratic theorists have long recognized, democracy cannot thrive without a well-educated citizenry. And important part of democratic education is learning how to deliberate well enough to be able to hold representatives accountable. Without a civil society that provides rehearsal space for political deliberation, citizens are less likely to be politically effective” (Gutmann and Thompson, *Why Deliberative Democracy?* pp. 35).

that deal with major failures in civil society.”<sup>126</sup> And as examples of appropriate non-state venues for deliberation, the authors point to the Truth and Reconciliation Commission (TRC) in South Africa, as well as corporations.<sup>127</sup>

However, the authors also believe that deliberation should not necessarily be extended to those civil “institutions and associations whose purposes are less public and whose effects are less far-reaching.”<sup>128</sup> In other words, “the less the aims of institutions and associations in civil society coincide with those of ordinary politics, the less subject they should be to the force of deliberative principles.”<sup>129</sup> So while deliberation might be appropriate within the public school system, for instance, Gutmann and Thompson believe that it should most likely stay out of the family and mass media.<sup>130</sup> Thus, the vast majority of social speech is exempted from deliberative norms in Gutmann and Thompson’s theory. (The Internet, in particular, is a poor location for deliberation, the authors argue, because it primarily hosts activity that “is not political but rather related to entertainment, shopping, travel, sex and personal relationships.”<sup>131</sup>) And even when deliberation is appropriate in civil society, Gutmann and Thompson believe that it ought not to be externally mandated. In other words, the majority of social speech ought to be exempt from deliberative norms.

This limitation does not present a problem for Gutmann and Thompson, however. Ultimately, the authors argue that deliberative democracy, as they have defined it, remains preferable to aggregative democracy because, while aggregate methods take “existing or minimally corrected preferences as given, as the base line for collective decisions,” deliberative

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<sup>126</sup> Ibid., pp. 33.

<sup>127</sup> Ibid., pp. 33-34.

<sup>128</sup> Ibid., pp. 34.

<sup>129</sup> Ibid., pp. 34.

<sup>130</sup> “Families are appropriately protected from intrusive political regulation by rights of privacy. The other set of institutions that dominate many people’s lives—consisting of the mass media, most prominently television—is among the most unfriendly to deliberation” (Ibid., pp. 36).

<sup>131</sup> Ibid.



democracy subjects preferences to strict scrutiny and moral reasoning.<sup>132</sup> And as Gutmann and Thompson explain in *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided in Politics, and What Should be Done About It*, the moral reasoning inherent to their vision of deliberation—which is delimited by the principles of reciprocity, publicity and accountability—ensure that deliberation will result in morally desirable outcomes.<sup>133</sup>

#### D. James Fishkin, et al. – Deliberative Polling

More than any other deliberative democratic theorists presented in this chapter (and, perhaps, beyond), James Fishkin presents an explicitly practical theory of deliberative democracy. Rather than treating deliberation as a mere philosophical construct, he and his colleagues have developed a method for incorporating deliberative principles into actual political decision-making. And through his Deliberative Polling experiments, Fishkin has successfully introduced deliberation into dozens of political systems.

Fishkin's interest in Deliberative Polling began with a concern over democratic legitimacy. He worries that traditional public opinion polls—which are often used to inform public policy making—are unable to capture the true preferences of the public. The problem, as Fishkin explains, is not that people do not respond to polling, but that they often do so with poorly considered and ill informed opinions about the issues under consideration. Starting from Philip E. Converse's work on nonattitudes, Fishkin argues that respondents to traditional public opinion

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<sup>132</sup> Ibid., pp. 16. When reasonable disagreements inevitably occur between deliberators, Gutmann and Thompson argue, "deliberation is more likely than aggregation to produce justifiable agreements in the future, and to promote mutual respect when no agreement is possible" (Ibid., pp. 20).

<sup>133</sup> See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement: Why Moral Conflict Cannot be Avoided in Politics, and What Should be Done About It* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996). Nevertheless, the authors do accept that deliberation will not always be able to produce moral agreements, even when conducted with the principles of reciprocity, publicity and accountability. Thus, their theory of deliberative democracy does not require that all decisions be made through deliberative procedures, but merely that, when other forms of decision-making are utilized, they must be subject to justification by a deliberative process at some point. See Gutmann and Thompson, *Why Deliberative Democracy?* pp. 3.

polls are likely to choose their answers almost randomly, and without much consideration.<sup>134</sup> Furthermore, this time building on the research of Anthony Downs, Fishkin suggests that this may be nearly unavoidable. Indeed, he argues that “rational ignorance” may be disincentivizing average citizens from becoming informed about public issues.<sup>135</sup> “If I have one vote in millions,” Fishkin asks, “why should I spend the time and effort to become well informed on complex issues or politics and policy? My individual vote, or my individual opinion, is unlikely to have any effect. And most of us have other pressing demands on our time, often in areas where we can, individually, make more of a difference than we can in politics or policy.”<sup>136</sup> Unfortunately, if most of the population follows this logic—choosing not to learn about public policy issues—it is difficult to say that any measure of public opinion actually represents their true preferences.

Given these limitations to traditional public opinion polls, Fishkin worries that any government, which relies upon these traditional measures of public opinion, could not possibly maintain democratic legitimacy. If private individuals are too uninformed and disengaged to know their own preferences, how can they relate them to the state? And if the public cannot represent its will to the state, how can a government ever democratically represent the wants and needs of its people?

To answer these questions, Fishkin has turned to deliberative democratic theory. Like the other deliberative democratic theorists in this chapter, he believes that, by enabling individuals to first become informed about an issue, and then discuss it with equals, in a respectful, open format, deliberation helps to reveal their true (or best) preferences. However, unlike the other theorists in this chapter, Fishkin’s understanding of what constitutes deliberation is actually quite broad.

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<sup>134</sup> See Philip E. Converse, “The Nature of Belief Systems in Mass Publics,” in *Ideology and Discontent*, David Apter (ed.) (New York: Free Press, 1964), pp. 206-261.

<sup>135</sup> See Anthony Downs, “An Economic Theory of Political Action in a Democracy,” in *The Journal of Political Economy*, Vol. 65, No. 2 (April 1957), pp. 135-150.

<sup>136</sup> Fishkin, “Consulting the Public Through Deliberative Polling,” pp. 128.

To illustrate, in the essay, “Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion,” Fishkin and his coauthor, Robert C. Luskin, define deliberation as the “weighing of competing considerations through discussion that is”.<sup>137</sup>

1. Informed, and thus informative
2. Balanced
3. Conscientious
4. Substantive
5. Comprehensive

First, by informed, the authors are referring to arguments that are “supported by appropriate and reasonably accurate factual claims.”<sup>138</sup> In order for deliberation to be legitimate, they argue, participants must be presented with all relevant data. Second, Fishkin and Luskin require that discussion not be one-sided; rather, “[a]rguments should be met with contrary arguments.”<sup>139</sup> Third, they explain that deliberators must be conscientious and “willing to talk and listen, with civility and respect.”<sup>140</sup> Fourth, the authors require that participants try to assess arguments on their merits, divorcing them from “how they are made or who is making them.”<sup>141</sup> Finally, Fishkin and Luskin argue that a deliberative exercise must be diverse and exhaustive. In other words, all existing positions and arguments that are “held by significant portions of the population” ought to be represented and considered.

While Fishkin and Luskin admit that these criteria may exclude “much everyday conversation,” they also insist that they are *relatively* undemanding.<sup>142</sup> Indeed, compared to other deliberative democratic theorists, these conditions are strikingly inclusive. For example, unlike Cohen, Gutmann and Thompson, the Fishkin/Luskin model of deliberation does not require that

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<sup>137</sup> Fishkin and Luskin, “Experimenting with a Democratic Ideal,” pp. 285.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

arguments be limited to those that would reasonably be accepted by all. Fishkin and Luskin also do not require that deliberation take place apart from, and vis-à-vis the state, as Habermas does. Essentially, all that Fishkin and Luskin require for communication to constitute deliberation is that it must be respectful, inclusive of the full range of informed opinions and based (as much as possible) on the validity of arguments.

Thus, in practice, Fishkin and Luskin's interpretation of deliberation is able to incorporate a fairly wide range of conversation. However, as the authors admit, this model still fails to accommodate social speech. While it may be less demanding than other deliberative ideals, the Fishkin/Luskin model remains too deliberate and structured to apply to everyday conversation. Specifically, the demands for informed reasons and norms of civility necessarily exclude the vast majority of social speech. However, the fact that Fishkin and Luskin's deliberation does not extend to that social speech, which characterizes the majority of communication that takes place between average citizens, does not mean that it does not apply to these individuals. Indeed, Fishkin has been extremely successful at bringing deliberation to the masses through his Deliberative Polling (initially developed in 1988).<sup>143</sup>

According to the website for Fishkin's Center for Deliberative Democracy at Stanford University, "Deliberative Polling is an attempt to use television and public opinion research in a new and constructive way."<sup>144</sup> By creating conditions that are as close to ideal deliberation as possible amongst a randomly selected sample of individuals, Fishkin and his fellow researchers believe that they can estimate what an entire population would think and do if they were all able to become truly engaged by an issue.<sup>145</sup> As Luskin, Fishkin and Jowell explain, Deliberative

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<sup>143</sup> Note that Fishkin directly refers to his Deliberative Polls as a fulfillment of Mill's call for a "Congress of Opinions." See James S. Fishkin and Robert C. Luskin, "The Quest for Deliberative Democracy," in *The Good Society*, Vol. 9, No. 1 (1999), pp. 7.

<sup>144</sup> The Center for Deliberative Democracy, "Deliberative Polling: Executive Summary." Available at: <http://cdd.stanford.edu/polls/docs/summary/>.

<sup>145</sup> For more information on the process of deliberative polling, see James S. Fishkin, "The Televised Deliberative Poll: An Experiment in Democracy," in *Annals of the American Academy of*

Polling, “is designed to show what the public *would* think about the issues [at hand], if it thought more earnestly and had more information about them. It is an attempt to provide some glimpse of a hypothetical public, one much more engaged with and better informed about politics than citizens in their natural surroundings actually are.”<sup>146</sup>

Deliberative Polling is actually fairly straightforward. First, individuals in a random, representative sample are polled on the issues under discussion. Once a baseline has been established, those same participants are invited to spend a weekend together in order to discuss those issues. Before they arrive, the participants are sent “carefully balanced briefing materials,” which they are instructed to review.<sup>147</sup> Once they have reached the deliberative venue, participants are broken down into small groups where, with the help of moderators, they develop questions that can then be posed to experts and political leaders. At the end of this process, a second poll is taken, during which participants are asked the original questions. The differences between the first and second polls are thought to represent the conclusions that the public might reach, if they had all had the opportunity to be better informed and engaged in those issues.

Since the advent of Deliberative Polling, Fishkin and his colleagues have conducted experiments dozens of times in the United States and abroad. For example, in 2007, a group of parents from Northern Ireland, including both Protestants and Catholics, were brought together to deliberate on the future of schools in the town of Omagh. Two years later, citizens from all 27 countries in the European Union deliberated in 21 languages about the upcoming elections for European parliament. And in 2011, South Korean citizens were gathered to participate in the first ever Deliberative Poll in Korea, where they discussed several aspects of the unification crisis

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*Political and Social Science*, Vol. 546 (July 1996), pp. 132-140; James S. Fishkin, “Consulting the Public through Deliberative Polling,” in *Journal of Policy Analysis and Management*, Vol. 22, No. 1 (Winter 2003), pp. 128-133; Robert C. Luskin, James S. Fishkin and Roger Jowell, “Considered Opinions: Deliberative Polling in Britain,” in *British Journal of Political Science*, Vol. 32, No. 3 (July 2002), pp. 455-487; James S. Fishkin, “Bringing Deliberation to Democracy: The British Experiment,” in *The Good Society*, Vol. 5, No. 3 (Fall 1995), pp. 45-49.

<sup>146</sup> Luskin, Fishkin and Jowell, “Considered Opinions,” pp. 458.

<sup>147</sup> The Center for Deliberative Democracy, “Deliberative Polling: Executive Summary.”

(e.g. conditions, timing, consequences). The entire event was broadcast on the South Korean public broadcasting network, KBS.<sup>148</sup>

As Fishkin and Robert C. Luskin explain in their article, “Broadcasts of Deliberative Polls: Aspirations and Effects,” many of these deliberative events have led to real policy changes.<sup>149</sup> For example, between 1996 and 1998, a series of eight Deliberative Polls were conducted for electric utility companies in the state of Texas, trying to assess how best to meet the needs of their service areas. And in all eight events, the participants eventually decided that they would prefer a move towards greener energy, even if it would cost them more. At the time of the polling, the companies were regulated monopolies, overseen by the Texas Public Utilities Commission (PUC). The PUC took a “great interest” in the Deliberative Polling project, and indicated that the utilities would be expected to abide by the results. And indeed, as a “direct result” of this, Texas became “a world leader in renewable energy.”<sup>150</sup>

It is likely that Deliberative Polling has significant indirect effects as well. Not only does deliberation—in its many iterations—help individuals both discover and create their will as a public, but it is also likely that this kind of communication influences community norms. The emphases that all deliberative democratic theories place on rational, information-based reason giving; balance; objectivity; civility and mutual respect are bound to bleed into a population’s understanding of how individuals should commune with one another. To the extent that this means that people come to view communication as an activity aimed at the public good, this may be a good thing. However, to the extent that an adherence to deliberative democratic ideals means that that speech, which does not live up to its stringent standards—as well as those

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<sup>148</sup> With the hopes of raising the levels of interest, thought and information among views, “nudging” the viewers’ opinions in the direction of the deliberative polling results and elevating awareness among policy makers, each deliberative poll has been televised. See James S. Fishkin and Robert C. Luskin, “Broadcasts of Deliberative Polls: Aspirations and Effects,” in *British Journal of Political Science*, Vol. 36, No. 1 (January 2006), pp. 184-188.

<sup>149</sup> *Ibid.*, pp. 186.

<sup>150</sup> *Ibid.*

individuals, who are more likely to be characterized by such speech—is devalued, deliberation may actually do serious harm.

## V. An assessment of deliberative democratic theory:

For the remainder of this chapter, I assess deliberative democratic theory in terms of the four representative schools of thought that I outlined in the previous section – Habermas, Cohen, Gutmann and Thompson, and Fishkin, et al. I begin by briefly considering some of the advantages of deliberative democratic theory. I then go on to review several common critiques of deliberation. Finally, I present my own criticisms of deliberative democratic theory from the perspective of social speech. Specifically, I argue that deliberative democracy is both too *abstract* and also too *narrowly construed* to be able to account for social speech. As a result, these theories can only present a partial picture of the relationship between speech and politics.

To begin, there are several advantages to the deliberative concept of democracy. However, because numerous proponents of deliberative democratic theory have already written extensively about these advantages, I will limit myself to addressing only what I consider to be three of the most significant benefits of deliberation: 1) its good for the individual; 2) its tendency to promote an “enlarged mentality”; and 3) the democratic validity of its outcomes.<sup>151</sup>

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<sup>151</sup> See the preceding descriptions of Habermas, Cohen, Gutmann, Thompson and Fishkin. See also Jon Elster, “Deliberation and Constitution Making,” in *Deliberative Democracy*, Jon Elster (ed.) (New York: Cambridge University Press, 1998), pp. 97-122; David Held, *Models of Deliberative Democracy*, 3<sup>rd</sup> Ed. (Stanford, CA: Stanford University Press, 2006); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); Noëlle McAfee, “Three Models of Democratic Deliberation,” in *The Journal of Speculative Philosophy*, Vol. 18, No. 1 (2004), pp. 44-59; Ethan J. Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (Pittsburg, PA: Penn State University Press, 2005); Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1998); Robert Talisse, *Democracy After Liberalism: Pragmatism and Deliberative Politics* (New York: Routledge, 2005).

First, deliberative democracy begins with the premise that democratic legitimacy is contingent upon citizen involvement in decision-making. This participatory requirement not only benefits the democratic state, however, it also represents a good for individuals. As Aristotle explains, humans are, by nature, political animals. And he argues that a political system, which requires individuals to participate in their own governance, enables them to achieve their highest sense of being (or *telos*).<sup>152</sup> According to this logic, by insisting that private individuals engage in the political process, deliberative democratic theory contributes to their own personal fulfillment.

Second, deliberation may help to fulfill the natural human desire to be a part of a community. Because deliberators rely on the force of their reasons to defend their arguments in a deliberative enterprise, they tend to choose their reasons based on what would be both acceptable and accessible to their fellow deliberators. Indeed, in some cases, deliberative democratic theorists mandate that deliberators utilize *only* those arguments that could be accepted by all. Habermas, for example, understands deliberation as a process in which participants must consider all those reasons that might count as good reasons for all those who are either involved in or effects by the issue under discussion.<sup>153</sup> Similarly, Cohen's theory of deliberative democracy demands that participants justify their arguments to one another using reasons that are acceptable to all.<sup>154</sup> By putting everyone on equal terms, this requirement naturally unites the community – in order to craft a deliberative argument, an individual must put herself into the positions of her fellow deliberators, thus building empathy. Furthermore, the “enlarged mentality” necessary for determining which arguments would be acceptable to all is, itself, a type of group solidarity.

Finally, at least in its ideal, theoretical form, deliberation provides a way to democratically ascertain (or estimate) the public will. Ideal deliberation, after all, reveals how the public might

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<sup>152</sup> See Aristotle, *Politics*, Book One, Benjamin Jowett (trans.) (New York: Dover Thrift Editions, 2000).

<sup>153</sup> Habermas, *Between Facts and Norms*, pp. 147-148.

<sup>154</sup> Cohen, “Procedure and Substance in Deliberative Democracy,” pp. 102.



think and act if they were given both adequate time and information to understand political issues, and also the opportunity to discuss their opinions with their equals. This is almost certainly a more robust measure of the public will than any aggregate models of public opinion to date. And not only is this knowledge theoretically valuable, but to the extent that the results of deliberation are adopted by public policy actors, it may also result in democratically superior (i.e. representative) outcomes.

Of course, as a number of political theorists have recognized, there are also several significant disadvantages to deliberative democratic theory.<sup>155</sup> As Lawrence R. Jacobs, Fay Lomax Cook and Michael X. Delli Carpini explain in their book, *Talking Together: Public Deliberation and Political Participation in America*, the major critiques of deliberative democracy can be generalized into six categories: 1) elitist; 2) exclusionary; 3) manipulative; 4) divisive; 5) oppressive; and 6) politically insignificant.<sup>156</sup>

First, the elitist critique of deliberative democracy is twofold. In the first place, it refers to the potential selection bias inherent in deliberation. While deliberative democratic experimenters—as exemplified by Fishkin—try to create random, scientific samples of participants, it is impossible to avoid the fact that only certain kinds of people are likely to actually

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<sup>155</sup> For a sample of critical perspectives on deliberative democratic theory, see Dryzek, *Deliberative Democracy and Beyond*; Benhabib, "Toward a Deliberative Model of Democratic Legitimacy"; Susan C. Stokes, "Pathologies of Deliberation," in *Deliberative Democracy*, Jon Elster (ed.) (New York: Cambridge University Press, 1998), pp. 123-139; Michael Walzer, "Deliberation, and What Else?" in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed.) (New York: Oxford University Press, 1999), pp. 58-69; Ian Shapiro, "Enough of Deliberation: Politics is About Interests and Power," in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed.) (New York: Oxford University Press, 1999), pp. 28-38; William H. Simon, "Three Limits of Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy," in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed.) (New York: Oxford University Press, 1999), pp. 49-57.

<sup>156</sup> Lawrence R. Jacobs, Fay Lomax Cook and Michael X. Delli Carpini, *Talking Together: Public Deliberation and Political Participation in America* (Chicago: The University of Chicago Press, 2009), pp. 15.

want to take part in deliberation.<sup>157</sup> And unfortunately, the individuals who do participate in deliberation they tend to be wealthier, better educated and more politically involved than the population as a whole.<sup>158</sup> In the second place, deliberative democratic theory is often criticized as being elitist in that it tends to ignore real inequalities by treating everyone equally. In doing so, as John Forester explains, these theories “end up ironically reproducing the very inequalities with which they began.”<sup>159</sup>

The second critique of deliberative democracy that Jacobs, Cook and Delli Carpini identify is that it is often deemed exclusionary. Not only do voluntary deliberative proceedings tend to automatically omit certain segments of the population (i.e. those who are in a less powerful socioeconomic position), but even when politically disadvantaged individuals do partake in deliberation, “many of them are likely to find their voices and interests discounted or excluded because of entrenched inequalities in information and expertise, skill in public speaking and persuasion, and other resources that systematically advantage certain participants in deliberative forums.”<sup>160</sup> Even the seemingly innocuous deliberative goal of consensus tends to have a

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<sup>157</sup> See Paul Lazarsfeld, Bernard Berelson, and Hazel Gaudet, *The People's Choice: How the Voter Makes Up His Mind in a Presidential Campaign*, Second Edition (New York: Columbia University Press, 1944); Bernard Berelson, Paul Lazarsfeld, and William McPhee, *Voting: A Study of Opinion Formation in a Presidential Campaign* (Chicago: University of Chicago Press, 1954); Robert Huckfeldt and John Sprague, *Citizens, Politics, and Social Communication: Information and Influence in an Election Campaign* (Cambridge: Cambridge University Press, 1995).

<sup>158</sup> As Jacobs, Cook and Delli Carpini explain, this bias has meant that “deliberation becomes another enclave of elitism or ‘gated democracy’—reserved for the same group of affluent and better educated Americans who vote more frequently, disproportionately use financial contributions to lure candidates to their favorite positions, and are well-endowed with social capital” (*Talking Together*, pp. 15).

<sup>159</sup> John Forester, *The Deliberative Practitioner: Encouraging Participatory Planning Processes* (Cambridge, MA: MIT Press, 1999), pp. 9.

<sup>160</sup> Jacobs, Cook and Delli Carpini, *Talking Together*, pp. 15. See also Charles Blattberg, “Patriotic, not Deliberative, Democracy,” in *Critical Review of International Social and Political Philosophy*, Vol. 6, No. 1 (2003), pp. 155-174; Nancy Fraser, “Communication, Transformation, and Consciousness-Raising,” in *Hannah Arendt and the Meaning of Politics*, Craig Calhoun and John McGowan (eds.) (Minneapolis: University of Minnesota Press, 1997); Melissa Williams, “The Uneasy Alliance of Group Representation and Deliberative Democracy,” in *Citizenship in Diverse Societies*, Will Kymlicka and Wayne Norman (eds.) (Oxford: Oxford University Press, 2000), pp. 124-154; Sanders, “Against Deliberation”; Dryzek, *Deliberative Democracy and Beyond*.

silencing affect on minority participants. As Lynn Sanders explains, when societies are already characterized by significant inequalities, focusing on what is common tends to suppress the voices of those who find themselves on the periphery.<sup>161</sup> Thus, societal power imbalances find their way into deliberation, even when all socioeconomic groups are technically included. And those who are less likely to be heard through traditional political processes are also less likely to be heeded in deliberation.

Third, a number of critics have speculated that deliberation may actually be manipulative. These opponents of deliberative democracy argue that deliberation is too focused on reason, in terms of the acquisition, processing and expression of information.<sup>162</sup> Not only does this dependence on reason bias the process of deliberation, but it is also probably unrealistic for many individuals.<sup>163</sup> Those who are less at ease with a reason-based approach to communication are likely to be less directly engaged in deliberation. Rather than taking part in a discussion that might be overly intimidating to them, these individuals may prefer to stay quiet and simply rely on expert opinion.

Fourth, Jacobs, Cook and Delli Carpini note that opponents of deliberative democracy allege that such theories are often divisive and oppressive. By insisting that individuals express divergent opinions in a public forum, critics worry, deliberative democracy may actually intensify divisions and disagreements.<sup>164</sup> Indeed, even to the extent that agreements can be reached,

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<sup>161</sup> Sanders, "Against Deliberation," pp. 362.

<sup>162</sup> See Bonnie Honig, "Difference, Dilemma, and the Politics of Home," in *Democracy and Difference: Contesting the Boundaries of the Political*, Seyla Benhabib (ed.) (Princeton, NJ: Princeton University Press, 1996), pp. 258; Chantal Mouffe, "Democracy, Power, and the 'Political,'" in *Democracy and Difference: Contesting the Boundaries of the Political*. Seyla Benhabib (ed.) (Princeton, NJ: Princeton University Press, 1996), pp. 254.

<sup>163</sup> See John Sullivan, James Piereson, and George Marcus, *Political Tolerance and American Democracy* (Chicago: University of Chicago Press, 1989); Joseph Cappella and Kathleen Hall Jamieson, *Spiral of Cynicism: The Press and the Public Good* (New York: Oxford University Press, 1997); Mansbridge, *Beyond Adversary Democracy*.

<sup>164</sup> See Jane J. Mansbridge. "Reconstructing Democracy," in *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory*, Nancy J. Hirschmann and Christine D. Stefano (eds.) (Boulder, CO: Westview Press, 1996), pp. 117-158; Cass Sunstein,

such a consensus may only be hiding or stifling genuine difference.<sup>165</sup> As Sanders writes, in many deliberative cases, “[c]alling for compromise... may be perilously close to suppressing the challenging perspectives of marginalized groups.”<sup>166</sup>

Finally, deliberative democratic critics often point to the fact that these theories are extremely difficult translate into political outcomes. And to the extent that deliberation actually can be made to affect politics, many suggest that these effects may actually be negative – reinforcing cynicism and disengagement.<sup>167</sup>

Building off of the list of criticisms presented by Jacobs, Cook and Delli Carpini, I have developed my own twofold critique of deliberative democratic theory, from the perspective of a theory of social speech. As should be evident from my treatment of Habermas, Cohen, Gutmann/Thompson and Fishkin, et al. in the preceding section, I believe that theories of deliberative democracy have a tendency to actively exclude social speech. More than that, I argue that these theories are actually designed to be *incapable* of accommodating social speech. For the remainder of this section, I argue that the failure of deliberative democratic theory to represent the kind of everyday social speech that characterizes most human interactions is the result of two inescapable characteristics: 1) its abstractness; and 2) its deliberateness.

#### A. *Social speech critique #1: Deliberative democratic theories are too abstract*

Deliberative democratic theory is not derived from any concrete, systematic understanding of human behavior. Rather, deliberative democracy is more of an abstract theory,

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“On a Danger of Deliberative Democracy,” in *Daedalus*, Vol. 131 (Fall 2002), pp. 120-124; Diana Mutz, *Hearing the Other Side: Deliberative versus Participatory Democracy* (New York: Cambridge University Press, 2006).

<sup>165</sup> See Iris Marion Young, “Communication and the Other: Beyond Deliberative Democracy,” in *Democracy and Difference: Contesting the Boundaries of the Political*. Seyla Benhabib (ed.) (Princeton, NJ: Princeton University Press, 1996), pp. 126, 133.

<sup>166</sup> Sanders, “Against Deliberation,” pp. 362.

<sup>167</sup> See Mutz, *Hearing the Other Side*.

based on ideal conditions and principles. It begins by positing at least four broad assumptions about human interactions. First, deliberative democratic theories assume that people are capable of engaging with one another with openness and mutual respect. Second, they assume that individuals will be able to look beyond social differences, treating everyone as equals and judging them only on the strength of their arguments. Third, they believe that all deliberative participants will be willing and able to express themselves using only reasonable, informed and morally justified arguments. Finally, these theories assume that individuals can—or, at least, should—put aside their own self-interests and work towards some amorphous common good.

Individual deliberative democratic theorists may emphasize some of these assumptions more than others. They may also incorporate additional assumptions, based on the specifics of their theories (e.g. if they believe that deliberation requires a sharp distinction between the state and civil society; if they prefer one singular public to a multitude of smaller publics).<sup>168</sup> However, whether neatly expressed or merely implied, all of the deliberative democratic theorists addressed in this chapter begin with these four assumptions.

Unfortunately, as Sanders explains, “[t]he (careful) articulation of these formal standards... is a far cry from an assessment of the probability of meeting them.”<sup>169</sup> And indeed, the vast majority of real, practiced speech only barely resembles the visions of communication presented by deliberative democratic theorists, such as Habermas, Cohen, Gutmann, Thompson and Fishkin, et al. As several critics of deliberative democracy have already noted, this is because conversations do not usually consist of reasoned, informed inclusive speech, respectfully expressed, and aimed at reaching a conclusive decision. Frederick Schauer, for example, explains that, while there may be some examples of successful deliberation in real life, it is clear that deliberation “is hardly the dominant form of American public discourse, as even the

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<sup>168</sup> See Fraser’s assessment of the assumptions in Habermas’ theory of the public sphere. Fraser, “Rethinking the Public Sphere,” pp. 62-63.

<sup>169</sup> Sanders, “Against Deliberation,” pp. 348.

briefest sojourn into talk radio, sound-bite television, and tabloid print journalism will attest.”<sup>170</sup>

Similarly, although Jacobs, Cook and Delli Carpini attest that many Americans are now communicating with one another in politically meaningful ways—what they call, “discursive participation”—they note that this speech “still falls short of the hopes and optimism of deliberative democratic theorists.”<sup>171</sup> They explain that the kind of “just talk” that characterizes most human interaction does not even come close to approximating deliberative democracy’s expectations for universality, representativeness and rationality. It is also not particularly likely to lead to result in general agreement.<sup>172</sup>

This gap between deliberative theory and practice is due to the fact that most people do not naturally adhere to the principles of civility, reason and balance in their daily communications. It may even be unrealistic to assume that they could do so on any large scale. For one thing, it is extremely difficult for individuals to completely put aside their personal preferences in favor of the common good. (Often, it is nearly impossible to separate the two.) And even when such a discussion is possible, not all individuals are equally capable of communicating using the formal, reason-based approach that is required in deliberation.<sup>173</sup>

There has been relatively little empirical research testing the accuracy of deliberative democratic assumptions, however. Until recently, the preference for the abstract over the concrete in deliberative democratic theory has meant that most scholarship on the subject has tended to focus more on the theory than the practice of deliberation. “A great deal of work has tried to define what scholars mean by deliberation,” explain Mark Button and Kevin Mattson. “Not

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<sup>170</sup> Frederick Schauer, “Talking as a Decision Procedure,” in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed.) (New York: Oxford University Press, 1999), pp. 22.

<sup>171</sup> Jacobs, Cook and Delli Carpini, *Talking Together*, pp. 4. “Discursive participation,” the authors explain, includes “debates over competing social values (for example, the right to choose regarding reproductive options versus the right to life), conflicts over government taxation and spending, and the clash of values and interests witnessed, for instance, in the heated forums over the war in Iraq” (Ibid., pp. 3).

<sup>172</sup> Ibid., pp. 4.

<sup>173</sup> See Critique #2.

enough has been said about how deliberation actually works among citizens.”<sup>174</sup> And for the most part, what empirical research does exist on deliberation is limited to isolated studies, such as decision-making in town hall meetings;<sup>175</sup> group meetings;<sup>176</sup> informal local conversations;<sup>177</sup> Deliberative Polls and National Issues Forums;<sup>178</sup> and experiments in individual laboratory settings.<sup>179</sup>

However, there have been some notable efforts to assess the practicality of deliberative democratic theory. Sanders, in particular, has looked at jury studies in order to test the feasibility of attaining the high standards imposed on human behavior by deliberative democratic theory.<sup>180</sup> Juries closely mimic deliberation in a real world setting, in that people participating in a jury are communicating—ideally, using reason and empirical evidence—in order to solve a common problem.<sup>181</sup> Thus, if it is possible for people to behave according to deliberative standards—by bracketing status differentials, treating one another with equal respect and focusing on the value of reasoned argument—in a jury, deliberative democratic theories may not be that far off.

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<sup>174</sup> See Mark Button and Kevin Mattson, “Deliberative Democracy in Practice: Challenges and Prospects for Civic Deliberation,” in *Polity*, Vol. 31 (Summer 1999), pp. 612. See also Jacobs, Cook and Delli Carpini, *Talking Together*: “Whether and how real citizens engage in discursive participation; the nature, settings, and impact of this public talk; and when and if ‘talk’ rises to the level of ‘democratic deliberation’—each of these is ignored or, at best, occasionally introduced by way of illustration or anecdote. In short, *the idea of deliberation draws far more attention than its actual practice*” (pp. 20).

<sup>175</sup> See Mansbridge, *Beyond Adversary Democracy*.

<sup>176</sup> See William Gamson, *Talking Politics* (New York: Cambridge University Press, 1992).

<sup>177</sup> See Matt Leighninger, *The Next Form of Democracy: How Expert Rule is Giving Way to Shared Government* (Nashville, TN: Vanderbilt University Press, 2006); Carmen Sirianni and Lewis Friedland, *Civic Innovation in America: Community Empowerment, Public Policy and the Movement for Civic Renewal* (Los Angeles: University of California Press, 2001).

<sup>178</sup> See Robert Luskin and James Fishkin, eds., “Symposium on Deliberative Democracy,” in *Good Society*, Vol. 9, No. 1 (1998); James Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven, CT: Yale University Press, 1995); John Gastil and James Dillard, “The Aims, Methods, and Effects of Deliberative Civic Education Through the National Issues Forums,” in *Communication Education*, Vol. 48, No. 3 (1999), pp. 179-182.

<sup>179</sup> See Tracy Sulkin and Adam Simon, “Habermas in the Lab: A Study of Deliberation in an Experimental Settings,” in *Political Psychology*, Vol. 22 (2001), pp. 809-826.

<sup>180</sup> See Sanders, “Against Deliberation.”

<sup>181</sup> See E. G. Cohen, “Expectation States and Interracial Interaction in School Settings,” in *Annual Review of Sociology*, Vol. 8 (1982), pp. 201-210.

Unfortunately, that does not appear to be the case. Sanders finds that people on juries are not actually capable of behaving in the ways that deliberative democratic theory might suggest. “When Americans assemble in juries,” she explains, “they do not leave behind the status, power, and privileges that they hold in the outside world.”<sup>182</sup> Rather, individuals tend to reproduce external power dynamics in two ways. First, jurors tend to coalesce behind a leader or foreperson. And, while gender, race and wealth do not *directly* determine who rises to power in a jury, Sanders explains, these factors do “increase the likelihood of behavior that leads to selection as head of the jury,” such as speaking first, sitting at the head of the table, etc.<sup>183</sup> Thus, just as in the outside world, the jury leader tends to be a college-educated, white male.<sup>184</sup> Second, even in conversation, some individuals (and their perspectives) have a disproportionate influence. Those who speak louder and more often have a higher likelihood of their opinion prevailing in jury deliberations than those who speak more softly and less often, regardless of the value of their inputs. And as Sanders points out, higher status individuals tend to be louder and more vocal than lower status individuals. Thus, those who are already privileged in society tend to have an especially strong influence in jury deliberations.

Sanders believes that these problems are unavoidable in the current American system. As long as material prerequisites are unevenly distributed, individuals maintain different levels of persuasiveness, and some people are less likely to be heard than others, it will be impossible to reproduce ideal deliberation in the real world.<sup>185</sup> “Deliberation requires not only equality in resources and the guarantee of equal opportunity to articulate persuasive arguments,” she writes, “but also equality in ‘epistemological authority,’ in the capacity to evoke acknowledgement of

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<sup>182</sup> Sanders, “Against Deliberation,” pp. 364.

<sup>183</sup> Ibid. See also Valerie P. Hans and Neil J. Vidmar, *Judging the Jury* (New York: Plenum, 1986).

<sup>184</sup> “Postgraduate work, a high-status occupation, and previous jury experience further enhance the chances of being selected” (Sanders, “Against Deliberation,” pp. 364).

<sup>185</sup> Ibid., pp. 349.



one's arguments."<sup>186</sup> Unfortunately, this kind of equality is practically impossible in an inherently unequal society.

Of course, deliberative democratic theory is not necessarily meant to be replicated in real life – or even to apply to it. As David Estlund explains, much of deliberative democratic theory is *designed* to be abstract. It is supposed to reflect an ideal, or a goal to which political actors should aspire. In other words, it “is not something to be emulated in practice, but a tool of thought and analysis by which appropriate sites for political engagement can be identified.”<sup>187</sup> And certainly, this is true for some of the theorists presented in this chapter. As discussed above, Cohen very explicitly insists that his theory of deliberative democracy is only meant to serve as “a standard for evaluating democratic institutions and procedures of collective decision-making.” And, as Estlund explains, Habermas can also be read to be saying that it would be unrealistic, utopian and, even, undesirable to design political institutions that closely resemble his ideal deliberative speech situation.<sup>188</sup> Thus, Estlund is able to argue that any fears that deliberative democratic theory privileges “the calm giving and receiving of reasons,” *in practice*, are unwarranted.<sup>189</sup> To the extent that critics of deliberative democracy are worried that these theories place unrealistic and biased standards on speech, he writes, it is only because they have failed “to put the ideal deliberative situation in its proper theoretical place.”<sup>190</sup>

To the extent that Estlund is correct—and deliberative democratic theory is only supposed to provide abstract, theoretical constructs—I believe that its utility is severely limited. While there is certainly some academic value in understanding, approximately, how people *might* communicate under *ideal* democratic conditions, political theory also has to provide insights into

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<sup>186</sup> Ibid., pp. 349.

<sup>187</sup> David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008), pp. 186.

<sup>188</sup> Estlund argues that, for Habermas, it “is preferable to have a ‘wild,’ ‘anarchic,’ and ‘unrestricted’ public sphere on which formal political institutions can draw, even though this does open the informal public sphere to morally undesirable biases and inequalities” (Ibid., pp. 199).

<sup>189</sup> Ibid., pp. 186.

<sup>190</sup> Ibid.

how to translate that information into practical results. Thus, deliberative democratic theories that do not extend to real world politics must, at the very least, be supplemented by more practical theories of communication.

There are several prominent deliberative democrats who do seem to be making more practical claims with their theories, however. For example, Fishkin, and other adherents to the Deliberative Polling project, are clearly trying to insert deliberative democratic principles into real political decision-making. And as Schauer points out, while Gutmann and Thompson may initially appear to be providing only “an aspirational vision of public deliberation as an exercise in ideal theory,” they are also, simultaneously, making the “claim that this vision is the appropriate decision for dealing with the fact of disagreement in a nonideal world.”<sup>191</sup>

Unfortunately, these more practical theories of deliberative democracy fall victim to the problems cited above. Because they are based on unrealistic abstractions of human relations, most deliberative democratic theory fails when it is put into practice. To the extent that is impossible to produce perfect conditions of equality and openness in the real world, I believe that deliberative democratic theory is ultimately unworkable.

*B. Social speech critique #2: Deliberative democratic theories are too deliberate*

As stated above, one consequence of the fact that deliberative democratic theory is founded on abstractions and ideals is that the standards for what constitutes deliberation are extremely rigid. While individual deliberative democratic theorists do differ somewhat in what they deem to be deliberation—as the preceding discussions of Habermas, Cohen, Gutmann/Thompson and Fishkin, et al. make clear—they all place strict, formal requirements on speech. To summarize, for speech to constitute deliberation, it must generally consist of informed, reasoned and balanced dialogue, conscientiously aimed at reaching a mutually

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<sup>191</sup> Schauer, “Talking as a Decision Procedure,” pp. 22.

acceptable result (if not always consensus). In other words, deliberation must be thoughtful, structured and purposeful. Thus, one might say that, far from being informal or casual, deliberation is actually highly *deliberate*.

The deliberateness of deliberation is not exactly neutral, however.<sup>192</sup> Any time that a political theory places formal, rigid standards upon a type of communication, that ideal will necessarily privilege certain ways of speaking. It will also tend to privilege certain kinds of people – specifically, those who are most skilled at and comfortable with that ideal form of speech.

In the case of deliberative democratic theory, the requirements placed upon deliberation mean that it is incapable of accommodating the unrehearsed, impassioned and personal conversations that characterize everyday, social speech. As Young explains, there are at least three types of social speech that clearly do not fall within the deliberative democratic model: 1) greeting; 2) rhetoric; and 3) storytelling.<sup>193</sup> By omitting these articulations of social speech, deliberative democratic theory not only misses out on a substantial portion of politically relevant speech, but it also marginalizes those groups that are most associated with these kinds of speech.

First, as Young explains, while “greeting” may be a kind of speech that doesn’t really say anything, it also acts as “a logical and motivational condition for dialogue that aims to reach understanding in that the parties in the dialogue recognize one another in their particularity.”<sup>194</sup> In other words, greetings are “gestures of politeness and deference,” which, by promoting friendliness and respect, ultimately facilitate communication.<sup>195</sup> Rhetoric is also politically

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<sup>192</sup> See Button and Mattson, “Deliberative Democracy in Practice,” pp. 628; Sanders, “Against Deliberation”; Young, “Communication and the Other”; Fraser, “Rethinking the Public Sphere.”

<sup>193</sup> See Young, “Communication and the Other.”

<sup>194</sup> *Ibid.*, pp. 129.

<sup>195</sup> “Communicative interaction in which participants aim at reaching understanding is often peppered with gestures of politeness and deference, the absence of which is felt as coldness, indifference, insult. Discussion is also wrapped in nonlinguistic gestures that bring people together warmly, seeing conditions for amicability: smiles, handshakes, hugs, the giving and taking of food and drink” (*Ibid.*, pp. 129).

influential, Young argues, in that it enables speakers to appeal to those with different aims, values and interests. When speaking to a heterogeneous group, “it is not enough to make assertions and give reasons,” she writes. “One must also be heard.”<sup>196</sup> Rhetoric—in the form of “humor, wordplay, images, and figures of speech”—promotes discussion by capturing the listener’s attention and evoking an emotional response.<sup>197</sup> Finally, Young explains how storytelling is often used in situations of vast cultural or class differences, in order to help individuals develop the empathy necessary for achieving justice. Narrative, she argues, by revealing the experiences of different groups; helping to build cross-cultural understandings of various values and cultural particularities; and illuminating a “total social perspective,” helps to alleviate the misunderstandings—“or a sense of complete lack of understanding”—that between different groups.<sup>198</sup> As a result, diverse peoples are able to recognize their commonalities.

Similarly, Sanders also believes that testimony is essential to any full communicative theory of democracy. Testimony, she points out, had a long history in America—especially in black politics and churches—before it was mostly overshadowed by the elite predilection for rational, impersonal deliberation.<sup>199</sup> And because testimony “encourages consideration of the worthiness of perspectives not obviously rooted in common ground and not necessarily voiced in a calmly rational way,” a political theory that validates such speech would be able to embrace difference and minority viewpoints.<sup>200</sup>

Unfortunately, standard models of deliberative democratic theory are too deliberate to include greeting, rhetoric and storytelling/testimony (thereby ensuring that they miss out on these potential political impacts of social speech). Instead, as Young explains, deliberation tends to favor three kinds of speech that are not equally accessible to all groups in society: assertive,

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<sup>196</sup> Ibid., pp. 130.

<sup>197</sup> Ibid., pp. 130-131.

<sup>198</sup> Ibid., pp. 131-132.

<sup>199</sup> Sanders, “Against Deliberation,” pp. 370.

<sup>200</sup> Ibid., pp. 372.

formal and rational speech.<sup>201</sup> First, the deliberation democratic requirements that communication must both emphasize reasons and also be goal oriented mean that “[s]peech that is assertive and confrontation is here more valued than speech that is tentative, exploratory, or conciliatory.”<sup>202</sup> Second, the norms of deliberation ensure that deliberators will be biased towards arguments based on logic and clear, formal reasoning, rather than personal appeals. “Speech that proceeds from premise to conclusion in an orderly fashion that clearly lays out its inference structure is better than other speech,” Young explains of deliberation.<sup>203</sup> “It is also better to assert one’s position in terms of generalities and principles that apply to particular instances.”<sup>204</sup> Finally, deliberative democrats tend to emphasize reason over passion. “Dispassionate and disembodied” communication is considered preferable to the kind of emotional appeals that characterize so much of human communication.<sup>205</sup>

By elevating the status of these kinds of formal deliberation at the expense of social speech, deliberative democratic theory privileges those who are more skilled at the former and rejects those who are more adept at the latter. And unfortunately, proficiency in assertive, logical, rational deliberation is not equally distributed across demographic groups. Men, in particular, tend to acquire a more assertive communicative style, while women often develop as more timid

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<sup>201</sup> See Young, “Communication and the Other.”

<sup>202</sup> *Ibid.*, pp. 123.

<sup>203</sup> *Ibid.*, pp. 124.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.* As Young explains, deliberative democratic theorists “tend to presuppose an opposition between mind and body, reason and emotion. They tend falsely to identify objectivity with calm and absence of emotional expression” (*Ibid.*). They also incorrectly believe that it is even possible—much less desirable—to form a dichotomy between passion and reason. In fact, reason and emotion often come together in political action. See Jane J. Mansbridge, “Everyday Talk in the Deliberative System,” in *Deliberative Politics: Essays on Democracy and Disagreement*, Stephen Macedo (ed.) (New York: Oxford University Press, 1999): “The emotions always include some form of appraisal and evaluation, and reason can proceed only rarely without emotional commitment, if only an emotional commitment to the process of reasoning” (pp. 225). See also See Amélie Oksenberg Rorty, “Varieties of Rationality, Varieties of Emotion,” in *Social Science Information*, Vol. 2 (1985), pp. 343-353; Martha Nussbaum, “Emotions and Women’s Capabilities,” in *Women, Culture, and Development*, Martha Nussbaum and Johnathan Glover (eds.) (Oxford: Oxford University Press, 1995).

conversationalists.<sup>206</sup> Similarly, wealthy, educated members of the majority community are more likely to have been trained to structure their arguments around logic and reason than who are lower down on the socioeconomic scale. Thus, it is the groups that are already disadvantaged in liberal democracies (i.e. female, racial minorities and lower income) that are more likely to be unpracticed in and uneasy about deliberation. On the other hand, those who are more powerful in society (i.e. male, white and higher income) tend to be more comfortable with this kind of communication.

Indeed, even if these differences in speaking styles are somewhat overblown—as several deliberative democratic theorists have argued (see below)—that does not take away from the argument that the deliberateness of deliberation privileges wealthy, white males. Regardless of how deliberative modes of speech are actually distributed across demographic groups, what matters most is that they are not *seen* to be equally distributed. To the extent that deliberation favors assertiveness, formal logic and reason, and to the extent that these styles of speech are typically associated with privileged groups, deliberative democratic theory implicitly elevates the status of these individuals. Likewise, to the extent that deliberation rejects informal social speech, and to the extent that this type of speech is often associated with marginalized members of society, deliberative democratic theory serves to diminish the status of these individuals.<sup>207</sup>

Many deliberative democratic theorists would respond that there is nothing *inherently* unequal about the deliberative preference for informative, reasoned, rational argument over social speech. Gutmann and Thompson, for example, claim that there is no reason to believe that certain societal groups are less capable of presenting their arguments according to deliberative standards than others. “As a generalization,” they write, “it would be hard to show that defenders

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<sup>206</sup> See Robin Lakoff, “Language and Woman’s Place,” in *Language in Society*, Vol. 2, No. 1 (April 1973), pp. 45-80; Susan A. Basow and Kimberly Rubenfeld, “‘Troubles Talk’: Effect of Gender and Gender-Typing,” in *Sex Roles*, Vol. 48, Nos. 3-4 (February 2003), pp. 183-187.

<sup>207</sup> See Barry Hindess, “Representation ingrafted upon democracy?” in *Democratization*, Vol. 7, No. 2 (2000), pp. 1-18.

of the disadvantaged have been less reasonable in presenting their arguments than defenders of the status quo.<sup>208</sup> Thus, Gutmann and Thompson suggest that the inferior political outcomes experienced by marginalized groups in democracies should be attributed, less to any lack of “deliberative competency,” and more to their lack of power.<sup>209</sup> Deliberation, the authors argue, actually levels the political playing field – at least as compared to bargaining and other more overtly aggressive political methods.<sup>210</sup>

But this somewhat misses the point. Gutmann and Thompson—as well as all other deliberative democratic theorists in this chapter—assume that it is somehow possible to separate out power from deliberation. But as Ian Shapiro explains, power relations always find their way into deliberation. While he consents that collective life is not entirely reducible to power relations, Shapiro points out that “power suffuses all collective life” – including deliberation.<sup>211</sup> In *The State of Democratic Theory*, Shapiro suggests that there are two ways in which power can insert itself into deliberation. First, he points out that the more socially powerful might lie and stall discussion, in order to undermine proper deliberative procedures.<sup>212</sup> However, Shapiro also believe that this possibility can be assuaged by limiting the right to demand more deliberation only to those parties whose basic interests are at stake (the vulnerable party). Second, regardless of whether governments assemble citizens into a sphere of deliberation, they cannot force them to behave according to the rules of deliberation. For example, they cannot ensure that people will deliberate towards the best result rather than bargain towards the easiest conclusion. “Governments can try to structure things so as to make deliberation more or less likely, but ultimately, deliberation depends on individual commitment. By its terms, deliberation requires solicitous goodwill, creative ingenuity, and a desire to get to the best answer. Even juries sometimes choose to

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<sup>208</sup> Gutmann and Thompson, *Why Deliberative Democracy?* pp. 51.

<sup>209</sup> *Ibid.*, pp. 50.

<sup>210</sup> “As we noted earlier, compared to bargaining or other purely aggressive methods of politics, deliberation can diminish the discriminatory effects of class, race, and gender inequalities that rightly trouble critics” (*Ibid.*).

<sup>211</sup> Shapiro, *The State of Democratic Theory*, pp. 39.

<sup>212</sup> *Ibid.*, pp. 43-48.

bargain rather than to deliberate when they want to go home, and, when they do, there is little anyone can do about it.”<sup>213</sup>

Furthermore, as I have argued, power relations and hierarchies influence deliberation right from the beginning, by determining who will be skilled at deliberate communication and, more importantly, who will be seen as being skilled at deliberate communication. Those who exist among the more privileged spheres of society receive training in deliberation that far surpasses that, which is received by members of groups that have traditionally been excluded from mainstream politics. Thus, socially advantaged individuals may find that they have a more seemingly natural fluency in deliberation than members of marginalized groups.<sup>214</sup>

So while deliberative democratic theorists like Gutmann and Thompson assume that everyone starts from a roughly equal discursive playing field, that is not, in fact, the case. Some individuals start out with a handicap in formal deliberation, while others have a leg up. And those who are comfortable with deliberation will ultimately find themselves in a position to reinforce their preexisting social superiority and political leadership.<sup>215</sup>

### **III. The role of social speech in deliberative democratic theory:**

Although the theories of deliberative democracy presented in this chapter are generally unable to account for the role that social speech plays in politics, that does not mean that all deliberative democracy is *necessarily* incompatible with social speech. Indeed, several deliberative democratic theorists have already recognized the need to expand their theories of

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<sup>213</sup> Ibid., pp. 49.

<sup>214</sup> See Sanders, “Against Deliberation,” pp. 348-349.

<sup>215</sup> Sanders argues that this imbalance cannot be remedied simply. “That is, ensuring participation in deliberation, and guaranteeing a discussion that calls on all perspectives, is not just a matter of teaching everyone to argue,” she writes. “To meet the concern of equal participation, democrats should explicitly attend to the issues of group dynamics and try to develop ways to undercut the dominance of higher-status individuals” (Ibid., pp. 367).



political communication to include more informal, everyday speech. And to that end, these theorists have suggested a number of ways in which deliberative democracy could be amended in order to be able to account for social speech.

Mansbridge, for example, suggests that several prominent deliberative democratic theories could potentially be modified in ways that would enable them to address something akin to social speech – what she calls, “everyday talk.”<sup>216</sup> First, referring specifically to Gutmann and Thompson’s theory of deliberative democracy, Mansbridge argues that the criteria they use for judging deliberation in a public assembly—reciprocity, publicity and accountability—could easily be revised to apply to everyday talk as well.<sup>217</sup> Second, she argues that Cohen’s four elements of the ideal deliberative procedure—free, reasoned, equal, consensus—could also each be amended to be more inclusive of social speech.<sup>218</sup>

Other critics of traditional theories of deliberative democracy have argued that, these models not only ought to be explicitly opened up to include those *forms of communication* that are most commonly associated with social speech, but that such an expansion is entirely feasible. For instance, Dryzek claims that there is no reason for deliberation to be restricted to the cold, reasoned, informed discussions that are generally indicative of the term; rather, he argues that deliberation can be understood to include such forms of speech as rhetoric, humor, emotion and storytelling.<sup>219</sup> Indeed, Dryzek’s modified ideal of deliberation has only two conditions: 1) Is that communication neither coercive nor threatening; and 2) Can it connect the particular to the general?<sup>220</sup> Anything that falls within those two perimeters, he argues, is a legitimate form of deliberation.

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<sup>216</sup> See Mansbridge, “Everyday Talk in the Deliberative System,” pp. 221.

<sup>217</sup> Ibid., pp. 221-223.

<sup>218</sup> Ibid., pp. 224-226.

<sup>219</sup> See Dryzek, *Deliberative Democracy and Beyond*, pp. 1-2.

<sup>220</sup> Ibid., pp. 68.

Thus, Dryzek's definition of deliberation does not limit acceptable communication to that formal, political discussion, which only takes place within the institutional structures of liberal democracy. Specifically, he argues that focusing only on deliberation within "the representative institutions and legal system of liberal democratic states" ties that mode of communication to "a needlessly thin conception of democracy, growing ever thinner in light of the constraints that the capitalist market economy imposes upon effective state democracy."<sup>221</sup> Instead, Dryzek believes that both the state and civil society should be construed as appropriate arenas for discursive democracy. Thus, his theory of deliberation appears to actually embrace social speech in civil society.<sup>222</sup>

Unfortunately, despite his aims to make deliberative democracy more inclusive, Dryzek's model of deliberation may not actually be as accommodating of social speech as it first appears. In practice, his two conditions for what constitutes deliberation actually eliminate several important forms of social speech. Greeting, rhetoric and storytelling, for example, all appear to be too coercive to be considered deliberation under Dryzek's model.<sup>223</sup> And from the perspective of social speech, these exclusions are significant. As stated above, greeting, rhetoric and storytelling are all common elements of informal, everyday conversation, and they each play a vital role in the political process. To the extent that Dryzek's revised theory of deliberative democracy is unable to adequately account for these more democratic forms of social speech, it remains deficient and prone towards inequalities.

## **VI. Conclusion:**

The attempts of certain deliberative democratic theorists—i.e. Mansbridge and Dryzek—to reimagine deliberative democratic theory in such a way that it is less obviously biased towards

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<sup>221</sup> Ibid.

<sup>222</sup> Ibid., pp. 81-114.

<sup>223</sup> Ibid., pp. 68-70.

argumentative speech provide substantial steps in the direction of a political theory of social speech. Unfortunately, as should be clear from this chapter, Mansbridge and Dryzek are, by far, the exceptions among deliberative democratic theorists – the majority of deliberative democratic theory remains neglectful of social speech. First, as an abstract theory, it is often expressly unconcerned with basing its assumptions in lived experience. As a result, deliberative democratic theory bears little resemblance to the kind of speech that typifies human interaction, and it often fails when put into practice. Second, the deliberateness of deliberation means that it is too formal and rigid to apply to most speech. Only that speech, which is free, reasoned, conscientious and goal oriented can be considered deliberation, which leaves out the vast majority of informal, everyday interactions.

This lack of interest in social speech, evident in several of the major strains of deliberative democratic theory, has gone a long way to disconnect a substantive portion of political theory from real life interactions, their political implications and the inner-workings of democratic life. Indeed, it may be fair to say that political theory's tendency to muse about ideal conditions has not only cleaved off the largest chunks of lived experience, but has also contributed to charges about political theory's irrelevance. What the discipline needs in order to fully understand the impact of speech on politics in general—and democratic citizenship specifically—is a theory of social speech that can complement more traditional and contemporary theories of speech by embracing the way people actually communicate.

## CHAPTER 3

CRITIQUE OF CONTEMPORARY THEORIES OF FREEDOM OF SPEECH:  
AMERICAN LEGAL THEORY

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”*

- *The First Amendment of the United States Constitution*<sup>224</sup>

*“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”*

- *Thornhill v. Alabama, 310 U.S. 88 (1940)*<sup>225</sup>

Freedom of expression is among the most fundamental liberties protected by the United States Constitution, as evidenced by its placement in the First Amendment to the Bill of Rights.<sup>226</sup> And while the Supreme Court had little to say about the scope of freedom of speech in the early years of the American Republic, since 1919, it has taken an active role in interpreting this portion of the First Amendment. Taken together, the sum of post-World War I First Amendment jurisprudence can be read like a theory of freedom of speech. And while that theory may not be

<sup>224</sup> United States Constitution, Amendment 1.

<sup>225</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940).

<sup>226</sup> The freedoms of speech and press have often been referred to jointly, as freedom of expression. See Thomas I. Emerson, *The System of Free Expression* (New York: Random House, 1970), pp. 3. Hereafter, I will use freedom of speech and freedom of expression interchangeably.

entirely consistent, there are some notable commonalities. Principle among these commonalities is the theme that speech does not merit protection because it is a good, in and of itself; rather, freedom of speech must be upheld, the Supreme Court has argued, because it contributes to the wider values of truth and democratic self-governance.

The Supreme Court's instrumentalist justifications for freedom of speech have meant that the First Amendment does not apply to all communication. As Stanley Ingber argues, Courts that invoke the marketplace of ideas model of the First Amendment justify freedom of speech on the basis of "the aggregate benefits to society," which leaves the First Amendment open to major limitations on speech if it can be determined that that is what would be to the greatest benefit to society.<sup>227</sup> Similarly, if freedom of speech is "merely a correlate of democracy then it need extend only to communication pertinent to democratic decisionmaking."<sup>228</sup> In other words, communication, which does not further the marketplace of ideas or democratic self-governance concerns, receives only limited constitutional protection, and can be legally abridged when it infringes upon other significant societal interests. Thus, contrary to popular belief, freedom of speech is not actually *absolute* in the United States.<sup>229</sup> The Supreme Court has, indeed, ruled that speech, which involves a "clear or present danger," insults, obscenity, defamation, disruption to school activities or a breach of the peace, can all be prohibited or punished.

But what of that speech, which the Supreme Court does not mention? In this chapter, I show how the American judiciary's treatment of freedom of speech has focused primarily on public, political speech. It is this kind of speech, the Court has repeatedly argued, that leads to the discovery of truth and democratic self-government, and therefore, merits constitutional protection. But the labels "political" and "public" only apply to a small fraction of communication.

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<sup>227</sup> Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth," in *Duke Law Journal*, Vol. 1 (February 1984), pp. 4.

<sup>228</sup> *Ibid.*, pp. 12.

<sup>229</sup> See Frederick Schauer, "The First Amendment as Ideology," in *Freeing the First Amendment: Critical Perspectives on Freedom of Expression*, David S. Allen and Robert Jensen (eds.) (New York: New York University Press, 1995), pp. 10-28.

The vast majority of speech that takes place in the world is social speech, and I argue that it, too, contributes to the pursuit of truth and effective democratic self-governance. However, by failing to adequately address this most pervasive and popular form of speech, the Supreme Court has implied that it is not as valuable as political, public speech.

I begin this chapter by reviewing the early American history of freedom of speech. Supreme Court Justices and American legal theorists, alike, have a tendency to couch their readings of the First Amendment in a historical context. In looking back to the experiences and intentions of the Founding Fathers, “originalist” constitutional scholars believe that they can interpret the right to freedom of speech in a way that is true to the spirit of the nation. While I do not believe that a historical analysis of the First Amendment is necessary for developing a theory of social speech, I would argue that it is important for contextualizing the judicial decisions and legal theory that followed.

In the second section of this chapter, I provide an overview of the Supreme Court’s opinions on freedom of speech since 1919. The Supreme Court’s theory of freedom of speech is perhaps more influential than anything else when it comes to determining the average citizen’s ideas about what constitutes valuable or meaningful communication; thus, I believe it deserves special attention. Rather than focusing on the opinions of individual justices or courts, I look at the Supreme Court’s First Amendment rulings as an inconsistent but intelligible whole. While this approach may be more challenging in some respects, it also allows me to develop a more cohesive analysis of free speech jurisprudence that is also larger in scope. And what I find, in this section, is that the Supreme Court has repeatedly defined the First Amendment through the use of two major arguments: 1) the marketplace of ideas; and 2) democratic self-governance. I argue that, while these rationales have been utilized by the Court to explicitly protect a wide range of public and political communication, they have not been extended to apply to social speech.

In the following section, I present my own critique of American jurisprudence on freedom of speech, from the perspective of a theory of social speech. I highlight the Supreme Court's brief and vague statements regarding private speech in order to show that it has not sufficiently addressed the issue of social speech. And to the extent that the Court's consequentialist reading of freedom of speech has only been applied to political, public speech, I argue that this poses a major problem for the theoretical study of communication. First, it devalues a huge sphere of human interaction, one that has significant implications for political life. Second, it means that the Court is missing an opportunity to regulate and structure democracy at the ground level.

Finally, I provide a brief overview of some of the leading American legal critiques of First Amendment jurisprudence. I find that, while there is a great deal of interest in the Supreme Court's distinction between public and private speech, there is comparatively little attention being paid to the status of social speech in the First Amendment. And although American legal scholarship may be moving in a direction that is more conducive to social speech, it is not yet adequately attentive to this form of communication.

#### **I. A brief history of freedom of speech in the United States:**

The early American colonists lived under a legal system that was considerably more hostile to freedom of speech concerns than that, which currently exists in the United States. Much of this early attitude towards freedom of expression can be attributed to the repressiveness in England, from where many of the colonists originated. At the time that the New World was being settled, the English approach towards freedom of expression was defined by two legal systems: 1) seditious libel; and 2) prior restraint in publishing.

First, the English common law tradition of seditious libel made it illegal to publish anything that was disrespectful of the church, the state or its officers. And punishment was potentially

severe, often consisting of the death penalty. As Sir William Blackstone explains, the premise for such a strict system of censorship is that “dangerous or offensive writings,” which are found to be “of a pernicious tendency,” disrupt the “preservation of peace and good order.”<sup>230</sup> Those, like Blackstone, who supported English seditious libel statutes, believed that if citizens were free to openly question and criticize the church, the state or its representatives, it would likely result in social upheaval and unrest. Even the exposure of true and accurate criticisms was therefore illegal, as these were perhaps even more likely to cause turmoil than false allegations.

Second—as I describe more thoroughly in Chapter Two—during the time of colonization, England also had a significant censorship apparatus in place, taking the form of a licensing system. In 1538, King Henry VIII issued a proclamation that required all individual to acquire a license before they could print anything, including books, pamphlets, etc. The immediate result of this system of prior restraint was the formation of printing monopolies, which effectively stifled the publication of unorthodox and oppositional opinions. Even when Parliament overthrew King Charles I and dismantled the existing licensing system, a new licensing statute quickly replaced it in 1643. This system remained in place until 1694.

Coming from this repressive environment, many early Americans were not very accepting of unusual or dissident opinions. And this attitude was reflected in the laws of the individual states, which, under the Articles of Confederation, were left to determine the scope of individual rights and liberties. Often, the most restrictive state controls on speech during the colonial period concerned blasphemous speech. In 1612, for example, under Virginia’s “Lawes Divine, Morall and Martiall,” the Governor was entitled to declare the death penalty for any individual who denied the “holy and blessed Trinitie.”<sup>231</sup> This law also explicitly outlawed “Blasphemy,” “taking

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<sup>230</sup> Sir William Blackstone, *Commentaries on the Laws of England*, Book 4, Ch. 2 (1765-1769), pp. 151-152.

<sup>231</sup> “For the Colony in Virginia Britannia. Lawes Divine, Morall and Martiall, &c. *Alget qui non Ardet. Res nostrae subinde non sunt, quales quis optaret, sed quales esse possunt*” (London: Walter Burre, 1612). Available at: <http://etext.lib.virginia.edu/etcbin/jamestown-browse?id=J1056>.



Gods holy name in vain,” and “traitorous words against his majesties person, or Royall Authority.”<sup>232</sup> Similarly, a “The Massachusetts Act Against Heresy and Error” of 1646 punished those who denied the immortality of the soul with banishment.<sup>233</sup> And in 1660, that state famously hanged a woman, named Mary Dyer, who refused to remain silent about her Quaker beliefs.<sup>234</sup>

And, as in Britain, colonial states also vigorously targeted seditious libel. While there were only a handful of trials for seditious libel in the United States before the American Revolution—as opposed to hundreds in England during the seventeenth and eighteenth centuries—governors (in concert with their Councils) and elected Assemblies exerted great power in order to stifle critical opinions.<sup>235</sup> As Mary Patterson Clarke asserts, “[I]terally scores of persons, probably hundreds, throughout the colonies were tracked down by the various messengers and sergeants and brought into the house to make inglorious submission for words spoken in the heat of anger or for writings which intentionally or otherwise had given offense.”<sup>236</sup>

In Virginia, for example, this meant that a military Captain was stripped of his rank for uttering “treasonable words,” an individual was convicted of “scandalous, mutinous, and seditious” words criticizing the house on a tax issue, and even a member of the Governor’s Council was heavily fined for referring to the governor as a law-breaker.<sup>237</sup> In Maryland, a law against mutinous and seditious speech was sharply criticized for the punishments it exerted,

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<sup>232</sup> Ibid.

<sup>233</sup> See Diana Loercher Pazicky, *Cultural Orphans in America* (Jackson, MS: University Press of Mississippi, 1998), pp. 46.

<sup>234</sup> See Edward T. James, Janet Wilson James and Paul S. Boyer, *Notable American Women, 1607-1950: A Biographical Dictionary, Vol. 1* (Cambridge, MA: Harvard University Press, 1971).

<sup>235</sup> See Leonard W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (New York: Harper Torchbooks, 1963), pp. 19-20.

<sup>236</sup> Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven: Yale University Press, 1943), pp. 117.

<sup>237</sup> See Virginia, General Assembly, House of Burgesses, *Journals of the House of Burgesses of Virginia, 1619-1776*, Vol. 1619-1659, H. R. McIlwaine and J. P. Kennedy (eds.) (Richmond, VA: Library Board, Virginia State Library); William Waller Hening, *The Statutes at Large Being a Collection of All the Laws of Virginia (1619-1792)*, Vol. 2 (Richmond, VA: Library Board, Virginia State Library), pp. 517; *ibid.*, pp. 15.

which included “Whipping, Branding, Boreing through the Tongue, Fine, Imprisonment, Banishment, or Death.”<sup>238</sup> And in Massachusetts, between 1637 and 1647, convictions for seditious speech were issued for John Wheelright, Anne Hutchinson and over half a dozen of their followers; Peter Hobart and others from the Hindman affair; and Robert Child and his six associates.<sup>239</sup>

However, that approach began to soften by the mid-eighteenth century. In a highly influential case in 1735, John Peter Zenger was prosecuted for seditious libel in response to several attacks that the newspaper he printed, the *New York Weekly Journal*, issued against the Royal Governor of New York, William Cosby. Although the truth of an attack did not constitute a defense for seditious libel under either English common law or the new American legal codes, Zenger’s lawyer, Andrew Hamilton, appealed to the jury on those grounds. And, ultimately, the jury agreed with him. Defying the judge’s ruling, the jury declared Zenger non guilty of seditious libel.<sup>240</sup> As Anthony Lewis explains, while this decision could not formally change the law, it “reverberated around the colonies and discouraged further prosecutions for seditious libel.”<sup>241</sup>

In the aftermath of the Zenger decision, James Alexander (who was Zenger’s attorney until he was disbarred for accusing the presiding judge of bias) published a vigorous series of defenses of freedom of speech. He was eventually joined by several other critics of seditious libel, who believed that the people had a right to know about the conduct of those in power.<sup>242</sup> And while libertarian voices were relatively few and far between during the mid-eighteenth

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<sup>238</sup> “The Declaration of the Reasons and Motives for the Present Appearing in Arms of Their Majesties Protestant Subjects In the Province of Maryland,” in *Narratives of the Insurrections, 1675-1690*, Charles M. Andrews (ed.) (New York: Charles Scribner’s Sons, 1915), pp. 309.

<sup>239</sup> See Mark DeWolfe Howe (ed.), *Readings in American Legal History* (Cambridge, MA: Harvard University Press, 1949).

<sup>240</sup> For more information, see Levy, *Freedom of Speech and Press in Early American History*; Paul Finkelman, “Zenger’s Case: Prototype of a Political Trial,” in *American Political Trials*, Michal R. Belknap (ed.) (Westport, CT: Praeger Publishers, 1994).

<sup>241</sup> Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (New York: Basic Books, 2007), pp. 4.

<sup>242</sup> See *Common Sense: or, the Englishman’s Journal* (London, 1738), pp. 331-341 and pp. 349-354. Available at: <https://archive.org/details/commonsenseoren00lyttgoog>.

century, a number of other political philosophers and activists began espousing arguments in favor of freedom of expression.<sup>243</sup>

In this atmosphere of the mid- to late-eighteenth century, politics began to shift gears. With political actors being influenced by the events of the time, as well as the political thought of those such as John Milton and John Locke, states started introducing protections for freedom of expression into their individual constitutions. In 1776, Virginia became the first state to insert freedom of the press into its Declaration of Rights. Section 12 of that article, drafted by George Mason, reads: "The freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments."<sup>244</sup> That same year, the state of Pennsylvania made freedom of speech a constitutional right. Its first constitution stipulated, "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."<sup>245</sup> The following year, the independent republic of Vermont copied its statement on freedom of speech in its own constitution. And in 1780, Massachusetts adopted a constitution, which explicitly protected freedom of the press. All in all, by 1787, nine of the original thirteen colonies had enacted constitutions and/or foundational documents included declarations of a right to some kind of freedom of expression.

This did not mean, however, that freedom of expression was protected by the states in the same sense that it is today. For example, Pennsylvania still continued to suppress loyalist speech and harass Quakers over their religious beliefs even after it adopted its freedom of expression clause.<sup>246</sup> As Lewis argues, freedom of speech may not have had much actual force

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<sup>243</sup> See Levy, *Freedom of Speech and Press in Early American History*, pp. 139-175.

<sup>244</sup> "The Virginia Declaration of Rights," in *The Federal and State Constitutions, Colonial Charters...* VII, F. N. Thorpe (ed.) (Washington, DC, 1909), pp. 3812-3814.

<sup>245</sup> "Declaration of Rights," Pennsylvania Constitution of 1776, Art. XII, in *The Founders' Constitution*, Philip B. Kurland and Ralph Lerner (eds.) (Chicago, University of Chicago Press, 1987).

<sup>246</sup> See Levy, *Freedom of Speech and Press in Early American History*, pp. 183.

during this period. Indeed, it looks as if the state bills of rights may have been considered more “admonitions to state legislatures,” as opposed to enforceable, legal provisions.<sup>247</sup>

Fortunately, a new national Bill of Rights was just on the horizon. By 1787, it had become clear to many Americans that the fledging nation required a stronger constitution than that, which the Articles of Confederation had to offer. Thus, at a Constitutional Convention in Philadelphia, on September 17, 1787, a new constitution was proposed. This new constitution had no bill of rights, and therefore, no protections for freedom of expression. Many Antifederalists feared—among other things—that a constitution devoid of guaranteed rights and liberties would give the federal government too much power, and it might eventually threaten the people. In order to assuage these fears, John Hancock proposed a plan: upon ratification of the new constitution, the first Congress would have to adopt a bill of rights.

A number of the Founding Fathers were hostile to this idea, however. Notably, James Madison feared that any efforts to enumerate individual rights risked implying that other, unnamed rights were unprotected. Furthermore, he was skeptical that a bill of rights would be effective. Looking at the experiences of the individual states, Madison pointed out that their bill of rights were often violated “by overbearing majorities in every State.”<sup>248</sup>

Nevertheless, after only a brief debate, Madison’s proposal was unanimously defeated by the state delegations, and it was decided that the new Congress would enact a national bill of rights. Thus, in the first session of the United States Congress, Madison proposed twenty constitutional amendments concerning individual rights. These twenty proposals were then condensed into twelve, and passed along to the states, which ratified ten of them. These ten amendments were officially adopted when the state of Virginia ratified them on December 15,

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<sup>247</sup> Lewis, *Freedom for the Thought We Hate*, pp. 7.

<sup>248</sup> James Madison, “Letter to Thomas Jefferson,” October 17, 1788. Available at: [http://www.constitution.org/jm/17881017\\_tj.htm](http://www.constitution.org/jm/17881017_tj.htm).

1791—thereby fulfilling the requirement that they be approved by three-fourths of the states—and together, they came to be known as the Bill of Rights.

As cited at the beginning of this chapter, the First Amendment of the United States Bill of Rights guarantees that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>249</sup> What exactly that means, however—especially as regards freedom of speech—has been hotly contested.

For one thing, at the time of ratification, the hierarchy between the federal constitution and state and local law was still unclear. While the United States Constitution was always meant to be binding on the states regarding sections that particularly referred to the states (e.g. the contract clause), many early American political actors believed that the First Amendment applied only to Congress. Thus, through much of the eighteenth and nineteenth centuries, the states often followed their own rules and regulations regarding freedom of speech. And this attitude was supported by the Supreme Court’s 1833 decision in *Barron v. Mayor and City Council of Baltimore*, which stated that the Bill of Rights applied only to the federal government.<sup>250</sup> It was not until the ratification of the Fourteenth Amendment in 1865 that states began to see substantial new federal restrictions on their policies towards freedom of speech.<sup>251</sup> And even then, the Supreme Court continued to find that the First and Second Amendments did not apply to the states.<sup>252</sup> It was only in 1925, with the decision in *Gitlow v. New York*—which first established the

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<sup>249</sup> *United States Constitution*, Amendment 1

<sup>250</sup> *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833).

<sup>251</sup> For more information on the ratification and judicial interpretations of the Fourteenth Amendment, especially as regards freedom of speech, see Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege”*: Struggles for Freedom of Expression in American History (Durham, NC: Duke University Press, 2000), pp. 357-383.

<sup>252</sup> See *United States v. Cruikshank*, 92 U.S. 542 (1876).

incorporation doctrine—that the constitutional right to freedom of speech was made to apply to the states.<sup>253</sup>

The language of the First Amendment is also extremely—and intentionally—vague. And because the First Amendment passed in both houses of Congress with almost no recorded debate, there is limited historical information available to provide guidance on how it ought to be understood. Thus, there has been a great deal of speculation among political theorists and actors about how the Founding Fathers meant for the First Amendment to be interpreted.

In his 1963 book, *Freedom of Speech and Press in Early American History: Legacy of Suppression*, Leonard W. Levy published a controversial account of the First Amendment. Pointing to the First Amendment's foundations in English common law, he argued that is impossible to know exactly how much of this tradition the Framers meant to infuse into freedom of speech. Their language is simply too vague. Perhaps they did mean to express a broad freedom of speech, he speculated. Or perhaps they did not know, themselves, what they meant. "It is not even certain that the Framers themselves knew what they had in mind," Levy wrote, "that is, at the time of the drafting and ratification of the First Amendment, few of them if any at all clearly understood what they meant by the free speech-and-press clause, and it is perhaps doubtful that those few agreed except in a generalized way and equally doubtful that they represented a consensus."<sup>254</sup>

The only aspect of the Framers' intentions that Levy was sure of was that they did not envision an *absolute* freedom of speech. There were always going to be limits, he explained. First, Levy suggested that, building off of the experience of censorship in England, perhaps the Framers only designed the First Amendment to forbid acts of prior restraint on speech. Second, he argued that the Constitution's freedom of speech was almost certainly constructed with an exception for seditious libel. "What is clear is that there exists no evidence to suggest an

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<sup>253</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>254</sup> Levy, *Freedom of Speech and Press in Early American History*, pp. 236.

understanding that a constitutional guarantee of free speech or press meant the impossibility of future prosecutions of seditious utterances,” Levy wrote.<sup>255</sup> “The security of the state against libelous advocacy or attack was always regarded as outweighing any social interest in open expression, at least through the period of the adoption of the First Amendment.”<sup>256</sup>

And certainly, this reading of the First Amendment appears to have been born out by the numerous wartime revisions to freedom of speech. In the late eighteenth century, President John Adams infamously oversaw the passage of the Alien and Sedition Acts of 1798, which gave federal authorities the power to prosecute any individual suspected of plotting against the federal government.<sup>257</sup> The Act also prohibited the writing, printing, speech and publishing of “any false, scandalous and malicious writing... with intent to defame” or bring “into contempt or disrepute” the government of the United States, either house of Congress of the United States or the President of the United States, as well as expression that is meant “to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to incite any unlawful combinations therein.”<sup>258</sup> Thus, the Alien and Sedition Act threatened political discussion until it expired in 1801.

However, this was not the end of wartime prohibitions on speech. During the Civil War, President Abraham Lincoln also infringed upon First Amendment rights in an effort to ensure the preservation of the nation. After the issuance of his Emancipation Proclamation in September 1862, there were significant criticisms directed against Lincoln and the federal government. Rebel and anti-war newspapers openly denounced the Proclamation—calling it “bloody” and

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<sup>255</sup> Ibid., pp. 237.

<sup>256</sup> Ibid.

<sup>257</sup> For a more detailed history of the Sedition Act of 1798, see James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, NY: Cornell University Press, 1956); Curtis, *Free Speech*, pp. 52-116; Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York: Oxford University Press, 1993), pp. 581-593, pp. 694-713.

<sup>258</sup> Ch. LXXIV.—An Act in addition to that act, entitled “An act for the punishment of certain crimes against the United States.” Available at: <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=719>.

“barbarous”—and personally attacked Lincoln.<sup>259</sup> These publications helped to fuel the growing opposition in the nation. And in response, Lincoln appointed several generals to keep the peace in the various states.

In 1863, Lincoln appointed General Ambrose Burnside Union Commander of the Department of Ohio. Acting under the president’s authority, Burnside quickly declared martial law and issued General Order No. 38, which criminalized any declaration of sympathies for the enemy.<sup>260</sup> With that order in place, he began to go after anti-war protestors, the most notable of which, was a former Ohio congressman, named Clement L. Vallandigham. Although Vallandigham was against slavery, personally, he was also a diehard Copperhead and a firm believer in state rights. On May 1, 1863, he gave a speech in Mount Vernon, Ohio, in which he declared the Union “wicked, cruel, and unnecessary.”<sup>261</sup> He called for “King Lincoln’s” removal from office, and claimed that his war was waged only for the “purpose of crushing out liberty and erecting despotism.”<sup>262</sup> Livid, Burnside had Vallandigham arrested and charged with uttering “disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress unlawful rebellion.” Vallandigham was then convicted by military tribunal and sentenced to close confinement. Only a month later—and against Federal Judge Thomas Drummond’s explicit orders—Burnside also seized and closed the offices of the *Chicago Times*, on account of its history of “disloyal and incendiary sentiments.”

Although Lincoln interceded—commuting Vallandigham’s sentence to banishment to the Confederacy and restoring publication of the *Chicago Times*—the unrest regarding censorship

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<sup>259</sup> See Geoffrey R. Stone, “Essay: Abraham Lincoln’s First Amendment,” in *New York University Law Review*, Vol. 78, No. 1 (April 2003), pp. 2.

<sup>260</sup> See General Order No. 38, Apr. 13, 1863, in *The Trial of Hon. Clement L. Vallandigham by a Military Commission*, 7, 7 (Cincinnati: Rickey and Carroll, 1863).

<sup>261</sup> Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War* (New York: Fordham University Press, 1999), pp. 154.

<sup>262</sup> *Ibid.*



began to escalate. Democratic editors and journalists called tyranny, and even Republican newspapers worried that the administration had blundered.<sup>263</sup>

In May 1864, two Copperhead newspapers, the *New York Journal of Commerce* and the *New York World*, even went so far as to publish a forged presidential proclamation ordering the draft of an additional 400,000 men. At this, Lincoln, himself, ordered both the suppression of the *New York Journal of Commerce* and the *New York World* and also the arrest of the editors of those papers. The Independent Telegraph System, which transmitted the story, was also seized and its transmissions were ceased. As Lincoln argued, freedom of speech is not justified in all instances. And while the infringement of rights ought to be avoided in times of peace, in times of war, such measures may be necessary. "I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace," Lincoln writes in his letter to Erastus Corning, "than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one."<sup>264</sup> In other words, sometimes the ends must justify the means.<sup>265</sup>

A similar attitude was adopted during World War I. At that time, the Espionage Act of 1917 hindered freedom of speech by making it a crime to write or say anything that might encourage disloyalty or interfere with the draft. As a result, "subversive" books were removed from bookstores and libraries.<sup>266</sup> A Federal Censorship Board was created to regulate these activities, and anyone found guilty of such acts, would be subject to a fine of \$10,000 and 20

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<sup>263</sup> Ibid., pp. 81.

<sup>264</sup> Abraham Lincoln, "Letter from Abraham Lincoln to Erastus Corning and Others" (June 12, 1863), in *Speeches and Writings, 1859-1865: Speeches, Letters and Miscellaneous Writings, Presidential Messages and Proclamations*, Don E. Fehrenbacher (ed.) (New York: Library of America, 1989), pp. 460-461.

<sup>265</sup> For more information on Lincoln's treatment of civil rights and liberties during the Civil War, see Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991); Curtis, *Free Speech*, pp. 300-356.

<sup>266</sup> United States Congress, *The Espionage Act of 1917*.

years in prison. This Act was reinforced the following year, with the passage of the Sedition Act of 1918, which made it illegal to “utter, print, write, or publish disloyal, profane, scurrilous, or abusive about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag... or the uniform of the Army or Navy of the United States.”<sup>267</sup> Any language that “intended to bring the form of government... or the Constitution... or the military or naval forces... or the flag... of the United States into contempt, scorn, contumely, or disrepute” was also forbidden.<sup>268</sup>

Virtually every major war that the United States has fought has been accompanied by some limitations on freedom of speech. And indeed, the courts have often been extremely lenient with these kinds of disruptions to civil rights and liberties. Thus, Levy’s theory that the First Amendment was actually meant to be read much more narrowly than it currently is initially appears to have some credence.

However, only 25 years after publishing his treatise on the repressive themes of the First Amendment, Levy retracted most of his claims regarding the narrowness of the First Amendment. While he still maintains that the prevailing early American legal theory of freedom of speech was repressive, he also finds that the experience of speech was often quite different. He argues that the law was frequently unenforced, and members of the press could therefore act as if it did not exist.<sup>269</sup> Thus, the press was actually able to be extremely critical of political actors.

A number of legal theorists have argued even more strongly that the Framers’ actually *intended* for the First Amendment to be read broadly.<sup>270</sup> And indeed, this attitude has often been

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<sup>267</sup> United States Congress, *The Sedition Act of 1918*.

<sup>268</sup> Ibid.

<sup>269</sup> See Leonard W. Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 1999).

<sup>270</sup> See, for example, Larry D. Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (New York: New York University Press, 1993); William T. Mayton, “Seditious Libel and the Lost Guarantee of a Freedom of Expression,” in *Columbia Law Review*, Vol. 84, No. 1 (1984), pp. 91-142; David M. Rabban, “The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History,” in *Stanford Law Review*, Vol. 37 (February 1985), pp. 795-856.

reflected in the aftermath of wartime prohibitions on freedom of speech. Wartime censorship has often been derided—even in its own time—for being against the wishes of the Founding Fathers, and contrary to the principles of the Constitution. For example, when the Alien and Sedition Acts of 1798 expired, President Thomas Jefferson pardoned all those convicted under the Act, and Congress voted to institute reparation to its victims.<sup>271</sup> After only two days, Lincoln withdrew the order of arrest and resumed publication of the *New York Journal of Commerce* and *New York World*. And, of course, Congress did eventually repeal the Sedition Act of 1917.

Thus, there are two conflicting themes present in the early American history of freedom of speech: one more repressive and one more inclusive. And indeed, in the end, it hardly matters which way the Framers leaned when they wrote the Bill of Rights. For one thing, as a heterogeneous group that needed to make serious compromises in order to ensure passage of both the Constitution and the Bill of Rights, it is inaccurate to think of the Framers as having any *one* intention. And even if they had all been of one mind, many of their intentions for other amendments have grown outmoded over the years. So while these original conversations about what the founding American documents should mean are important, they ought not necessarily dictate current understandings.

Much more important than determining the intentions of the Founding Fathers regarding freedom of speech, I believe, is understanding how the First Amendment has been interpreted by the judicial branch. As the branch of government that has been charged with interpreting the Constitution, it is the judiciary's reading of the First Amendment that is authoritative in law. Unfortunately, it is difficult to know what the early American judiciary thought of these two strands,

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<sup>271</sup> As Supreme Court Justice William J. Brennan, Jr. wrote in *New York Times v. Sullivan*, 376 U.S. 245, 276 (1964), “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”

as the Supreme Court heard less than a dozen First Amendment cases between 1791 and 1889.<sup>272</sup> All of that changed, however, in the early twentieth century.

## II. Modern American jurisprudence on freedom of speech in the First Amendment:

As David M. Rabban explains, attitudes towards freedom of speech underwent a radical transformation after the repression of World War I.<sup>273</sup> During this period, the Supreme Court began hearing a significant number of First Amendment cases.<sup>274</sup> Thus, a true jurisprudential interpretation of the First Amendment finally emerged. And apart from the wartime exceptions, I argue that the modern Supreme Court's justification of the First Amendment right to freedom of speech can be sorted into at least two major arguments: 1) the marketplace of ideas; and 2) democratic self-governance.<sup>275</sup> Each of these arguments—used at different points and to different degrees—represents the lens through which freedom of speech is understood. They also, therefore, dictate the limitations that the Supreme Court has placed upon this fundamental liberty.<sup>276</sup>

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<sup>272</sup> Michael Gibson argues that this was due to the then-prevailing view among federal judges that the Bill of Rights did not apply to the states. See Michael T. Gibson, "The Supreme Court and Freedom of Expression from 1791 to 1917," in *Fordham Law Review*, Vol. 55, Iss. 3 (1986), pp. 263-333.

<sup>273</sup> See David M. Rabban, *Free Speech in Its Forgotten Years* (New York: Cambridge University Press, 1997). See also Harry Kalven, Jr. *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row, Publishers, 1988).

<sup>274</sup> Rabban, *Free Speech in Its Forgotten Years*, pp. 19.

<sup>275</sup> Some have suggested that the Supreme Court also utilizes a third justification for freedom of speech: autonomy. See Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence," in *Eternally Vigilant: Free Speech in the Modern Era*, Lee C. Bollinger and Geoffrey R. Stone (eds.) (Chicago: The University of Chicago Press, 2002), pp. 152-173. However, while this theme is certainly present within the American free speech jurisprudence, it is by no means as prevalent as the other the marketplace of ideas and the argument from democratic self-governance. Thus, I have omitted it from this analysis.

<sup>276</sup> See Stanley Fish, *There's No Such Thing as Free Speech ...and it's a good thing too* (New York: Oxford University Press, 1994), pp. 104.

To begin, the classic marketplace of ideas justification for freedom of speech refers to the argument that competition between ideas will eventually lead to the triumph of truth over falsehood.<sup>277</sup> In other words, this theory posits that a process of vigorous debate, populated by a multitude of perspectives and ideas, will ultimately lead to intellectual development progress.<sup>278</sup> For such competition to occur, however, people must be willing and able to participate in open, reasoned debate. The freer the public forum in which the debate takes place, the more likely it is that truth will be discovered and adopted. When external, authoritative forces (i.e. the state) try to stifle discussion and authoritatively impose truths from above, they limit the market's ability to properly do its job.<sup>279</sup>

This Millian argument that freedom of speech is necessary for a thriving marketplace of ideas is perhaps the Court's most important and oft-cited justification for its reading of the First Amendment.<sup>280</sup> Indeed, the Supreme Court has defended freedom of speech as a means of

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<sup>277</sup> The marketplace of ideas theory has been severely criticized over the years, perhaps most notably by those who question the validity of its assumptions. See, for example, Thomas I. Emerson, *Toward A General Theory of the First Amendment* (New York: Random House, 1966); Alexander Meiklejohn, *Free Speech: And Its Relation to Self-Government* (New York: Harper & Brothers Publishers, 1948); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Ann Arbor, MI: University of Michigan Press, 1960); Alexander Meiklejohn, "The First Amendment is an Absolute," in *Supreme Court Review*, Vol. 1961, No. 245 (1961); C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," in *UCLA Law Review*, Vol. 25, No. 964 (1978); Stanley Ingber, "Defamation: A Conflict Between Reason and Decency," in *Virginia Law Review*, Vol. 65, No. 5 (1979); Martin H. Redish, "Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger," in *California Law Review*, Vol. 70, No. 5 (1982); Steven Shiffrin, "Government Speech and the Falsification of Consent," in *UCLA Law Review*, Vol. 27, No. 565 (1980); C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989); Ingber, "The Marketplace of Ideas"; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982), pp. 15-34; Willmoore Kendall, "The 'Open Society' and Its Fallacies," in *The American Political Science Review*, Vol. 54, No. 4 (December, 1960), pp. 972, 977-79; David A. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment," in *University of Pennsylvania Law Review*, Vol. 123, No. 1 (November, 1974), pp. 45.

<sup>278</sup> The link between free speech and progress, it should be noted, is not an uncontested one. See Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty*, Isaiah Berlin (ed.) (Oxford: Oxford University Press, 1969), pp. 40-41.

<sup>279</sup> For a more thorough discussion of the marketplace of ideas theory of freedom of speech, see the discussion in Chapter Four.

<sup>280</sup> The term "marketplace of ideas" can be found in the majority, concurring and/or dissenting opinions of at least 74 United States Supreme Court cases.

achieving truth and social progress in several of its most influential and historic First Amendment cases.<sup>281</sup> Most notably, Justice Oliver Wendell Holmes' 1919 dissent in *Abrams v. United States* introduced the marketplace of ideas argument into the Supreme Court's jurisprudence and cemented this concept into the popular imagination.<sup>282</sup>

Modern American free speech jurisprudence could be said to have begun with Holmes' dissent in *Abrams*, in which he waxed eloquently about the battle between truth and falsehood, ultimately concluding that freedom of expression is the best way to encourage the discovery of truth. As described above, the Espionage Act of 1917 had made it illegal to criticize the United States government in any way that might impede the war effort. In this case, the defendants had printed two leaflets that they then distributed by throwing off the top of a building. The first leaflet, signed "revolutionists," denounced the sending of American troops to Russia, and the second leaflet, written in Yiddish, denounced the war and U.S. efforts to impede the Russian Revolution. The defendants were charged and convicted, in a 7-2 decision, for inciting resistance to the war effort and for urging curtailment of production of essential munitions. They were each sentenced to 20 years in prison.

The majority opinion, written by Justice John Hessin Clarke, held that the Espionage Act and its amendments did not violate the First Amendment. However, it is Holmes' dissenting opinion that has had the most lasting influence in this case. Like Mill, he believed that the truth is rarely—if ever—obvious. The only way to discriminate good ideas from bad ones, Homes

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<sup>281</sup> See, for example, *Board of Education, Island Trees Union Free School District No. 26, et al. v. Pico, by his Next Friend Pico, et al.*, 457 U.S. 853 (1982); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Gary Davenport v. Washington Education Association* *Washington v. Washington Education Association*, 551 U.S. 177 (2007); *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 507 U.S. 1301 (1993); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *New York State Board of Elections v. Margarita Lopez Torres*, 552 U.S. 196 (2008); *Miami Herald Publishing Co., Division of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974).

<sup>282</sup> See *Abrams v. United States*, 250 U.S. 616, 624 (1919). *Abrams* has been cited in 429 federal and states cases. It has also been featured in 2,772 law review articles.

argued, is to allow them all an opportunity to battle face-to-face. In such a competition, incorrect ideas should be dismissed, partially correct ideas should be sorted out and the truth should be revealed. As Holmes writes,

The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.<sup>283</sup>

Thus, Holmes argued that he would rather “be safe, not sorry” when it comes to freedom speech. Not only might any idea potentially constitute (or contain some portion of) the truth, but also even false ideas serve an important purpose, he wrote, in that they help to bring the truth to light.

Holmes argued that no amount of censorship could lead the people towards truth. Instead, he believed that the only way to ensure that truth will emerge is for society to be structured as an open forum, where different ideas can be expressed, compared and refuted. In other words, there must be a free and open *marketplace of ideas*. Holmes cautioned that the American people ought to be “eternally vigilant” against any attempts to censor on the basis of content. To the extent that censorship is ever appropriate, he wrote, it is only when “the expression of opinions” may “so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country.”<sup>284</sup>

So despite the broad theoretical defense of freedom of speech in the *Abrams* dissent, Holmes also reminded readers that the First Amendment is not meant to include everything. In this case, Holmes argued that Abrams’ leaflets did not present a “clear and present danger,” but if

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<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

they had, the government would have been justified in silencing speech.<sup>285</sup> “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of an opinion where private rights are not concerned,” Holmes wrote.<sup>286</sup> And as C. Edwin Baker points out, this limitation does not infringe upon the classic marketplace of ideas theory.<sup>287</sup> Remember Mill’s example of the corn dealers, he tells the reader. Even the truest and fairest of opinions may be suppressed if they are expressed under such circumstances as to do harm or incite violence.

This dissent marked a major turnaround for Holmes. Only two years earlier, in *Debs v. United States*, Holmes had led the Court in ruling against Eugene V. Debs, a leader of the Socialist Party of America, who gave a speech in Canton, Ohio, protesting United States involvement in World War I.<sup>288</sup> Debs, Holmes wrote in his majority opinion, had violated the same Espionage Act that he considered unconstitutional in the *Abrams* case. And in the 1919 case, *Schenck v. United States*, writing for a unanimous court, Holmes argued that the distributor of a circular—which argued that the draft was a major wrong, motivated by capitalism, and ought to be protested against—was not protected by the First Amendment.<sup>289</sup> He argued that the character of every act depends on its circumstances. “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,” Holmes wrote.<sup>290</sup>

While Holmes continued to utilize the “clear and present danger” test for assessing the constitutionality of speech, he began to adopt a more permissible attitude only shortly after

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<sup>285</sup> This standard was not new to the *Abrams* dissent; rather, it was a continuation of the clear and present danger test that was created by Holmes in *Schenk v US*, 249 U.S. 47 (1919). However, the *Abrams* dissent did give this test new meaning.

<sup>286</sup> *Ibid.*

<sup>287</sup> See Baker, *Human Liberty and Freedom of Speech*, pp. 8.

<sup>288</sup> See *Debs v. United States*, 249 U.S. 211 (1919).

<sup>289</sup> See *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>290</sup> *Ibid.*



*Schenck*. Francis Canavan has suggested that this change may be largely attributed to a run-in between Holmes and Zechariah Chafee, Jr.<sup>291</sup> In 1919, Chafee wrote an article in the *Harvard Law Review*, criticizing Holmes' decision in *Schenck* for applying the "clear and present danger" test too restrictively. Within a few months of meeting Chafee for tea to discuss their opinions, Holmes had adopted his view, and had used the clear and present danger formula as a positive rule to defend freedom of speech in the *Abrams* dissent.

And once Holmes began to read the First Amendment right to freedom of speech more broadly, he was not to be stopped. As Ronald Dworkin puts it, although Holmes' "skepticism made him reluctant to overturn any legislative decision, [and he] was slower to be converted, he was a lion once he was."<sup>292</sup> So with Holmes leading the way, the *Abrams* dissent became orthodoxy by the 1960's.

Indeed, as early as 1925, in *Gitlow*, Holmes—this time writing for the majority—continued with his argument that speech ought to be allowed to compete freely in an open market unless it presents a clear and present danger.<sup>293</sup> And two years later, in *Whitney v. California*, the Court supported a vision of freedom of speech that was not only consistent with *Abrams*, but also added an additional justification for freedom of speech: democratic self-governance.<sup>294</sup>

In this case, Charlotte Anita Whitney, a member of the Communist Labor Party of California, had been prosecuted under that state's Criminal Syndicalism Act. The Act prohibited advocating, teaching, or aiding the commission of a crime, including "terrorism as a means of accomplishing a change in industrial ownership... or effecting any political change."<sup>295</sup> In a unanimous decision, the Court sustained Whitney's conviction and held that the Act did not

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<sup>291</sup> See Francis Canavan, *Freedom of Expression: Purpose as Limit* (Durham, NC: Carolina Academic Press, 1984), pp. 124-125.

<sup>292</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996).

<sup>293</sup> See *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

<sup>294</sup> See *Whitney v. California*, 274 U.S. 357, 372 (1927).

<sup>295</sup> *Ibid.*

violate the Constitution, claiming that it did not violate the Due Process Clause or the Equal Protection Clause, and that freedom of speech was not an absolute right. The majority argued "that a State... may punish those who abuse this freedom by utterances... tending to... endanger the foundations of organized government and threaten its overthrow by unlawful means."<sup>296</sup>

Nevertheless, it is the concurring opinion, written by Justice Louis D. Brandeis and signed by Holmes, which most clearly portrayed their Court's growing understanding of the First Amendment. In this opinion, Brandeis argued that only clear, present and imminent threats of "serious evils" could justify suppression of speech. This is because the liberty of speech is not only the "secret of happiness," but also

... [F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>297</sup>

Thus, in this defense of freedom of speech, Brandeis presents both justifications that mentioned above: marketplace of ideas and democratic self-governance.

First, Brandeis argued that freedom of expression is "indispensable to the discovery and spread of political truth."<sup>298</sup> In other words, as stated above, he asserted that speech must be allowed to exist in an open forum so that all opinions are given the opportunity to compete. Second, Brandeis wrote that the act of citizen discussion is an important aspect of democratic self-governance. An "inert people" is "the greatest menace to freedom," he explained. And in

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<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

order to ensure that citizens engage in meaningful discourse, speech must be free and open.<sup>299</sup>

Brandeis also pointed out that freedom of speech is the “secret to happiness” – it is how human beings find fulfillment.<sup>300</sup> As a fundamental element of what it means to be human, he argued, speech ought not to be infringed upon.

The argument from democracy stems from the idea that, in a democracy, the people are sovereign. Three implications flow from this principle. First, as a sovereign body, the people must have access to all relevant information if they are to decide which propositions to accept and which ones to reject. Second, an open public forum also allows the sovereign people to express their desires to their leaders. Finally, if government actors really are servants of the people, the people must have some avenues for criticizing them, and even removing them when necessary. Thus, open debate is necessary for proper self-governance.<sup>301</sup>

This justification for freedom of speech is perhaps most associated with Alexander Meiklejohn.<sup>302</sup> In his book, *Free Speech: And Its Relation to Self-Government*, Meiklejohn suggests that democratic self-governance—and not the pursuit of truth—is the main reason behind the broad freedom of expression that can be found in Article 1, Section 6 of the United States Constitution.<sup>303</sup> “The First Amendment is not, primarily, a device for the winning of new

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<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> It is important to note that the Supreme Court’s use of the argument from democracy has been frequently revisited and reassessed over the years. See, for example, Thomas I. Emerson, “First Amendment Doctrine and the Burger Court,” in *California Law Review*, Vol. 68, No. 422 (1980); Kenneth L. Karst, “Equality as a Central Principle of the First Amendment,” in *University of Chicago Law Review*, No. 43, Vol. 20 (1975).

<sup>302</sup> Post argues that Meiklejohn’s theory represents only one half of the Supreme Court’s democracy argument, and that there are actually two schools of thought. The second school relies on a participatory perspective, claiming that the First Amendment ought to be used to safeguard speech that helps us build a community and expresses authentic self-determination (autonomy of individuals). See Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” pp. 166-167.

<sup>303</sup> See Meiklejohn, *Free Speech*. Meiklejohn also describes a second level of free speech protection, located within the Fifth Amendment. See below.

truth, though that is very important,” he explains.<sup>304</sup> “It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal.”<sup>305</sup> In other words, Meiklejohn believes that freedom of speech exists to ensure that all members of the voting public are informed about the issues and procedures that are relevant to their responsibilities as good democratic citizens.

And if the purpose of freedom of speech is to further democracy, then it is only that speech, which is likely to achieve that end that will be fully protected. As Meiklejohn writes, if the principle of freedom of speech is derived... from the necessities of self-government by universal suffrage, there follows at once a very large limitation on the scope of the principle. The guarantee given by the First Amendment is not, then assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.<sup>306</sup>

In other words, it is only political, public-minded speech that is protected under the democratic self-governance justification for freedom of speech. As Ingber explains, “[a] right founded upon the deliberative role of citizens in a democratic political order need not apply to all forms of expression; the debates over artistic merit, the best style of personal life, or the quality of Mrs. Smith’s pies would probably not qualify for protection.”<sup>307</sup>

While the democracy justification for freedom of speech may not have achieved the same status in popular culture as the marketplace of ideas, it has been instrumental in the Supreme Court’s understanding of freedom of speech. Meiklejohn, himself, has been directly cited in at

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<sup>304</sup> Ibid., pp. 88.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid., pp. 93-94.

<sup>307</sup> Ingber, “The Marketplace of Ideas,” pp. 12.

least 30 Supreme Court opinions—majority, concurring and/or dissenting—to First Amendment cases.<sup>308</sup> And his argument, grounding freedom of speech in democratic self-governance, has been featured in numerous decisions, including: *Garrison v. Louisiana*; *Jay F. Hein, White House Office of Faith-Based and Community Initiatives, et al., Petitioners v. Freedom from Religion Foundation, Inc., et al.* (Kennedy’s concurrence); *McDonald v. Smith* (Brennan’s concurrence); *United States and Department of Agriculture, Petitioners v. United Foods, Inc.* (Breyer’s dissent); *Arizona Free Enterprise Club’s Freedom Club PAC, et al. Petitioners v. Ken Bennett, Arizona Secretary of State, John McComish v. Ken Bennett, Arizona Secretary of State* (Kagan’s dissent); and *Herbert v. Lando et al* (Brennan’s dissent).<sup>309</sup> Perhaps most directly, this approach was utilized in the case of *Stromberg v. California*.<sup>310</sup> Writing for the majority, Chief Justice Charles Evan Hughes wrote: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means is a fundamental principle of our constitutional system.”<sup>311</sup>

Taken together, these two justifications for freedom of speech—marketplace of ideas and democratic self-governance—have continued to form the basis of First Amendment jurisprudence up to the present day. Most often they are presented in the context of the Court’s ongoing battle to determine what speech deserves First Amendment protection and what speech does not. For the remainder of this section, I review several of the most noteworthy and influential Supreme Court

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<sup>308</sup> See, for example, *Branzburg v. Hayes et al., Judges*, 408 U.S. 665 (1972); *Board of Education, Island Trees Union Free School District No. 26, et al. v. Pico, by his Next Friend Pico, et al.*, 457 U.S. 853 (1982); *Jeremiah H. (Jay) Nixon, Attorney General of Missouri, et al., Petitioners v. Shrink Missouri Government PAC et al.*, 528 U.S. 377 (2000); *Connick, District Attorney in and for the Parish of Orleans, Louisiana v. Meyers*, 461 U.S. 138 (1983).

<sup>309</sup> See *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Jay F. Hein, White House Office of Faith-Based and Community Initiatives, et al., Petitioners v. Freedom from Religion Foundation, Inc., et al.*, 551 U.S. 587 (2007); *McDonald v. Smith*, 472 U.S. 479 (1985); *United States and Department of Agriculture, Petitioners v. United Foods, Inc.*, 533 U.S. 405 (2001); *Arizona Free Enterprise Club’s Freedom Club PAC, et al. Petitioners v. Ken Bennett, Arizona Secretary of State, John McComish v. Ken Bennett, Arizona Secretary of State*, 131 S. Ct. 2806 (2011); *Herbert v. Lando et al.*, 441 U.S. 153 (1979).

<sup>310</sup> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>311</sup> *Ibid.*

cases, determining the scope of freedom of speech. In doing so, I discuss, not only the major limitations that have been placed upon constitutionally protected speech (e.g. insults, obscenity, libel), but also which arguments have been utilized to justify those limits. And while these reasons *could* be utilized to justify the constitutional protection of certain social speech, I argue that the Court has generally implied that they only apply to explicitly political, public speech.

To begin, the “fighting words” restriction on freedom of speech is one of the longest established limitations to the First Amendment. The Court’s history of such restrictions dates back to the 1942 case of *Chaplinsky v. New Hampshire*.<sup>312</sup> Walter Chaplinsky, a Jehovah’s Witness, was arrested in November 1941 for calling a city marshal a “God-damned racketeer” and “a damned fascist” in a public forum.<sup>313</sup> However, under Chapter 378, Paragraph 2 of the Public Laws of New Hampshire, it was illegal to address “any offensive, derisive or annoying word to anyone who is lawfully in any street or public place... or to call him by an offensive or derisive name.”<sup>314</sup> Since Chaplinsky did not deny having made these comments (aside from the name of the deity), he was convicted by the state of New Hampshire.

Chaplinsky appealed this decision on the grounds that this portion of the Public Laws of New Hampshire violated his First and Fourteenth Amendment rights to freedom of speech. However, writing for the majority, Justice Frank Murphy pointed out that the First Amendment does not protect all speech. Citing Chafee’s *Free Speech in the United States*, Murphy argued that “the lewd and obscene, the profane, the libelous, and the insulting or fighting words – those by which their very utterance inflict injury or tend to incite an immediate breach of the peace” do not fall within the scope of the First Amendment.<sup>315</sup> He argued that this is because these kinds of speech are of “such slight social value as a step to truth that any benefit that may be derived from

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<sup>312</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

<sup>315</sup> *Ibid.*

them is clearly outweighed by the social interest in order and morality.”<sup>316</sup> In other words, since Murphy understood the First Amendment to be justified according to the marketplace of ideas theory, he believed that it did not protect speech, which did not sufficiently contribute to the discovery of truth – at least in instances where that speech may have other negative effects (i.e. provoking a violent reaction). Thus, the legal statute was deemed constitutional, and the lower courts’ decisions were upheld.

In *Roth v. United States*, the Court continued to refine its position on what constitutes acceptable speech, this time by directly addressing pornography.<sup>317</sup> Samuel Roth operated a New York book-selling business that sold pornographic materials and also distributed erotic circulars. He was found to be in violation of a federal obscenity statute, which criminalized the sending of “obscene, lewd, lascivious or filthy” materials. Roth’s case was combined with *Alberts v. California*, in which David Alberts challenged a California obscenity law after his similar conviction for selling lewd and obscene books in addition to composing and publishing obscene advertisements for his products.

These cases represented the first time that the question of whether or not the First Amendment applied to obscenity had “been squarely presented to this Court.”<sup>318</sup> Prior to these cases, the Court’s stance on obscenity had been strongly influenced by the English common law, which defined any material as obscene, which tended to “deprave and corrupt those whose minds are open to such immoral influences.”<sup>319</sup> *Roth* provided the Court with an opportunity to institute a stricter standard for obscenity, defining it as any material whose “dominant theme taken as a

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<sup>316</sup> Ibid.

<sup>317</sup> See *Roth v. United States*, 354 U.S. 476 (1957).

<sup>318</sup> As the majority opinion points out, however, there had already been some cases that indicated that obscenity was not protected under either freedom of speech nor the press. See *Ex parte Jackson*, 96 U.S. 727 (1878); *United States v. Chase*, 135 U.S. 255 (1890); *Robertson v. Baldwin*, 165 U.S. 275 (1897); *Public Clearing House v. Coyne*, 194, U.S. 497 (1904); *Hoke v. United States*, 227 U.S. 308 (1930); *Near v. Minnesota*, 283 U.S. 697 (1931); *Chaplinsky v. New Hampshire*, 315, U.S. 568 (1942); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Winters v. New York*, 333 U.S. 507 (1948); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

<sup>319</sup> See *Regina v. Hicklin*, L.R. 2 Q.B. 360 (1868).

whole appeals to the prurient interest” to the “average person, applying contemporary community standards.”<sup>320</sup> However, this did not mean that the Court believed that obscenity constituted protected speech. Indeed, writing for the majority, Justice William J. Brennan, Jr. held that obscenity was not “within the area of constitutionally protected speech or press.”<sup>321</sup> Thus, the convictions for Roth and Alberts were upheld.

The First Amendment, Brennan argued, was not intended to protect every form of expression. Citing the both the marketplace of ideas and the democratic self-governance rationales, he explained that the constitutional rights to freedom of speech and the press were “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>322</sup> It is for these reasons that speech is protected – not any inherent right people have to speak freely. Thus, any “ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion” are protected by the First Amendment (unless they encroached upon more important interests).<sup>323</sup> However, implicit within this argument, Brennan argued, is the claim that any materials that are “utterly without redeeming social importance” are outside the purview of the First Amendment. And obscenity, he claimed, is one such kind of speech.

This case did not settle the issue of pornography, however. Although Chief Justice Earl Warren concurred with the majority’s decision regarding the constitutional status of pornography, he worried that obscenity had been defined too broadly, and might be made to apply to “the arts and sciences and freedom of communication generally.”<sup>324</sup> Justice John Marshall Harlan split his decision—dissenting in *Roth* and concurring in *Alberts*—on the basis that obscenity law ought to

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<sup>320</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>321</sup> *Ibid.*

<sup>322</sup> *Ibid.* See Baker, *Human Liberty and Freedom of Speech*, pp. 8.

<sup>323</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>324</sup> *Ibid.*



be decided at the state level.<sup>325</sup> Justices Hugo Black and William O. Douglas dissented entirely, arguing that the First Amendment did, in fact, cover obscenity.<sup>326</sup> And ultimately, Brennan later reversed his position on obscenity in the 1973 case, *Miller v. California*, in which he helped to devise a three-pronged approach for determining obscenity.<sup>327</sup>

Nevertheless, in 1964, in *New York Times v. Sullivan*—which was decided together with *Abernathy v. Sullivan*—the Court established guidelines for defamation and libel, which drew heavily upon the majority decision in *Roth*.<sup>328</sup> In this case, the *New York Times* had featured a full-page advertisement, which alleged that Rev. Martin Luther King, Jr.'s arrest for perjury in Alabama was part of a larger campaign to impede upon King's civil rights efforts. The Montgomery city commissioner, L.B. Sullivan, filed a libel action against the newspaper and four black ministers who were listed as endorsers of the ad, claiming that the allegations against the Montgomery police defamed him personally. Under Alabama law, he did not need to prove that he had been harmed. And since the ad had included factual errors, the defendants were unable to claim truth as a defense of their speech, so a defense claiming that the ad was truthful was unavailable. Thus, Sullivan won a \$500,000 judgment.

Writing for a unanimous Court, Brennan ruled in favor of the *New York Times*. Citing his opinion in *Roth*, Brennan revisited his argument that First Amendment "was fashioned to assure unfettered interchange of ideas."<sup>329</sup> "The maintenance of the opportunity for free political discussion," he argued, ensures that government remains "responsive to the will of the people

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<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> See the obscenity test in *Miller v. California*, 413 U.S. 15 (1973): "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

<sup>328</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>329</sup> Ibid.

and that changes may be obtained by lawful means.”<sup>330</sup> Thus, Brennan believed that effective democratic self-governance required that citizens be free to (sharply) criticize and question the state and its actors.<sup>331</sup> He argued that the First Amendment protects the publication of all statements (even false ones) about public officials, except when they are made with actual malice (i.e. with the knowledge that they are false or with reckless disregard for their veracity). This became known as the “actual malice” standard, and puts a high burden of proof on the plaintiff, making it extremely difficult to show that there was any wrongdoing.

In writing this decision, Brennan also relied heavily on the marketplace of ideas theory. He even pulled directly from John Stuart Mill when he argued that false or questionable statements are an unavoidable feature of reasoned discussion, whether made in good faith or bad.<sup>332</sup> In order to protect an open exchange, people must be free to say things that may be wrong without fear of legal repercussions. “Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred,” he explained.<sup>333</sup> Furthermore, he pointed out that even false statements could contribute positively to discussions by making the truth stand out even brighter.

Following the decision in *Sullivan*, the Supreme Court decided several landmark cases regarding the scope of symbolic speech.<sup>334</sup> First, in 1969, the Court heard *Tinker v. Des Moines Independent Community School District Et Al.*<sup>335</sup> This case involved 15-year-old John Tinker, his sister, 13-year-old Mary Beth Tinker and 16-year-old Christopher Echardt. Together with their parents, the three students decided to protest the Vietnam War by wearing black armbands to

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<sup>330</sup> Ibid.

<sup>331</sup> See also *Terminiello v. Chicago*, 337 U.S. 1 (1939); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

<sup>332</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964). See also *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>333</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>334</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court acknowledged that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”

<sup>335</sup> See *Tinker v. Des Moines Independent Community School District Et Al.*, 393 U.S. 503 (1969).

their Des Moines schools during the Christmas holiday season. Upon learning of their intentions, and fearing that the armbands would provoke disturbances, the principals of the Des Moines school district decided that all students wearing armbands would be asked to remove them or face suspension. When the Tinker siblings and Echardt wore their armbands to school, they were asked to remove them. When they refused, they were suspended until after New Year's Day.

The main question that the Court faced was whether the symbolic action of wearing a black armband to school constituted either political speech or disruptive conduct. Writing for the majority, Justice Abe Fortas began by pointing out that the Free Speech Clause of the First Amendment does, indeed, protect symbolic speech, and that this actions in this case were "closely akin to 'pure speech.'"<sup>336</sup> He then went on to address the limits of symbolic speech within the school environment. Fortas argued that it has long been the Court's opinion that First Amendment rights extend to schools. "It can hardly be argued," he wrote, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>337</sup> However, Fortas also admitted that there is a "need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."<sup>338</sup> In other words, he argued that the school environment implies limitations on freedom of expression.

However, in this case, Fortas believed that the principals lacked justification for imposing limits on the wearing of black armbands. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion," he argued, "it must be able to show that

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<sup>336</sup> Ibid. See also *West Virginia v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Adderley v. Florida*, 385 U.S. 29 (1966).

<sup>337</sup> *Tinker v. Des Moines Independent Community School District Et Al.*, 393 U.S. 503 (1969).

<sup>338</sup> Ibid. See also *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

its action was caused by more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>339</sup> And in this case, no such justification was found. Indeed, the principals had failed to show that the forbidden conduct would “materially and substantially interfere with requirements of appropriate discipline in the operation of the school.”<sup>340</sup>

Fortas worried that the restrictions on black armbands were motivated more out of a concern for the message being portrayed than a concern for school order. And this, he considered to be a significant problem, as he believed that students must be free to explore multiple ideas and perspectives (barring any constitutionally valid reason why they should not). “The classroom,” he wrote, “is peculiarly the ‘marketplace of ideas.’”<sup>341</sup> And the future of the United States “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>342</sup>

Harlan took a similar approach to understanding freedom of speech just two years later, in *Cohen v. California*.<sup>343</sup> This case considered the circumstances of 19-year-old Paul Robert Cohen, who, while walking through a Los Angeles County Courthouse corridor, wore a jacket emblazoned with the words “FUCK THE DRAFT. STOP THE WAR.” He was charged under a California statute that prohibits “maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person [by] offensive conduct.” Cohen was found guilty and sentenced to 30 days in jail.

In a 5-4 decision, the Court found in favor of Cohen, arguing that the California statute violated freedom of expression as protected by the First Amendment. Writing for the majority,

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<sup>339</sup> *Tinker v. Des Moines Independent Community School District Et Al.*, 393 U.S. 503 (1969).

<sup>340</sup> *Ibid.* See also *Burnside v. Byars*, 363 U.S. 744 (1966).

<sup>341</sup> *Tinker v. Des Moines Independent Community School District Et Al.*, 393 U.S. 503 (1969).

<sup>342</sup> *Ibid.*

<sup>343</sup> See *Cohen v. California*, 403 U.S. 15 (1971).

Harlan argued that Cohen could not rightfully be punished for expressing his opinion regarding the “inutility or immorality of the draft,” unless he showed intent to either incite violence or disrupt the draft.<sup>344</sup> And although his use of the word “fuck”—which is often associated with provoking violent reactions—could have placed Cohen within the “fighting words” exception to the First Amendment (see *Chaplinsky*), the fact that this epithet was not “directed to the person of the hearer” meant that no one should have taken it as a direct insult.<sup>345</sup> Besides, Harlan argued, there was no evidence that substantial numbers of people would be provoked into some kind of physical action by the words on Cohen’s jacket (see *Tinker*).

Harlan then addressed the argument that the state might have an interest in punishing the “public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politics.”<sup>346</sup> And he argued that the constitutional backdrop of the right to freedom of speech suggests that such restrictions would only be appropriate under the already established exceptions (e.g. obscenity, insults, fighting words). “The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours,” Harlan wrote.<sup>347</sup>

It is designed and intended to remove governmental restraints from the area of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>348</sup>

Thus, much as in *Whitney*, the *Cohen* decision is based on the premise that freedom of speech is not only a necessary element for the discovery of truth, but that it also helps to ensure the

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<sup>344</sup> Ibid. See also *Yates v. United States*, 345 U.S. 298 (1957).

<sup>345</sup> See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>346</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

principles of democratic self-governance. While, in the short term, this broad understanding of freedom of speech may appear to cause “only verbal tumult, discord, and even offensive utterances,” Harlan wrote, these are actually only “necessary side effects of the broader enduring values which the process of open debate permits us to achieve.”<sup>349</sup>

The Supreme Court continued to address issues surrounding symbolic speech well after the Vietnam War came to an end. And as in both *Tinker* and *Cohen*, the cases that have come to the forefront are those in which the symbolic speech in question was of a directly political and public nature. The flag burning cases, in particular, provide excellent examples of the Supreme Court’s willingness to view actions that express a directly political message as protected speech.

The 1989 case, *Texas v. Johnson*, involved the political protest of Gregory Lee Johnson.<sup>350</sup> As a way of expressing his dissatisfaction with the policies of President Ronald Reagan’s administration and certain Dallas-based corporations, Johnson engaged in a demonstration in the streets of Dallas during the Republican National Convention. The protestors marched, shouted political slogans and engaged in “die-ins” at several local businesses. While Johnson did not directly engage in any of the vandalism that took place during this protest, he did accept an American flag that was taken from another protestor, who had stolen it from a flagpole outside of one the local businesses. When the demonstration came to an end outside of the Dallas City Hall, Johnson lit the flag on fire. As it burned, the protestors chanted, “America, the red, white, and blue, we spit on you.” Johnson, alone, was tried and convicted under a Texas law, which outlawed “the desecration of a venerated object,” and was sentenced to one year in jail and a \$2,000 fine.<sup>351</sup> After the Texas Court of Criminal Appeals reversed the conviction, the case went to the Supreme Court.

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<sup>349</sup> Ibid.

<sup>350</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>351</sup> Ibid.

In another 5-4 decision, the Court held that Johnson's burning of a flag constituted protected expression under the First Amendment. Writing for the majority, Brennan found that Johnson's actions clearly fell into the category of expressive conduct and had a distinctively political nature. And because no breach of the peace occurred either at the time of the flag burning or in response to it, he wrote, the State was not able show that it had a valid interest in preventing a breach of the peace, which would justify Johnson's conviction for flag desecration. Rather, the State's claim was that "an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis."<sup>352</sup> However, Brennan argued that the fact that an audience takes offense to certain ideas or expression does not justify prohibitions of speech.<sup>353</sup> (Indeed, the likelihood that a certain opinion will provoke offense may actually imply that it needs constitutional protection.<sup>354</sup>) The state does not have a right to censor the content of speech "simply because society find the idea itself offense or disagreeable," he wrote.<sup>355</sup> Certainly, no official actor can "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>356</sup>

However, the same year that the Court heard *Texas v. Johnson*, Congress passed the Flag Protection Act, which made it illegal to destroy an American flag (or any likeness of an American flag), which may be "commonly displayed." This resulted in several prosecutions, including *United States v. Eichman* (in which Eichman set a flag on fire on the steps of the United States Capitol in protest of the government's domestic and foreign policy) and *United States v.*

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<sup>352</sup> Ibid.

<sup>353</sup> Ibid. See also *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>354</sup> See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

<sup>355</sup> *Texas v. Johnson*, 491 U.S. 397 (1989). See also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 60 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Carey v. Brown*, 447 U.S. 455 (1980); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Grayned v. Rockford*, 408 U.S. 104 (1972); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Bachellar v. Maryland*, 397 U.S. 564 (1970); *United States v. O'Brien*, 391 U.S. 367 (1968); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Stromberg v. California*, 283 U.S. 359 (1931).

<sup>356</sup> *West Virginia v. Barnette*, 319 U.S. 624 (1943).

*Haggerty* (in which Haggerty burned flags in Seattle in protest of the passage of the Flag Protection Act). Both cases were argued together in 1990, under *United States v. Eichman*.<sup>357</sup>

Again, the question at stake was whether or not the government had the power to punish the symbolic speech act of flag burning. And again, the Court narrowly (5-4) ruled that the government was unjustified in suppressing free expression on the basis of its content.<sup>358</sup> In one of his last majority opinions, Brennan conceded that the federal statute did not contain any “explicit content-based limitation on the scope of prohibited conduct”—as in *Johnson*—however, he argued that there could be no doubt that that was its intention.<sup>359</sup> Because the statute allowed the flag to be burned in a disposal ceremony, but prohibited protestors from setting it ablaze at a political protest, it was clearly aimed at silencing the expression of a political belief. As such, it had to be subject to “the most exacting scrutiny.”<sup>360</sup> In other words, when the state attempts to infringe upon freedom of speech on the basis of its content, it has a special obligation to show an overriding interest in suppressing that speech.<sup>361</sup>

Taken together, this body of First Amendment cases reveals an attitude towards freedom of speech that is considerably more forgiving than that, which was present in the early years of the Republic. By couching freedom of speech within the arguments for the marketplace of ideas and democratic self-governance, the modern United States Supreme Court has developed a doctrine that allowed for greater expression of ideas than perhaps anything that had come before.

However, just as there was no one, authoritative understanding of freedom of speech during the Colonial Era, there is also no one, continuous reading of that liberty in the Post-World War I Era. Indeed, while I believe that American jurisprudence, as a whole, can be taken as a

<sup>357</sup> See *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>358</sup> *Ibid.* See also *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>359</sup> *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>360</sup> *Ibid.* See also *Boos v. Barry*, 485 U.S. 312 (1988).

<sup>361</sup> This does not mean, however, that the Supreme Court has always maintained content neutrality in practice. During the 1940s and 1950s, the Justices commonly distinguished between “high value” and “low value” speech when deciding First Amendment cases. For example, see *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).



theory of the freedom of speech, it is a theory that is rife with inconsistencies and exceptions. Chief among these are the limitations that the Supreme Court has placed upon the fundamental liberty of freedom of speech. As I have explained throughout this section, even within a relatively broad framework of freedom of speech, that liberty has never been understood to be absolute. Because the Supreme Court values freedom of speech in terms of the goods that it results in (i.e. the discovery of truth and democratic self-governance), it has had little problem restricting that speech, which it believes does not adequately contribute to those goods – at least in cases where there is another competing interest. Thus, as described in this section, the Supreme Court has ruled that freedom of speech does not extend to “fighting words,”<sup>362</sup> obscenity,<sup>363</sup> private defamation,<sup>364</sup> disruptions to the educational environment<sup>365</sup> or speech that poses an imminent breach of peace.<sup>366</sup>

But the marketplace of ideas and democratic self-governance justifications for freedom of speech have done more than just establish exceptions to the First Amendment – they have actually created entire classes of communication. In the following section, I argue that, in addition to the *explicit* restrictions on freedom of speech that I discussed in this section, the Supreme Court has also *implicitly* limited its understanding of that liberty to that communication, which takes place in a public forum and involves issues of clear political importance. And as a result of the privileged position that has been afforded political, public speech, social speech has been neglected.

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<sup>362</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>363</sup> See *Roth v. United States*, 354 U.S. 476 (1957). See also *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>364</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>365</sup> See *Tinker v. Des Moines Independent Community School District Et Al.*, 393 U.S. 503 (1969).

<sup>366</sup> See *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). See also *Cantwell v. Connecticut*, 310 U.S. 310 (1940); *Schenck v. United States*, 249 U.S. 47 (1919); *Brandenburg v. Ohio*, U.S. 444 (1969).

### III. Social speech in modern American jurisprudence on freedom of speech in the First Amendment?

The Supreme Court's marketplace of ideas and democratic self-governance justifications for freedom of speech have led to the creation of a two-tiered approach to freedom of speech – speech that contributes to these goals merits protection; speech that does not contribute to these goals does not necessarily merit protection. Often, these two tiers have corresponded with the divisions between both political and non-political speech, and also public and private speech. Since public, political speech is both more directly connected to the pursuit of political truth and progress, and also more clearly impacts the capacity for democratic self-governance, it tends to receive the highest level of First Amendment protection. On the other hand, private, non-political speech, because its connection to these social goods is not always as obvious, tends to receive a lower level of protection. Indeed, in some cases, the Supreme Court has deemed that such speech is entirely outside the scope of the First Amendment.<sup>367</sup>

In this section, I review the distinction that the Supreme Court has made between public, political speech and private, non-political speech. I argue that, the Supreme Court's consequentialist reading of the First Amendment displays a clear bias towards political or public speech over non-political or private speech. And while this preference is often merely implied in the Court's rulings, I show that it has also been explicitly stated. This does not mean, however, that I believe *private* speech has been entirely excluded from American jurisprudence. Indeed, I show that, at certain points, the Supreme Court has shown openness towards private speech. Unfortunately, these efforts have been mostly unclear, undeveloped and inconsistent. And to the extent that the Supreme Court tends to define private speech as that communication, which takes place in civil society, but still concerns the public good, I argue that it does not accommodate the full breadth of *social* speech.

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<sup>367</sup> See Thomas I. Emerson, "Toward a General Theory of the First Amendment," in *The Yale Law Journal*, Vol. 72, No. 5 (1963), pp. 877-956.

As the previous cases suggest, the Supreme Court tends to claim that political speech is the foundation of the First Amendment. In *Whitney*, for example, Brandeis' opinion specifies that freedom of thought and expression are necessary to "the discovery and spread of *political* truth [emphasis added]."<sup>368</sup> Similarly, in the *Roth* decision, Brennan argued that the American freedoms of speech and the press were both founded to "assure unfettered interchange of ideas for the bringing about of *political* and social changes desired by the people [emphasis added]."<sup>369</sup> Brennan also seems to equate freedom of speech with political speech in *Sullivan*, when he writes that government responsiveness to the will of the people requires "to opportunity for free *political* discussion [emphasis added]."<sup>370</sup>

In some cases, the Supreme Court has actually been even more explicit in its preference for political, public speech, claiming that it is the "core value" of the First Amendment.<sup>371</sup> In *Carey v. Brown* for example, Brennan argued that public issue picketing—a clear example of political speech—"has always rested on the highest rung of the hierarchy of First Amendment values."<sup>372</sup> That same year, in *NAACP v. Claiborne Hardware Co.*, Justice John Paul Stevens used the First Amendment to protect an NAACP boycott on the grounds that this expression "sought to bring about political, social, and economic change" in Mississippi.<sup>373</sup> And in both *First National Bank of Boston v. Bellotti* and *Consolidated Edison v. PSC*, Justice Lewis F. Powell authored majority opinions, which maintained that speech regarding a political issue "is at the heart of the First Amendment's protections."<sup>374</sup>

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<sup>368</sup> *Whitney v. California*, 274 U.S. 357, 372 (1927).

<sup>369</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>370</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>371</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968). See Edward V. Heck and Albert C. Ringelstein, "The Burger Court and the Primacy of Political Expression," in *The Western Political Quarterly*, Vol. 40, No. 3 (September 1987), pp. 413-425.

<sup>372</sup> *Carey v. Brown*, 427 U.S. 452 (1982).

<sup>373</sup> *NAACP v. Claiborne Hardware Co.*, 485 U.S. 886 (1982).

<sup>374</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison v. PSC*, 447 U.S. 530 (1980).

And indeed, the jurisprudence on defamation relies heavily on the distinctions between political, public speech and non-political, private speech.<sup>375</sup> Throughout the nation's history, it had been argued that, in order for democracy to flourish, there must be opportunities for free and open discussion about public officials. As Madison wrote in his Report on the Virginia Resolution, "In every state, probably in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this foundation it stands."<sup>376</sup> And because the Supreme Court has adopted this view that the nation has an overriding interest in information and discussion about state actors, it has afforded constitutional protections to defamation and libel about these public individuals (except in cases that meet the actual malice standard).<sup>377</sup> "Purely private defamation," however, because it "has little to do with the political ends of a self-governing society," does not merit the same protections.<sup>378</sup> Thus, in the 1974 case of *Gertz v. Robert Welch*, the Supreme Court found that the *Sullivan* standard for defamation and libel did not apply in the case of an individual who was neither a public official nor a public actor.<sup>379</sup> Private citizens, the majority opinion reads, ought to be allowed more protection from libelous statements than individuals in the public eye. This means that defamation against private individuals does not fall within the First Amendment.

Thus, the Supreme Court has repeatedly decided to afford First Amendment protections to speech on the basis of its political nature. Speech that constitutes public discussion or clearly

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<sup>375</sup> See *ibid.*; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>376</sup> James Madison, "Madison's Report on the Virginia Resolution," House of Delegates, Session of 1799-1800, in *Debates of the Adoption of the Federal Constitution, Vol. IV*, Jonathan Elliot (ed.) (New York: Burt Franklin, 1888), pp. 570.

<sup>377</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964): "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussion is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great."

<sup>378</sup> *Ibid.*

<sup>379</sup> See *Gertz v. Robert Welch*, 418 U.S. 323 (1974). See also *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

contributes to the discovery of a political truth is afforded protection (barring an overriding interest) largely on the basis of its political nature – even when that speech takes place outside of the public sphere, between private individuals.<sup>380</sup> Thus, any attempt to censor or punish acts of political protest—such as, demonstrators burning the American flag, anti-war individuals wearing certain articles of clothing and blacks hosting a sit-in a “whites only” area to protest segregation—must be subject to the “most exacting scrutiny.”<sup>381</sup> Indeed, the American judiciary seems to think that political speech is so important that even corporations should have a right to engage in it.<sup>382</sup>

While these cases protecting speech on the basis of its important political content and public context do not *necessarily* imply that the Supreme Court would find that the First Amendment does not protect private speech, they do strongly suggest that this is the case. As David A. Richards explains in his essay, “Public and Private Discourse of the First Amendment,” the negative implication of the Supreme Court’s understanding that the First Amendment protects public discourse is “that private discourse is or should be correspondingly unprotected.”<sup>383</sup> Indeed, if the Supreme Court believes that the First Amendment exists primarily to protect that speech, which leads society down a road to political progress and better governance, it only makes sense that it would also conclude that speech, which does not appear to serve these goals, is excluded. And while the Court admits that it cannot know exactly which speech will matter politically and which will not, its decisions do suggest that it has, at points, shied away from affording full constitutional protections to private speech.

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<sup>380</sup> See *Bartnicki et al. v. Vopper, aka Williams, et al.*, 532 U.S. 514 (2001). See also Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” in *Harvard Law Review*, Vol. 4, No. 193 (December 1890), pp. 193-220.

<sup>381</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990); *Tinker v. Des Moines Independent Community School District Et Al.*, 393 U.S. 503 (1969); *Cohen v. California*, 403 U.S. 15 (1971); *Schacht v. United States*, 398 U.S. 58 (1970); *Brown v. Louisiana*, 383 U.S. 131 (1966).

<sup>382</sup> See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), in which the majority ruled that political speech is indispensable to a democracy, and that this is no less true just because speech comes from a corporation.

<sup>383</sup> David A. Richards, “Public and Private in the Discourse of the First Amendment,” in *Cardozo Studies in Law and Literature*, Vol. 12, No. 1 (Summer, 2000), pp. 61.

There are several examples of the Supreme Court refusing to extend First Amendment protection to speech because it is not sufficiently political. In *Miller v. California*, for example, Chief Justice Warren E. Burger argued that certain obscene material was outside the scope of freedom of speech because it did not amount to the kind of political speech that the First Amendment was designed to protect. “[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material,” he wrote, “demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”<sup>384</sup> And in *Young v. American Mini-Theatres*, Stevens claimed that the social interest in protecting pornographic films “is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.”<sup>385</sup>

*Miller* and *Young* do not represent the whole of American jurisprudence on private speech, however. Despite these cases and the clear preference for political, public speech, which has been portrayed over the past hundred years, the Supreme Court has not yet articulated a clear, reasoned policy towards private speech. And this lack of clarity has resulted in some very messy and inconsistent casework. Indeed, before joining the Supreme Court, Elena Kagan wrote an article for *The University of Chicago Law Review*, in which she argued that the law regarding government restrictions on private speech “is largely a mess, resisting any coherent understanding.”<sup>386</sup>

Thus, while there are numerous instances in which the Court has suggested—or explicitly argued—that public, political speech is the basis of the First Amendment, there are also several

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<sup>384</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>385</sup> *Young v. American Mini-Theatres*, 427 U.S. 50 (1976).

<sup>386</sup> Elena Kagan, “Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine,” in *The University of Chicago Law Review*, Vol. 63, No. 2 (Spring 1996), pp. 433.

cases in which it has displayed a more open attitude towards private speech.<sup>387</sup> Unfortunately, to the extent that Supreme Court has acknowledged freedom of private speech, it has only ever been as a brief (and uninformative) aside. The justices may claim that private speech deserves the same protection—and should be subject to the same limitations—as public, political speech, but they never explain *why*. In Stevens' majority opinion for *Bartnicki et al. v. Vopper*, for example, he presented the case as “a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech.”<sup>388</sup> But while the interest in individual privacy has been long established in the United States, Steven makes no attempt to explain why there is an interest in fostering private speech. Similarly, in his concurring opinion, Justice Stephen Breyer wrote that the right to personal privacy involves, not only the “right to be left alone,” but also the interest in “fostering private speech.”<sup>389</sup> But he did not clarify what the interest in fostering private speech might entail, or to whom this interest belongs. Citing Brandeis' dissent in *Olmstead v. United States*, Breyer merely asserted that the state should resist policies of disclosure, which might lead to a “natural reluctance to discuss private matters.”<sup>390</sup>

The case of *Givhan v. Western Line Consolidated School District* provides an especially illuminating example of the Supreme Court's cursory treatment of non-political, non-public speech.<sup>391</sup> This case involved a junior high school teacher, Bessie Givhan, who repeatedly complained to the school administration about alleged racial discrimination and segregation. Her complaints antagonized the principal, ultimately resulting in her dismissal. Givhan sued, claiming

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<sup>387</sup> See *Bartnicki et al. v. Vopper, aka Williams, et al.*, 532 U.S. 514 (2001); *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, dissenting); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

<sup>388</sup> *Bartnicki et al. v. Vopper, aka Williams, et al.*, 532 U.S. 514 (2001).

<sup>389</sup> *Ibid.*

<sup>390</sup> *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, dissenting).

<sup>391</sup> See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

that because her termination came about as the result of her speech, it violated her First Amendment rights. And the district agreed.<sup>392</sup>

The Fifth District Court reversed this decision, however.<sup>393</sup> The majority argued that, in this case, it was unnecessary to engage in a balancing analysis for speech by public employees.<sup>394</sup> According to the court, that was because Givhan's speech was entirely outside the scope of the First Amendment.<sup>395</sup> In other words, not only did the majority argue that Givhan's speech did not constitute *protected speech*, but they also asserted that speech in the "private forum" is not even *covered* by the First Amendment.<sup>396</sup> In other words, the ruled that private speech is entirely outside the scope of freedom of speech.

Speaking for a unanimous Supreme Court, Justice William Rehnquist rejected this reading of the First Amendment. He argued that the location of speech does not determine its constitutional status, and thus, the fact that Givhan's conversations took place in the principal's private office did not disqualify her speech from First Amendment protection.<sup>397</sup> And if Givhan's speech was protected under the First Amendment, Rehnquist argued, it could only lead to her dismissal if the school board could show that it violated other significant interests.

In arriving at this decision, Rehnquist pointed out that the First Amendment forbids only abridgement to the "freedom of speech," and neither that amendment nor American free speech jurisprudence says anything "to indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the

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<sup>392</sup> See *Ayers v. Western Line Consolidated School District*, 404 F. Supp. 1225 (N.D. Miss. 1975).

<sup>393</sup> See *Ayers v. Western Line Consolidated School District*, 555 F.2d 1309 (5<sup>th</sup> Cir. 1977).

<sup>394</sup> *Ibid.* See *Pickering v. Board of Education*, 225 NE 2d 1 (1967); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

<sup>395</sup> The majority also pointed out that the First Amendment does not protect speech that is forced upon an unwilling audience. *Ayers v. Western Line Consolidated School District*, 555 F.2d 1309 (5<sup>th</sup> Cir. 1977).

<sup>396</sup> *Ibid.*

<sup>397</sup> *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).



public.”<sup>398</sup> Thus, Rehnquist appeared to be rejecting the Court’s previous distinction between political, protected speech and non-political, less-protected speech. While he said nothing about private persons, Rehnquist did argue that private speech by a public employee merits the same protections and considerations as public speech by a public employee. In other words, he claimed that private speech should not be excluded from free speech protections simply because it is private. Rather, Rehnquist argued that private speech should be understood just as political speech: it has the First Amendment’s protection unless it falls under one of the categories of unprotected speech, already defined.

Considering the relative dearth of Supreme Court cases, which consider the constitutional status of non-public, non-political speech, this is a significant statement. And considering the Court’s frequent allusions to the special status of public, political speech, this opinion is also surprising. And yet, despite Rehnquist’s bold claim that there is no constitutional justification for differentiating between political and non-political speech, his decision only barely touches on the subject. In fact, this argument only merits three sentences of the decision. As Frederick Schauer explains, there is nothing in the *Givhan* decision explaining “why private communication falls into the same category as spreading one’s views before the public, with the exception of one rather unusual source for First Amendment doctrine. The Court looked at and relied on the text of the First Amendment!”<sup>399</sup> But that is not a sufficient explanation in this case. While Schauer admits that “most of our First Amendment doctrine is based on the very strong wording of that amendment,” he also points out that it provides very little guidance in difficult cases, such as these.<sup>400</sup> For although it is true that the First Amendment makes no explicit distinction between public and private speech, it also fails to differentiate between any other types

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<sup>398</sup> Ibid.

<sup>399</sup> Frederick Schauer, “‘Private’ Speech and the ‘Private’ Forum: *Givhan v. Western Line School District*,” in *The Supreme Court Review*, Vol. 1979 (1979), pp. 226.

<sup>400</sup> Ibid.

communication (e.g. commercial and non-commercial speech, defamation and non-defamation, etc.). And yet, the Supreme Court has undoubtedly ruled that these kinds of distinction do exist.

Furthermore, not only does the Supreme Court fail to explain its rationale for suddenly equating public and private speech in *Givhan*, but it also neglects to explain what it means by the term “private speech.” For example, is private speech private in that it is directed at a particular individual, as opposed to a wider, more abstract audience? Is private speech private only when it takes place within a private location in civil society?<sup>401</sup> Or is private speech private because of its intimate, personal and (seemingly) politically trivial content? To the extent that Rehnquist claimed that the First Amendment applies equally to both public and private speech, he ought to have explained what kind of speech that covers. But by not elaborating on his decision, the question remains open.

It can be inferred, however, that the Supreme Court is not addressing the third possible definition of private speech in the *Givhan* case. *Givhan*’s speech was clearly directed at a particular individual (the principal) and took place in a private location (the principal’s office). But the content of her speech was decidedly political and related to the public good. Thus, in affording constitutional protection to *Givhan*’s speech the Court said nothing about how it would treat private speech that is not so directly related to the public good.

But this, of course, is the essence of social speech. Certainly, *Givhan*’s communication represents one type of social speech. However, social speech, as I have defined it, includes two other types of social speech as well: 1) private, personal communication that takes place in political institutions; and 2) speech that takes place in a private forum and involves issues of a more personal or trivial nature. Thus, even though the Court ruled that *Givhan*’s type of social speech falls within the First Amendment, it has said nothing about the constitutional status of the other two types. In other words, while there may be precedent for recognizing a First Amendment

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<sup>401</sup> See *ibid.*, pp. 232-234.

right to one kind of social speech, there is still no reason to believe that the Supreme Court means to extend explicit constitutional coverage to all casual, everyday speech.

Unfortunately, the American legal theory community has only rarely provided critical assessments of this element of American jurisprudence on freedom of speech. While the Supreme Court is frequently evaluated for both the rationales it utilizes and the results it achieves, many legal theorists tend to accept the assumption that meaningful, constitutionally protected speech must be public and political. And this attitude is largely reflected in the scholarship regarding non-public, non-political. To the extent that some legal theorists have found a right to freedom of private speech in the First Amendment, they—like the Court in *Givhan*—tend to focus on private speech that concerns issues of public importance. The rest of social speech, however, is either ignored or considered outside the scope of the First Amendment. In the next section, I visit some of the most prominent of these critiques, and draw attention to the lack of concern for social speech in the American legal theory community.

#### **IV. American legal theory on the Supreme Court's reading of freedom of speech in the First Amendment:**

It is extremely difficult to demonstrate a *lack* of attention to any particular theme within a field of study. So while it is relatively simple to highlight instances in which the legal theory community addresses the issue of social speech, it is much more challenging to show that the majority of legal theorists ignore or avoid social speech. However, in this section, I attempt to do exactly that.

I begin this section by presenting several of the most prominent American legal theory critiques of the Supreme Court's treatment of the public/private divide within First Amendment right to freedom of speech. While this is not meant to be a comprehensive list, those theories that

I do discuss allow me to explore some key aspects of the constitutional debate regarding the status of non-political, non-public speech. And what I find is that, from the perspective of a theory of social speech, it does not matter whether or not a particular theorist supports the hierarchy of speech. In either case, I explain, she is still extremely unlikely to believe that social speech ought to fall within the realm of public law. I show that, even theorists who believe that the Supreme Court should afford the same protection to private speech as public speech tend to equate private speech with communication about political/public issues, which takes place within civil society. And, as stated above, this only represents one segment of the larger concept of social speech. In order for American legal theory to adequately address social speech, I argue, it would also need to consider speech about personal, intimate issues. And thus far, there are only a handful of American legal theorists who have attempted this endeavor.

To begin, the public/private divide has played a central role in American legal critiques of First Amendment jurisprudence.<sup>402</sup> In general, there appear to be two sides to the debate.<sup>403</sup> First, there are those who condone the separation between public, political speech and private, non-political speech. These theorists tend to point to the consequentialist justifications of the First Amendment, and thus, they echo the Supreme Court's rulings that speech, which contributes to the discovery of truth and the goal of democratic self-governance, merits greater protection than speech, which does not. Second, there are those American legal theorists who condemn the separation between public, political speech and private, non-political speech.

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<sup>402</sup> See, for example, Meiklejohn, "The First Amendment Is an Absolute," pp. 245-266; David M. Rabban, "The First Amendment in Its Forgotten Years," in *The Yale Law Journal*, Vol. 90, No. 3 (January 1981), pp. 514-595; Edward G. White, "The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America," in *Michigan Law Review*, Vol. 95, No. 2 (November 1996), pp. 299-392; Lillian R. BeVier, "The First Amendment and Political Speech: And Inquiry into the Substance and Limits of Principle," in *Stanford Law Review*, Vol. 30, No. 299 (1978); Robert H. Bork, "Neutral Principles and Some First Amendment Problems," in *Indiana Law Journal*, Vol. 27, No. 191 (1971).

<sup>403</sup> Both sides of the debate tend to agree, however, that the protection of political speech is a crucial element of the First Amendment. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), pp. 93-94.

In terms of those who support a constitutional division between public and private speech, there are several scholars whose writings have been especially influential. Henry Schofield, for example, presents a historical justification for limiting First Amendment freedom of expression to public, political speech. Writing around the time of *Abrams*, Schofield argues that a chief objective of the American Revolution was to abolish English common law regarding freedom of expression, which—as stated above—was largely limited to restricting prior restraint in publishing.<sup>404</sup> Thus, as he explains, the first Continental Congress deemed freedom of the press one of only five invaluable rights, without which a person could not be free.<sup>405</sup> The participants in that 1774 Congress believed that the importance of freedom of the press consisted

in the advancement of truth, science, morality, and arts in general, and in the diffusion of liberal sentiments on the administration of government, the ready communication of thought between subjects, and the consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.<sup>406</sup>

Schofield claims that this declaration—along with several other early documents regarding freedom of the press—proves that, at the time of the nation’s founding, freedom of expression was thought to be “confined to matters of public concern such as those enumerated... and does not extend to matters of private concerns.”<sup>407</sup>

Similarly, Thomas M. Cooley also argues that the First Amendment exists to prevent repression of political discussion, only.<sup>408</sup> He claims that the First Amendment freedoms of

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<sup>404</sup> Henry Schofield, “Freedom of the Press in the United States,” in *Essays on constitutional law and equity, and other subjects*, Vol. II, Henry Schofield (ed.) (Boston: The Chipman Law Publishing Company, 1921), pp. 521-522.

<sup>405</sup> *Ibid.*, pp. 522.

<sup>406</sup> *Ibid.*

<sup>407</sup> *Ibid.*

<sup>408</sup> See Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1868).

speech and press were designed to be more than a mere guarantee against prior restraint.<sup>409</sup>

But that does not mean that these liberties were meant to apply to all communication. Rather, Cooley states that the purpose of the freedoms of speech and press “has evidently been to protect parties in the free publication of matters of public concern, to keep secure their right to free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.”<sup>410</sup> Private speech, on the other hand, is generally outside the scope of freedom of speech. Indeed, Cooley writes that the First Amendment only applies to private speech if there is a public policy reason for protecting that communication.<sup>411</sup>

Similar accounts of the distinction between private and public speech in First Amendment abound in early twentieth century legal theory.<sup>412</sup> And it is important to note that, within these theories that respect a difference between public and private speech, it is almost always the former kind of communication that receives the highest First Amendment protection.<sup>413</sup> Indeed, it

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<sup>409</sup> “Conceding, however, that liberty of speech and of the press does not imply complete exemption from responsibility for everything a citizen may say or publish... it is still believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications” (Ibid., pp. 421).

<sup>410</sup> Ibid., pp. 421-422.

<sup>411</sup> See *ibid.*, pp. 440.

<sup>412</sup> For more examples, see Thomas Schroeder, “The Meaning of Unabridged Freedom of Speech,” in *Free Speech for Radicals* (New York: The Free Speech League, 1916), pp. 37-44; Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: University of Chicago Press, 1904).

<sup>413</sup> Several legal theorists have argued that, to the extent that one does distinguish between types of speech, the highest level of protection will necessarily go to political speech. See, for example, Robert Post, “Participatory Democracy and Free Speech,” in *Virginia Law Review*, Vol. 97, No. 477 (2011); James Weinstein, “Participatory Democracy as the Central Value of American Free Speech Doctrine,” in *Virginia Law Review*, Vol. 97, No. 491 (2011); Francis Canavan, “Freedom of Speech and Press: For What Purpose?” in *American Journal of Jurisprudence*, Vol. 16, No. 1 (1971), pp. 125-126; William W. Van Alstyne, *Interpretations of the First Amendment* (Durham, NC: Duke University Press, 1984), pp. 40-42.

is extremely rare that private speech is afforded any explicit constitutional protection under these schemes.

One notable exception can be found in Schauer's essay, "'Private' Speech and the 'Private' Forum: *Givhan v. Western Line School District*."<sup>414</sup> While Schauer appears to accept a distinction between private and public speech, he does not believe that the former is necessarily less deserving of First Amendment protections than the latter. He points out that the free speech theories that form the foundation of the First Amendment—marketplace of ideas and the principles of democratic self-governance—“are directed more toward the interests of society, and also to the interests of the listeners, than they are toward the interests of the speaker.”<sup>415</sup> Because these theories “protect speakers only instrumentally in the service of these broader interests,” Schauer explains that it is easy to “imagine granting less protection to private speech.”<sup>416</sup>

However, as Schauer argues, just because private speech could be viewed as less valuable than public speech in this theory, that does not mean that it should be. He recognizes that “a great deal of political speech takes place outside of the public forum.”<sup>417</sup> “To find the ‘true’ forum for political discussion and commentary in this country,” Schauer writes, “we should not journey to the theaters, the parks, or the streets, or read newspapers, magazines, placards, posters, or billboards. Rather, we must go to the pool halls, the factories, the bars, the private offices, the barbershops and the proverbial living room in Peoria.”<sup>418</sup> In other words, Schauer believes that, for most people, it is civil society—and not formal political institutions—that provides the background of their political communication.

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<sup>414</sup> See Schauer, “‘Private’ Speech and the ‘Private’ Forum.” See also Steven Shiffrin, “Defamatory Non-Media Speech and First Amendment Methodology,” in *UCLA Law Review*, Vol. 25, No. 915 (1978), pp. 561.

<sup>415</sup> Schauer, “‘Private’ Speech and the ‘Private’ Forum,” pp. 237.

<sup>416</sup> *Ibid.*

<sup>417</sup> *Ibid.*, pp. 236.

<sup>418</sup> *Ibid.*

Indeed, Schauer not only argues that political speech in the private sphere allows private citizens to explore issues of governance, but he also suggests that it may serve the same self-expressive and cathartic purposes as political speech in the public sphere.<sup>419</sup> Furthermore, Schauer argues that private political speech can even help correct—or, at least, challenge—orthodoxy from the ground up.<sup>420</sup> At the very least, he points out that it would be absurd to argue that the First Amendment protects speech criticizing an elected official on the news, but that same speech, if spoken face-to-face, is not protected.<sup>421</sup> Thus, he argues that the First Amendment must be read to include private speech.

Nevertheless, even Schauer's formulation of a First Amendment that distinguishes between public and private speech excludes social speech. While he recognizes the value of *non-public* speech, he never addresses the issue of *non-political* speech. Indeed, private speech, for Schauer, ought to be protected precisely because it is home to a significant portion of political speech concerning issues of the public good. Private speech that involves more personal, intimate issues, on the other hand, seems to be outside the scope of his argument.<sup>422</sup> Thus, a great deal of social speech is omitted.

This is even truer for the majority of American legal theorists who accept the public/private speech divide. To the extent that they consider private speech to be less relevant to the First Amendment than public speech, they are most likely to place social speech on an even lower rung in the hierarchy. In fact, such communication is generally not even mentioned.

Not all American constitutional scholars take this approach, however. By the mid-twentieth century, many American legal theorists had begun to call into question the distinction between public and private speech. For example, both Chafee and Thomas I. Emerson have

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<sup>419</sup> Ibid., pp. 237.

<sup>420</sup> Ibid., pp. 238-239.

<sup>421</sup> Ibid., pp. 239.

<sup>422</sup> "*In all senses other than the subject-matter sense the truly private speech is a two person face-to-face conversation in a private living room closed to everyone except the two participants [emphasis added]*" (Ibid., pp. 235).



rejected the notion that the Supreme Court can differentiate between public and private speech.<sup>423</sup> Steven Shiffrin also claims that, “[a]ny distinction between public or important speech and private or trivial speech may be unworkable.”<sup>424</sup> Similarly, Cass R. Sunstein suggests that all speech is essentially public. Just as the New Deal eliminated the notion that there is a private sphere, which is immune from government regulation, he argues, free speech theory should do the same. Sunstein believes that legal theorists ought to reject the notion of private speech, and instead, accept that there are actually two classes of public speech – one that the state must leave unregulated.<sup>425</sup>

Even Meiklejohn, who began his career by arguing that the Constitution protects some speech more than others, eventually found the division between public and private speech unsustainable.<sup>426</sup> Initially, Meiklejohn had argued that there were two kinds of speech, each of which was protected under a different portion of the Constitution. First, there was the right to absolute freedom of speech—discussed above—which can be found in Article 1, Section 6 of the United States Constitution. This portion of the Constitution, Meiklejohn explained, protected that speech, which contributed towards the proper functioning of self-government. Second, there was the more limited right to freedom of speech, which was justified by the Fifth Amendment’s due process clause.<sup>427</sup>

Meiklejohn noted (regretfully) that the Supreme Court often merged these two justifications for freedom of speech into one. “With some hesitation and uncertainty,” he claimed, the Supreme Court “has thrust aside the ‘privileges and immunities’ clause of the Fourteenth

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<sup>423</sup> See Zechariah Chafee, Jr., “Book Review,” in *Harvard Law Review*, Vol. 62, No. 891 (1949); Emerson, *The System of Free Expression*.

<sup>424</sup> Shiffrin, “Defamatory Non-Media Speech and First Amendment Methodology,” pp. 936.

<sup>425</sup> Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1995), pp. 35-38. Sunstein argues that all speech should be regulable. However, while there is a very strong burden placed on government when it wishes to police “political speech,” there is a less severe burden of justifying regulation of non-political speech. See *ibid.*, pp. 132-137.

<sup>426</sup> See Meiklejohn, “The First Amendment Is an Absolute,” pp. 245-266.

<sup>427</sup> See Meiklejohn, *Free Speech*, pp. 35-38.

Amendment and has chosen, in the state field, to protect but freedom of speech of the First Amendment and that of the Fifth, under the due process clause which is taken directly from the latter.<sup>428</sup> According to Meiklejohn, this meant that certain opportunities for public speech were being blocked, and democratic self-governance thereby suffered.

Eventually, Meiklejohn came to realize that it was, indeed, very difficult to distinguish between public and private speech. He had defined public, First Amendment-protected speech as communication that is related to the collective self-determination of a free people. But as he conceded, this does not apply only to speech regarding government processes. “[T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values,” he wrote.<sup>429</sup> Specifically, Meiklejohn was referring to four spheres of communication: education; philosophy and science; the arts; and public discussions of public issues. He argued that, to the extent that these types of communication tend to bear upon public issues, they are relevant to democratic government. Thus, the division between public speech and private speech fell apart.

This does not mean, however, that Meiklejohn, and those who, like him, reject a division between public and private speech, mean to incorporate all social speech into their theories of freedom of speech. The more private kinds of communication that these theorists wish to absorb into the category of protected speech are worthwhile largely because they contain political ideas. But what of that social speech, which involves only personal and intimate issues? Again, this kind of speech is left out of the debate. That is, except to the degree that certain free speech theories are deemed almost absurd in that their broad understanding of protected speech could be construed to apply to *all* communication – even the very personal.<sup>430</sup>

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<sup>428</sup> Ibid., pp. 60-61.

<sup>429</sup> Meiklejohn, “The First Amendment Is an Absolute,” pp. 256.

<sup>430</sup> See, for example, Emerson, *The System of Free Expression*, pp. 541.

The one thing that all of these free speech critics discussed in this section have in common is that they each take it for granted that freedom of speech applies more to certain kinds of speech than others. By accepting the Supreme Court's premise that freedom of speech is justified, not as a good in itself, but for its ability to result in social goods, these legal theorists also acknowledge that speech, which does not further these social goods, is less deserving of the First Amendment's protection.<sup>431</sup> And while they may disagree about exactly which kinds of speech contribute to these social goals, nearly all American legal theorists concur with the Supreme Court that political, public speech is at the heart of the purpose of the First Amendment. This is generally true in relation to private speech, but it even truer in relation to social speech. Plenty of theorists may worry about the Court's distinction between public and private speech, but the question of where social speech might fit in to a theory of freedom of speech is hardly ever broached.

Having performed a search of American law reviews and journals, I found that the terms "political speech" and "public speech" have appeared in at least 998 and 997 articles, respectively. The term "social speech," on the other hand, has only come up in 92 American law review articles. And of those 92 essays, the vast majority of authors are not referring to social speech, as I have defined it, but rather, to "serious" social speech. This serious social speech is merely a corollary to political and religious speech. Whereas purely political speech may involve issues of government and governance, this version of social speech covers that communication, which concerns social issues of public importance. Essentially, to the extent that the term "social speech" has been utilized in these American law review articles, it is as the branch of political speech, which deals with issues like abortion, gay marriage, marijuana legalization, etc. Used in

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<sup>431</sup> Of course, there is a minority of First Amendment scholars who believe freedom of speech is, in fact, a good in and of itself. See, for example, Rodney A. Smolla, *Free Speech in an Open Society* (New York: Vintage Books, 1992); Lawrence H. Tribe, *American Constitutional Law* (Mineola, NY: Foundation Press, 1978); Steven Heyman, *Free Speech and Human Dignity* (New Haven, CT: Yale University Press, 2008). For Supreme Court cases that express this viewpoint, see *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

this sense, social speech is placed in contrast to both artistic and commercial speech, and not political speech (as I have done).<sup>432</sup>

Indeed, “serious” social speech is quite similar to the kind of private speech that I discuss above, and which has been addressed by numerous American legal theorists. And again, while this terminology suggests that legal theorists have extended their constitutional analyses to speech that is *non-public*, not all private speech is tantamount to social speech. In fact, private speech only represents one portion of what I have called social speech. Namely, it tends to refer to speech that is private in the sense that it takes place in civil society (as opposed to formal political institutions), but is not private (or intimate, personal, etc.) in terms of its content. Like the Supreme Court, these American political theorists of private speech tend to only consider that speech, which expresses topics of political value.

This lack of attention to the full range of social speech suggests that the majority of American legal free speech theorists consider it to be a non-issue. In other words, while most of these theorists do not appear openly hostile to a reading of the First Amendment that incorporates social speech, by not even mentioning the possibility, they are also implicitly suggesting that it does not belong. Nevertheless, to the extent that the American legal theory community has struggled with the issue of how private or “serious” social speech relates to the First Amendment, I would argue that they have not gone far enough. For the most part, I believe that this approach is still overly attached to the overtly political nature of First Amendment speech. Rather than argue that the First Amendment applies to all social speech that takes place within civil society—as I do—these kinds of legal theorists refer either to public speech about

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<sup>432</sup> See, for example, Mark W. Cordes, “Making Sense of High School Speech After *Morse v. Frederick*,” in *William & Mary Bill of Rights Journal*, Vol. 16, No. 657 (March 2009); Michael Hoefges, “Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.,” in *Communication Law and Policy*, Vol. 8, No. 267 (Summer 2003); Daniel S. Balboni, “But I Thought This Was Sin City!: Nevada’s Restrictions on Advertisements for Legal Brothel Services,” in *Nevada Law Journal*, Vol. 7, No. 548 (Spring 2007); Vincent Lodato, “Computer-Generated Child Pornography – Exposing Prejudice in Our First Amendment Jurisprudence?” in *Seton Hall Law Review*, Vol. 28, No. 1328 (1998).

social issues or private speech about political issues. Indeed, I could find only 92 American law review articles that utilize the term “social speech.” Of these, only six essays actually refer to a concept that remotely resembles what I have presented in this project.<sup>433</sup> And there is only one instance of an American law review article acknowledging the political power inherent in social speech: Orville Lee’s “Legal Weapons for the Weak?”<sup>434</sup>

There is reason to be optimistic that this will change, however. While social speech has had a meager presence in First Amendment scholarship up until this point, it is possible that the discourse could expand to include it. The Supreme Court has already conceded that its understanding of the First Amendment’s right to freedom of speech may expand as the needs of citizens grow.<sup>435</sup> And as Rabban explains, even those American legal theorists who favor a sharp distinction between public and private speech tend to agree “that First Amendment guarantees, although never subject to abridgment, can be broadened to accommodate society’s desire for additional free expression.”<sup>436</sup> Schofield, for example, argued that, although private speech does not fall within the purview of the First Amendment, what was once considered private might eventually come to be considered public, political speech.<sup>437</sup> Similarly, Cooley believed that,

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<sup>433</sup> See Patrick M. Garry, “The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?” in *The University of Pittsburgh Law Review*, Vol. 65, No. 183 (Winter 2004); Darren Bush, “The ‘Marketplace of Ideas’: Is Judge Posner Chasing Don Quixote’s Windmills?” in *Arizona State Law Journal*, Vol. 32, No. 1107 (Winter 2000); Jeanne M. Craddock, “Constitutional Law-‘Words that Injure; Laws that Silence:’ Campus Hate Speech Codes and the Threat to American Education,” in *Florida State University Law Review*, Vol. 22, No. 1047 (Spring 1995); James R. O’Connor, “The Tenth Anniversary of the ABA Capital Defense Guidelines: The Road Traveled and the Road to be Traveled,” Part Two, in *Hostra Law Review*, Vol. 42, No. 647 (Winter 2013); Thomas J. Curtin, “The Name Game: Cybersquatting and Trademark Infringement on Social Media Websites,” in *Journal of Law & Policy*, Vol. 19, No. 353 (2010); Orville Lee, “Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society,” in *Law & Social Inquiry*, Vol. 26, No. 847 (Fall 2001).

<sup>434</sup> In this essay, Lee argues that social speech may have significant “force.” However, he does not elaborate on the power of social speech, in general, nor does he ever discuss the status of social speech in the First Amendment. Rather, this paper considers the personal and political impact of hate speech. See *ibid.*

<sup>435</sup> See the opening quotation from Justice Frank Murphy’s majority decision for *Thornhill v. Alabama*.

<sup>436</sup> Rabban, “The First Amendment in Its Forgotten Years,” pp. 568.

<sup>437</sup> Schofield, “Freedom of the Press in the United States,” pp. 529.

while freedom of speech should always be at least “as broad as existed when the constitution which guarantees it was adopted,” that does not mean this liberty cannot expand and grow even broader.<sup>438</sup> So the more that people begin to recognize the value in all social speech—not just private speech regarding issues of public importance—the more that efforts may be made to absorb it into existing theories of freedom of speech.

## V. Conclusion:

The question posed by this chapter is not, “Should social speech, as a whole, be protected under the First Amendment to the United States Constitution?” (There are already more than enough American legal theorists arguing that the First Amendment protects either too much or too little speech.<sup>439</sup>) Rather, the question raised by this chapter is whether or not the Supreme Court has developed an understanding of freedom of speech that accounts for social speech. In other words, is social speech covered by the First Amendment freedom of speech (i.e. subject to its protections and restrictions)?<sup>440</sup> And to the extent that the Supreme Court has not included social speech within its First Amendment analyses, what does that imply about its perceived value? Equally importantly, what does it mean that constitutional scholars tend to accept and reproduce this oversight?

For the most part, it appears that American legal theorists are not looking at how social speech might fit into a theory of freedom of speech. And, of course, the Supreme Court has also said very little about where social speech fits in to its theory of the First Amendment – except for

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<sup>438</sup> Cooley, *Constitutional Limitations*, pp. 429.

<sup>439</sup> For example, Schauer claims that the United States is now underwritten by the ideology that free speech is good, and more freedom of speech is better. This attitude is no longer just an ideology, but it has become a true orthodoxy. See Schauer, “The First Amendment as Ideology,” pp. 13. See also Lee C. Bollinger, *The Tolerant Society* (New York: Oxford University Press, 1986), pp. 23.

<sup>440</sup> Coverage, after all, does not necessarily equate to protection. See, for example, the defamation cases.

what it has implied by this silence. (For the sake of comparison, the phrase “public speech” can be found in the majority, concurring and/or dissenting opinions of at least 49 First Amendment Supreme Court cases.<sup>441</sup> The phrase “political speech” has similarly occurred in 116 cases.<sup>442</sup> The term “social speech,” on the other hand, cannot be found in a single opinion issued by the Supreme Court.<sup>443</sup>) Throughout this chapter, I have argued that the dearth of social speech analyses belies an attitude that is dismissive of this type of communication. And this attitude, I believe, may be based on an incomplete understanding of the relationship between speech and liberal democratic citizenship and political outcomes.

The American legal community has decided that some speech is so essential to American values—i.e. the pursuit of truth and democratic self-governance—that it must be clearly defined and explicitly protected. Since social speech may not initially appear to contribute to these social goods, however, it has not merited the same degree of consideration within the context of the First Amendment as more political, public forms of expression. But by determining that social speech is irrelevant to the First Amendment, Supreme Court Justices and American legal scholars are actually making a claim that this speech does not matter.

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<sup>441</sup> See, for example, *Dennis et al. v. United States*, 341 U.S. 494 (1951); *Perry Educational Association v. Perry Local Educators’ Association et al.*, 460 U.S. 37 (1983); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Jay F. Hein, White House Office of Faith-Based and Community Initiatives, et al., Petitioners v. Freedom from Religion Foundation, Inc., et al.*, 551 U.S. 587 (2007).

<sup>442</sup> See, for example, *Citizens United, Appellant v. Federal Election Commission*, 558 U.S. 310 (2010); *Mitch McConnell, et al. v. Federal Elections Commission, et al.*, 540 U.S. 93 (2003); *Pacific Gas & Electric Co. v. Public Utilities Commission of California et al.*, 475 U.S. 1 (1986); *Shaun McCutcheon, et al., Appellants v. Federal Election Commission*, 134 S. Ct. 1434 (2014); *Charles W. Burson, Attorney General and Reporter for Tennessee, Petitioner v. Mary Rebecca Freeman*, 504 U.S. 191 (1992).

<sup>443</sup> The closest that the Supreme Court ever got to using the term “social speech” was in *Metromedia, Inc., et al. v. City of San Diego, et al.*, 453 U.S. 490 (1981). Writing for the majority, Justice Byron Raymond White argued that outdoor advertising (i.e. billboards) provides “valuable commercial, political and social information” to the public. However, he was referring to messaging about “social causes,” rather than social speech, as I have defined it.

The fact that American legal theorists and practitioners have generally failed to address the place of social speech in the First Amendment does not mean that there is no room for it, however. Much as in the case of private speech, if social speech can be proven to substantially contribute to the marketplace of ideas, democratic self-governance or another significant societal good, then it could possibly be absorbed into the Supreme Court's doctrine of freedom of speech. In such a case, it might be afforded protections and subject to restrictions, which are similar to what is applied to political, public speech. The trick is merely to show that social speech does serve valuable social and political purposes. It is to that task that I turn in Chapters Four and Five.



## CHAPTER 4

RETHINKING CLASSICAL LIBERAL SPEECH THOUGHT: JOHN MILTON AND JOHN  
STUART MILL ON FREEDOM OF SPEECH IN THE SOCIAL

*“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”*

- John Milton, “Areopagitica”<sup>444</sup>

*“The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”*

- John Stuart Mill, On Liberty<sup>445</sup>

Freedom of speech enjoys unparalleled esteem in liberal democratic societies.

Contemporary theories of speech, as exemplified by deliberative democratic and legal theorists (discussed in Chapters Two and Three, respectively), particularly valorize this liberty. And in practice, lawmakers consistently elevate freedom of speech to the status of a fundamental right, often placing it first and foremost in national bills of rights. The First Amendment of the United States Constitution, for one, famously guarantees that “Congress shall make no law... abridging the freedom of speech, or of the press.”<sup>446</sup> Throughout the world, other nation states (including many with lesser commitments to democratic, liberal values) have followed suit. From

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<sup>444</sup> John Milton, “Areopagitica a Speech for the Liberty of Unlicensed Printing to the Parliament of England” (Memphis, TN: General Books, 2010), pp. 26.

<sup>445</sup> John Stuart Mill, “On Liberty,” in *On Liberty and Other Essays*, John Gray (ed.) (New York: Oxford University Press, 1998), pp. 21.

<sup>446</sup> United States Constitution, Amendment 1.

Switzerland to India to the Philippines, regardless of how it is actually exercised, national constitutions explicitly acknowledge the importance of free expression by including it among their fundamental rights.<sup>447</sup>

So while there is significant variation between theories and practices regarding the exact contours of what constitutes that speech, which ought to be protected, there is little doubt that the dual freedoms of thought and expression do and should form the bedrock of modern liberal society. And this consensus is no accident. A respect for freedom of conscience and the corresponding freedom of expression has stemmed out of the Lockean liberal tradition, which emphasizes the right of all men to think for themselves.

In his essay, "A Letter on Toleration," John Locke explicitly argues for a separation between church and state, but the issue at stake is actually much broader – Locke considers this separation necessary because he believes that it is impossible for the state to compel morality. He claims that "liberty of conscience is every man's natural right, equally belonging to dissenters as to themselves; and that nobody ought to be compelled in matters of religion either by law or force."<sup>448</sup> In other words, individuals must be masters of their own thoughts and consciences. This is as true for those who fall within the mainstream as for those who exist on the periphery. Governments must tolerate all viewpoints, even the conflicting ones. This means that state censorship based on the content of speech is highly problematic for Locke.

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<sup>447</sup> Art. 16 Freedom of expression and of information, of Title Two: Fundamental Rights, Citizenship and Social Goals, of the Constitution of the Swiss Confederation states: "1) Freedom of expression and of information is guaranteed. 2) Everyone has the right freely to form, express, and impart their opinions. 3) Everyone has the right freely to receive information to gather it from generally accessible sources and to disseminate it." Part III Fundamental Rights, Article 19 Protection of certain rights regarding freedom of speech, etc. in the Constitution of India (1949) states: "(1) All citizens shall have the right... to freedom of speech and expression." Article III, Section 4 of the Bill of Rights of the Constitution of the Republic of the Philippine states: "No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."

<sup>448</sup> John Locke, "A Letter Concerning Toleration" (Upper Saddle River, NJ: Prentice Hall, 1950), pp. 52.

Locke's ideas regarding freedom of thought have had far-reaching consequences, perhaps most notably in the writing of the United States Constitution. Many of the Founding Fathers consciously sought to incorporate Locke into the nation's legal tradition, and his influence on the First Amendment clauses for freedom of religion, speech and assembly can be seen in their writings of the time. In James Madison's "Memorial and Remonstrance Against Religious Assessments," for instance, the signer of the Constitution and future president appropriates an argument straight out of Locke, claiming "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force of violence."<sup>449</sup> Men, Madison argues, must be enabled to reach conclusions about religion and morality independently and without compulsion. Thomas Jefferson takes this line of thinking even further in "The Virginia Act for Establishing Religious Freedom," when he applies Locke's arguments in favor of freedom of religion to freedom of speech, as well: "[T]ruth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."<sup>450</sup> Not only do people have a right to dictate their own moral codes, Jefferson argues, but the intervention of a state actor may actually be harmful to this process.

Locke's influence on the founding of the United States government can be seen, not only in its broad strokes, but also in its many caveats and limitations. Like Locke—who only touts toleration for certain ideas and people—the Framers of the Constitution have a fairly limited understanding of freedom of speech; they tend to focus almost exclusively on protecting a kind of formal speech, which concerns only topics of public interest.<sup>451</sup> And as I discussed in Chapters

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<sup>449</sup> James Madison, "Memorial and Remonstrance Against Religious Assessments," 1785. Available at: [http://religiousfreedom.lib.virginia.edu/sacred/madison\\_m&r\\_1785.html](http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html).

<sup>450</sup> Thomas Jefferson, "The Virginia Act For Establishing Religious Freedom," 1786. Available at: <http://religiousfreedom.lib.virginia.edu/sacred/vaact.html>.

<sup>451</sup> "I say, first, no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate. ... [Second],

Two and Three and, this has been no less true for the contemporary political and legal theorists of speech who have followed in their footsteps. Today's political theories of free speech often deem only "public speech" (i.e. that which takes place in Congress, town hall meetings, televised political debates, or anywhere else where people are deliberating in their official capacities about issues of public importance) worthy of protection from state involvement. The issues addressed by these contemporary theories can be grouped into two categories: 1) How best to structure public speech so that it achieves positive democratic outcomes, including self governance, as well as the pursuit of truth and progress; 2) How to balance freedom of speech against other competing rights, such as equal dignity and respect.

While these are worthwhile concerns, the contemporary focus on public, political speech questions has meant that political and legal theorists have failed to address the impact of more informal social speech on liberal democratic politics. As stated in the previous chapters, this is a significant omission. Not only is social speech the most prevalent form of communication for the average person, but it is also instrumental in shaping the kind of citizen that she will turn out to be.

Fortunately, the idea that one's social interactions, as a private individual, may influence her choices and abilities, as a political actor, is not new. Indeed, it stems from a theoretical tradition that predates even Locke, and includes two of the fathers of the contemporary tradition of free speech: John Milton and John Stuart Mill. In this chapter, I discuss these two theorists of speech and the social. First, I begin by highlighting the influence that Milton and Mill have had on practical and theoretical representations of freedom of speech. Next, I examine their individual theories of freedom of speech more closely, exploring the role that social speech plays in determining good citizenship and political outcomes. Although neither theorist directly addresses

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that church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby *ipso facto* deliver themselves up to the protection and service of another prince... Lastly, those are not at all to be tolerated who deny the being of a God" (Locke, "A Letter Concerning Toleration," pp. 50-52).

social speech in his writings, I argue that both Milton and Mill do suggest that the liberties of thought and expression, which are usually considered individualistic freedoms, are actually already social.

First, I show how, in "Areopagitica," Milton argues that freedom from prior restraint in publishing is necessary on the grounds that it leads to the development of good character. It is only when people are confronted by both good and evil ideas, and then freely choose the good, that they can be considered truly virtuous. This process of moral development can occur in all spheres of thought and communication, but it is especially likely to take place in the social. And while the origins of good character are social, Milton believes that individual virtue is necessary to the health of a nation. Only a morally virtuous citizenry, he claims, will be able to question authority and keep the state in line. Thus, Milton's theory of freedom of expression conveys the political value of speech in its myriad forms and contexts, including the social.

Second, I suggest that Mill's concept of the social and its relationship to politics is perhaps even more robust than Milton's theory. While Mill does not explicitly connect his theories of the social with his discussions on freedom of expression in his most notable text on speech, "On Liberty," it is evident throughout his writings that Mill sees social communication as necessary to both the individual and the political sphere. For Mill, there is no more natural desire than the desire to communicate with others, and a personal connection to one's community is necessary to his concept of individualism. "The social state is at once so natural, so necessary, and so habitual to man," he writes, "that, except in some unusual circumstances or by an effort of voluntary abstraction, he never conceives himself as otherwise than as a member of a body; and this association is riveted more and more, as mankind are further removed from the state of savage independence."<sup>452</sup> And as Nancy J. Hirschmann explains, "the context in which Mill's

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<sup>452</sup> John Stuart Mill, "Utilitarianism," in *On Liberty and Other Essays*, John Grey (ed.) (New York: Oxford University Press, 1998), pp. 164.

individuals live is a social one, not (merely) an individualistic one."<sup>453</sup> It is only by communicating with others than an individual can experience and conceptualize herself as an individual.

I argue that Mill's theory of the social influences his theory of freedom of speech in two ways. First, Mill's emphasis on the importance of social interactions can be interpreted to suggest that they may serve as an important venue for the discovery of truth. Second, Mill's theory of social constructivism implies that social communication is necessary for individuals to acquire and hone the kind of character traits that are conducive to participatory government aimed at social progress. By relating to others in the social sphere, people are likely to be influenced by social pressures (and even the threat of social pressures) in such a way that they seek to become more rational, inquisitive, distrustful of authority, etc. Mill also believes that social interactions can combat selfishness and habituate people into becoming the kind of citizens who associate their own happiness with that of the whole. These character traits are essential to Mill's vision of good republican government.

Although contemporary Anglo-American free speech theorists tend to ground their work in the tradition of Milton and Mill, they often neglect the social aspects of these theories. In this chapter, I attempt to remedy this omission by reexamining these seminal texts of the freedom of speech literature, and highlighting the ways in which they speak to the powerful role of social speech. My goal is not to prove that the more traditional readings of Milton and Mill, which emphasize public, political speech, are simply wrong. Public, political speech is clearly important for both theorists. However, insofar as contemporary theories of free speech fail to also address the place of more informal, social communication, I argue that they are incomplete.

### **I. The influence of Milton and Mill on contemporary political and legal thought:**

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<sup>453</sup> Nancy J. Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton: Princeton University Press, 2003), pp. 63.

John Milton is often cited as the forefather of the modern liberal conception of freedom of speech. To be sure, Milton hardly paints himself as a liberal in his writings. Those who study him closely are quick to point out that his most famous and oft-cited work concerning freedom of expression, *Areopagitica a Speech for the Liberty of Unlicensed Printing to the Parliament of England*, makes only a very restricted argument in favor of liberty. In this essay, Milton argues only for increased freedom in publishing, being prompted by the new laws for *a priori* censorship that arose during the politically tumultuous mid-Seventeenth Century.

In November 1640, financial pressures led King Charles I to convene the Long Parliament. One of the new legislature's first actions was to abolish the Court of Star Chamber, the offshoot of the King's Privy Council, which had served as the primary setting for prosecuting political dissidents, religious rebels and any person who defied royally sanctioned monopolies of the printing trade. Although this action was more of an attack on royal prerogative than an overt policy in favor of freeing the press, the elimination of the Star Chamber, in effect, meant a temporary suspension of the licensing policy that had been in existence for over a hundred years. The result was an outpouring of new religious and political ideas.<sup>454</sup> It was in this atmosphere of free and open dissent that civil war broke out.

Concerned about dissention in its own ranks and the success of royal propaganda, Parliament chose to reinstate government control over printing in June 1643. The ensuing Licensing Order of 1643 required that "no Order or Declaration of both, or either House of Parliament shall be printed by any, but by order of one or both the said houses: nor other Book, Pamphlet, paper, or part of any such Book, Pamphlet, or paper, shall from henceforth be printed, bound, stitched or put to sale by any person or persons whatsoever, unless the same be first

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<sup>454</sup> See Vincent Blasi, "Milton's *Areopagitica* and the Modern First Amendment." *Occasional Papers*, Paper 6 (1995). Available at: [http://digitalcommons.law.yale.edu/ylosop\\_papers/6/](http://digitalcommons.law.yale.edu/ylosop_papers/6/): "Tudor and early Stuart licensing had been variable though sometimes Draconian, often corrupt, and usually porous. The elimination in 1641 of the institutions of press control caused a dramatic increase in both the volume of advocacy and the range of views expressed. By one count, the number of pamphlets published during the year 1640 was 22; in 1642, it was 1,966."

approved of and licensed under the hands of such person or persons as both, or either of the said Houses shall appoint for the licensing of the same.”<sup>455</sup> This meant that before any book could be published, it must first pass government inspection. While Parliament was the primary enforcement agency, the printers were also called upon to police themselves. Through their trade organization, the Stationers’ Company, all master printers who held printing patents were legally required to report their peers who printed without a license. Specialized licensers were also appointed to review potential publications in different categories (i.e. law, philosophy, mathematics). If these licensers were deemed too permissive by Parliament, they could be subject to imprisonment along with the offending writers and printers.

During this same period, members of Parliament finally recognized that they would need an alliance with Scotland if they were to maintain any chance of winning the English Civil War. The Scots provided military resources, but in return, they also demanded a religious settlement in England along Presbyterian lines. This prospect was controversial among members of Parliament, including many Presbyterians who were uncomfortable with Scottish Presbyterianism’s strict Calvinist theology and its subordination of secular institutions. In the hope of finding a compromise, Parliament created the Westminster Assembly, which would become a formal congress of 120 English clerics, 20 laymen from the Lords and Commons and 8 Scottish representatives. However, even months after its founding, tensions and bitter disputes still raged within the Assembly. Some of the most contentious debates on issues such as parliamentary autonomy and toleration became public, migrating into the House of Commons, the army camps and the street. In response, many notable essays on religious toleration were written and published in violation of the Licensing Order of 1643.

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<sup>455</sup> “Ordinance for correcting and regulating abuses of the Press” (June 14, 1643) in “Table of acts: 1643,” C. H. Firth and R. S. Rait (eds.) *Acts and Ordinances of the Interregnum, 1642-1660* (1911): IV-XVIII, British History Online. Available at: <http://www.british-history.ac.uk/report.aspx?compid=56675>.



One of the most famous and enduring of these essays was Milton's "Areopagitica."

Following a disillusioning marriage to Mary Powell in 1642 (although the couple later reconciled, Powell initially abandoned Milton after only one month of marriage), Milton authored a treatise on the subject of divorce. In his 1643 pamphlet, *The Doctrine and Discipline of Divorce*, Milton made the controversial argument that an incompatibility of personalities, even without any accompanying infidelity, might be a valid justification for divorce. Not only was Milton unable to obtain licensing for this publication—he published it anyway—but the claims within it immediately branded Milton as a "dangerous radical with licentious sympathies."<sup>456</sup>

This experience of censorship almost certainly helped motivate the writing of "Areopagitica," which served as a direct response to the Licensing Order of 1643. And indeed, at first glance, Milton's plea against this law for prior restraint in publishing appears extensive. He encourages governments to censor that which is "scandalous, seditious, and libelous,"<sup>457</sup> but otherwise employs broad language when referring to freedom from licensing. And Milton's grand rhetoric about the battle between Truth and Falsehood—the portion of "Areopagitica" that is most discussed by speech theorists—suggests a potentially extensive justification for freedom of speech. However, there are three aspects of "Areopagitica," which suggest that Milton did not mean to extend freedom of expression to *all* people and *all* ideas.

First, as Leonard W. Levy argues in his essay, "Freedom of speech in Seventeenth-Century Thought," in order to fully understand "Milton's 'dream of free speech, to utter, and to argue freely according to conscience, above all liberties,'" one must note that "his use of the personal pronoun is significant, for his well-advertised tolerance did not extend to the thought that

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<sup>456</sup> Blasi, "Milton's Areopagitica and the Modern First Amendment."

<sup>457</sup> "But that other cause of licensing books, which we thought had died with his brother quadragesimal and matrimonial when the prelates expired, I shall now attend with such a homily, as shall lay before ye, first the inventors of it to be those whom ye will be loath to own; next what is to be thought in general of reading, whatever sort to books be; and that this Order avails nothing to the suppression of scandalous, seditious, and libellous books, which were mainly to be suppressed" (Milton, "Areopagitica," pp. 3).

he hated.”<sup>458</sup> The terms “scandalous, seditious, and libelous” actually contained a great deal for Milton, including religious viewpoints that he deemed treacherous. Thus, Milton did not encourage toleration of religious viewpoint that he deemed dangerous and heretical. His vision of freedom of expression extended only to “neighboring differences, or rather indifferences,” which in 1644, meant variations on Protestantism.<sup>459</sup> In fact, Milton specifically excluded both “popery, and open superstition”—believing it should be “extirpated”—and also that, “which is impious or evil absolutely either against faith or manners”—arguing that “no law can possibly permit” it—from his treatise on freedom of expression.<sup>460</sup>

Second, in his “Areopagitica,” Milton barely mentioned the topic of extending freedom of the press to polemical news writers.<sup>461</sup> To the extent that he did address these controversial authors, he argued that royalist writings (i.e. “that continued court-libel against the Parliament and City, printed, as the wet sheets can witness, and dispersed among us) *ought to be censored*.”<sup>462</sup> If the new licensing system were to be justified in any way, he argued, it was in providing this “prime service.”<sup>463</sup>

Finally, in later writings, Milton made it clear that he did not intend for anything but serious intellectual work, written by academic and/or religious scholars, to ever truly be free. Even the high level of discourse that merited freedom from restraint should not be made open and available to all, he claimed. In his essay, “Of True Religion, Heresy, Schism, and Toleration,” Milton explained his worry that a scholarly discussion of scripture might “unsettle the weaker sort.” While he still believed that such a debate should be allowed to occur, his suggestion was to make discussion as impenetrable as possible for the average man. If scholars were going to

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<sup>458</sup> Leonard W. Levy, “Freedom of Speech in Seventeenth-Century Thought,” in *The Antioch Review*, Vol. 57, No. 2, Essays: Personal & Political (Spring, 1999), pp. 171-172.

<sup>459</sup> Milton, “Areopagitica,” pp. 27.

<sup>460</sup> *Ibid.*

<sup>461</sup> See Levy, “Freedom of Speech in Seventeenth-Century Thought,” pp. 172.

<sup>462</sup> Milton, “Areopagitica,” pp. 14.

<sup>463</sup> *Ibid.*

publish their ideas, he argued, “[a]t least, then, let them have to write in Latin, which the common people understand not; that what they hold may be discussed among the learned only.”<sup>464</sup> Thus, the goal of Milton’s “Areopagitica” was not to promote free speech as it is understood today; rather, he aimed to protect the publication of only that speech that appealed to him (both religiously and politically), while at the same time limiting its audience to those who might not be “unsettled” by new ideas.

Despite these illiberal elements, Milton’s elegant prose has had a significant influence on contemporary theories concerning freedom of speech. And while they may overestimate his commitment to a broad liberty of conscience, many of the most prominent political theorists of speech believe the modern discourse about free speech to have begun with Milton. In *Free Speech: A Philosophical Inquiry*, for example, Frederick Schauer argues that Milton’s “Areopagitica” is “the earliest comprehensive defense of freedom of speech.”<sup>465</sup> Similarly, in *The System of Freedom of Expression*, Thomas I. Emerson dates the birth of the “argument that the rights of citizens should include a far broader scope for free expression” to John Milton’s speech in the Long Parliament.<sup>466</sup> And as Lee Bollinger explains, “the life history of the [free speech] principle dates back several centuries, at least to the seventeenth century, which is when John Milton wrote his famous defense of liberty of speech and press in *Areopagitica*. The contemporary rhetoric of free speech, the language and terms used to think and talk about the principle, draws heavily on the writings of the earlier centuries.”<sup>467</sup> Thus, Bollinger claims that Milton has been instrumental in elevating the importance of the concept of free speech above where it had ever been before.

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<sup>464</sup> John Milton, “Of True Religion, Heresy, Schism, Toleration,” in *The Prose Works of John Milton*. Vol. II. London: Henry G. Bohn, 1848, pp. 405.

<sup>465</sup> Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982), pp. 15.

<sup>466</sup> Thomas I. Emerson, *The System of Freedom of Expression* (New York: Vintage Books, 1970), pp. 99.

<sup>467</sup> Lee C. Bollinger, *The Tolerant Society* (New York: Oxford University Press, 1986), pp. 6-7.

Others choose to show deference to “Areopagitica’s” foundational influence on freedom of speech theories by opening their own writings with its most famous passage. Both C. Edwin Baker and Zachariah Chaffee begin the first chapters of their canonical books—*Human Liberty and Freedom of Speech* and *Freedom of Speech*, respectively—with Milton’s battle between Truth and Falsehood.<sup>468</sup> And a number of contemporary political speech theorists, by focusing almost exclusively this one passage, have used Milton to justify the marketplace of ideas theory. Stanley Ingber, for example, claims that the “classic image of competing ideas and robust debate dates back to English philosophers John Milton and John Stuart Mill.”<sup>469</sup> So while the term “marketplace of ideas” was not actually coined until Justice Holmes’s 1919 dissent in *Abrams vs. United States*, Ingber claims that it has its earliest foundations in Milton’s theory.

The United States Supreme Court has also been clear in its veneration of Milton’s theory of freedom of expression, dating the beginning of the concept back his “Areopagitica.” For example, when considering a licensing tax for newspaper advertisers in *Grosjean v. American Press Co.*, 297 U.S. 233, Justice George Sutherland’s majority opinion begins its history of the First Amendment with a discussion of Milton: “As early as 1644,” Sutherland writes, “John Milton, in an ‘Appeal for the Liberty of Unlicensed Printing’... vigorously defended the right of every man to make public his honest views ‘without previous censure’; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties.”<sup>470</sup> The Supreme Court has also frequently cited Milton when deciding in favor of a broad reading of the First Amendment right to freedom of speech. For instance, in 1961, Justice Tom C. Clark repeatedly cited Milton in his majority opinion for *Times*

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<sup>468</sup> C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989), pp. 6; Zachariah Chaffee, *Freedom of Speech* (New York: Harcourt, Brace and Howe, 1920), pp. 1.

<sup>469</sup> Stanley Ingber, “The Marketplace of Ideas: A Legitimizing Myth,” in *Duke Law Journal* (1984), pp. 3.

<sup>470</sup> *Grosjean v. American Press Co.*, 297 U.S. 233 246 (1936).

*Film Corp. v. City of Chicago, et al.*, in an attempt to prove the dangers of prior restraint.<sup>471</sup> Then in 1972, Justice William O. Douglas utilized Milton in his concurring opinion for *Eisenstadt v. Baird*, striking down a law that limited lectures on birth control. “The teachings of Baird and those of Galileo might be of a different order,” he writes, “but the suppression of either is equally repugnant. As Milton said in the *Areopagitica*, ‘Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.’”<sup>472</sup>

Not only has Milton carried historical and jurisprudential significance for the U.S. Supreme Court, but his influence can also be seen in the language that justices have adopted to discuss freedom of speech. In *Abrams v. U.S.*, Justice Oliver Wendell Holmes’s famed dissent sets a precedent for nearly all freedom of speech cases.<sup>473</sup> And his writing bears a striking resemblance to “*Areopagitica*.” “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” Holmes argues, “and that truth is the only ground upon which their wishes can safely be carried out. That, at any rate, is the theory of our Constitution.”<sup>474</sup> This analogy is clearly indebted to Milton’s battle between Truth and Falsehood.

But Milton, of course, is not the only forbearer of the contemporary liberal notion of freedom of speech. Indeed, if Milton has been considered the father of free speech theory, then John Stuart Mill has been deemed his son and rightful heir. Those who date the beginning of contemporary political speech theory to Milton almost always turn to Mill in their next breath. Again, this is especially true of the United States Supreme Court, which has drawn from both

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<sup>471</sup> See *Times Film Corp. v. City of Chicago, et al.*, 365 U.S. 43 (1961): “A most distinguished antagonist of censorship, in ‘a plea for unlicensed printing,’ has said: ‘If he (the censor) be of such worth as behoovs him, there cannot be a more tedious and displeasing Journey-work, a greater loss of time levied upon his head, then to be made the perpetuall reader of unchosen books and pamphlets \* \* \* we may easily forsee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remisse, or basely pecuniary.’ *Areopagitica*, in the *Complete Poetry and Selected Prose of John Milton* (Modern Library College Ed. 1950), 677, at 700. There is no sign that Milton’s fear of the censor would be dispelled in twentieth century America.”

<sup>472</sup> *Eisenstadt v. Baird*, 405 U.S. 538 (1972).

<sup>473</sup> See *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>474</sup> *Ibid.*

theorists to support a marketplace of ideas justification for freedom of speech. In 1964, for example, when the Supreme Court used Milton to justify the protection of all ideas—especially false ones—under the marketplace of ideas theory in *New York Times v. Sullivan*, it included citations to Milton and Mill, side-by-side.<sup>475</sup>

The coupling of Milton and Mill is, in many ways, a natural one. There does, indeed, appear to be a direct lineage between the two theorists, with Milton introducing the idea that society benefits by allowing an open struggle between Truth and Falsehood, and Mill developing it to its full potential.<sup>476</sup> And it is clear from historical texts that Milton truly did influence Mill's writings. His father, who "cared little for any English poetry," had "the highest admiration" for Milton's poems, and assuredly introduced them to his son during the latter's rigorous education.<sup>477</sup> Later in life, Mill had occasion to become familiar with "Areopagitica," finding excerpts of it in his own library's copy of Samuel Taylor Coleridge's *The Friend* and reading Thomas Babington Macaulay's tribute to Milton in the *Edinburgh Review* in 1825.<sup>478</sup> And in 1837, Mill proves his familiarity with "Areopagitica" by referencing Milton in his review of Thomas Carlyle's *French Revolution*.<sup>479</sup>

Like Milton, Mill's theory in favor of freedom of speech must also be understood as a reaction to his historical and personal circumstances. Mill's childhood was remarkable in many

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<sup>475</sup> "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; see also Milton, *Areopagitica*, in *Prose Works* (Yale, 1959), Vol. II, at 561" (*New York Times v. Sullivan*, 376 U.S. 254 (1964)).

<sup>476</sup> "John Milton's imagery received possibly its best elaboration by John Stuart Mill..." (Baker, *Human Liberty and Freedom of Speech*, pp. 6).

<sup>477</sup> See Nicholas Capaldi, *John Stuart Mill: An Autobiography* (New York: Cambridge University Press, 2004), pp. 16.

<sup>478</sup> See Stewart Justman, *The Hidden Text of Mill's Liberty* (Savage, MD: Rowman & Littlefield Publishers, Inc., 1991), pp. 86.

<sup>479</sup> John Stuart Mill, "Carlyle's French Revolution 1837," in *The Collected Works of John Stuart Mill*, Vol. XX – Essays on French History and Historians (1826), John M. Robson (ed.) (Toronto: University of Toronto Press, 1985). Mill argues that "if even Milton's *Areopagitica*, of which now, it would seem, no one dares speak with only moderate praise, were now first to issue from the press, it would be turned from with contempt by everyone who will think of speak disparagingly of this work by Mr. Carlyle" (*Ibid.*).

respects. As the eldest child of utilitarian philosopher and leader of the Philosophical Radical movement, James Mill, the young Mill was subject to a rigorous and demanding education. Under his father's strict tutelage, Mill was taught Greek beginning at age three and Latin five years later. By his early teens, he had made a wide survey of history, including many of the Greek and Latin classics; performed extensive work in logic and mathematics; and mastered political economy, legal philosophy and metaphysics. This knowledge was reinforced by Mill's daily instruction of his own younger siblings, as well as evening with his father, during which the young Mill was called upon to share everything that he had learned that day.<sup>480</sup>

As Mill explains in his *Autobiography*, the stress of his schooling and social isolation (as well as other factors) led to a severe "mental crisis" in 1826.<sup>481</sup> In response to this breakdown, he began to reassess the value of an education in analytic ability, when divorced from the development of a capacity for feeling. And his positive experience with poetry—especially William Wordsworth—encouraged him in the belief that the cold rationalism of an Enlightenment education needed to be combined with an education in sentiment and feeling.<sup>482</sup>

Thus, Mill began to explore the Romantic Movement that had sprung up in response to the rigid moral code of the English Victorian era. Mill ultimately aimed to reconcile the utilitarian philosophies of his father, Jeremy Bentham and the other Radicals with key figures of Romanticism, such as Samuel Taylor Coleridge, Johann Wolfgang von Goethe and

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<sup>480</sup> John Stuart Mill, *Autobiography*, John Stuart Mill, Thomas Carlyle, Vol. 25 (New York, P. F. Collier & Son, 1909), pp. 9-29.

<sup>481</sup> See *ibid.*, pp. 89.

<sup>482</sup> "What made Wordsworth's poems a medicine for my state of mind," Mill explains, "was that they expressed not mere outward beauty, but states of feeling, and of thought coloured by feeling, under the excitement of beauty. They seemed to be the very culture of the feelings, which I was in quest of... I needed to be made to feel that there was real, permanent happiness in tranquil contemplation. Wordsworth taught me this, not only without turning away from, but with a greatly increased interest in the common feelings and common destiny of human beings" (*Ibid.*, pp. 97-98).

Wordsworth.<sup>483</sup> And in doing so, he developed a version philosophic radicalism that was meant to incorporate the best elements of each school of thought – utilitarian morality combined with an appreciation for feeling.

It was as part of this intellectual endeavor that Mill began to develop his own ideas about the social, and to identify the critical role that social and cultural institutions play in human development. Mill believed that, in order to become the kind of creative, active individuals, with a preference for higher pleasures, who would push society towards progress, people must be allowed certain liberties.<sup>484</sup> Specifically, he argued that freedom of thought and discussion are essential for creating individuality. Where people are encouraged to merely accept and conform to custom, they are unlikely to generate anything new. On the other hand, where a culture of free and open discussion exists, people are likely to critically assess the status quo and reflect upon their own ideas. As a result, these individuals are able to push society forward. Thus, Mill had a strong interest in fostering the social institution of freedom of speech.

And Mill's theory of freedom of speech, while also not exactly liberal by contemporary standards, is considerably more inclusive than that, which Milton proposed. For one thing, Mill seems to move away from the notion of freedom of the press as freedom only from prior restraint, broadening the call for government non-interference in speech. For another, he seems to suggest that freedom of speech—while still not appropriate for all—ought to be applied to a wider audience. And at the very least, Mill does not openly worry that laic individuals ought to be shielded from deep philosophical discussion.

These differences between Milton and Mill make the latter considerably more relatable to contemporary notions of freedom of speech. This may explain his special prevalence in political theories of speech, even as compared to Milton. For example, although Justice William Brennan

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<sup>483</sup> As Mill explains, his goal was “to show that there was a Radical philosophy, better and more complete than Bentham’s, while recognizing and incorporating all of Bentham’s which is permanently valuable” (Ibid., pp. 138).

<sup>484</sup> This is true, at least during critical periods of history. See below.



cited both Milton and Mill in the *Sullivan* decision, Mill was clearly his starting off point. In establishing guidelines for defamation and libel, Brennan pulled directly from Mill when he claimed that, for a statement to be considered libel, a publisher must be aware that it was false or that she acted recklessly in terms of its truth – the “actual malice” standard. Drawing from Mill, Brennan argued that false or questionable statements are an unavoidable feature of reasoned discussion, whether made in good faith or bad.<sup>485</sup> And in order to protect an open exchange, he claimed, people must be free to say things that may be wrong without fear of legal repercussions.<sup>486</sup> Finally, much like Mill’s “On Liberty,” Brennan asserts that this is nothing to worry about: false statements can even contribute positively to discussions by making the truth stand out even brighter.

But the Supreme Court is not the only place where Mill’s impact on freedom of speech has been felt. In *Free Speech*, Alan Haworth argues that one way to measure Mill’s influence is by taking stock of the lines from “On Liberty,” which have entered the common stock of epigrams.<sup>487</sup> And indeed, Haworth claims that both of Mill’s lines, “If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind,” and also “All silencing of discussion is an assumption of infallibility,” have made it into the American vernacular.<sup>488</sup> As he explains, both of these “passages are familiar to people who have never heard of John Stuart Mill, as well as to those who have, but who could not give you a half-way adequate account of what his argument

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<sup>485</sup> “[E]rroneous statement is inevitable in free debate, and... it must be protected if the freedoms of expression are to have the ‘breathing space’ they need to survive” (Ibid.).

<sup>486</sup> “Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred” (*New York Times v. Sullivan*).

<sup>487</sup> Alan Haworth, *Free Speech* (New York: Routledge, 1998), pp. 33.

<sup>488</sup> Ibid., pp. 33-34.

actually is.”<sup>489</sup> And any time that freedom of speech comes up in the media, it is likely that these and similar phrases will be utilized “quite out of context.”<sup>490</sup>

Mill, after all, while frequently cited, is also often misunderstood. Like Milton, many who call upon Mill to justify freedom of speech paint him as more of a liberal than he actually was. While these misreadings may corrupt his message, they do not diminish Mill’s influence. Even one of Mill’s staunchest critics, Willmore Kendall, has admitted that the scope of arguments utilized by liberal democrats today “have not varied perceptibly since Mill.”<sup>491</sup> Virtually all liberal theorists of freedom of speech quote from and draw upon Mill when forming their arguments. Indeed, it is nearly impossible to delineate the full breadth of his influence on political theory, legal theory and practical attitudes towards freedom of speech.

To summarize, both Milton and Mill have had a profound effect on the ways that liberal democratic citizens conceptualize their relationships to the state and each other. Whether used as a jumping off point, a foil or historical background, both Milton and Mill’s theories on freedom of speech have gone on to inform nearly every free speech author or commentator, from deliberative democratic theorists to Anglo-American legal academics to Supreme Court justices. As such, their theories have transcended the purely philosophical, and have grown to form the basis for a practical understanding of one the world’s most cherished fundamental rights – freedom of speech.

This immediate connection to lived experience suggests that, when free speech scholars analyze these canonical theories, they have a particular duty to provide a full and accurate representation of the texts. To the extent that Milton and Mill are aware of the potential advantages and dangers of social interactions—a claim that I will take up in the following sections—today’s scholars ought to consider the place of social speech when reading these

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<sup>489</sup> Ibid., pp. 34.

<sup>490</sup> Ibid.

<sup>491</sup> Willmoore Kendall, “The ‘Open Society’ and its Fallacies,” in *The American Political Science Review*, Vol. 54, No. 4 (December, 1960), pp. 972-979.

theories. Unfortunately, readings of Milton and Mill that focused almost entirely on the public and political elements of speech in their theories have put all free speech theory on a path that ignores social communication and its implications for both individual development and political outcomes. For the remainder of this chapter, I seek to correct this problem by directly addressing the role that social interactions play in the theories of both Milton and Mill.

## **II. John Milton on virtue and truth in the social:**

As stated above, Milton's "Areopagitica" should not be read as a justification for a completely liberal understanding of freedom of expression. Nevertheless, in this section, I argue that Milton's framework for understanding (partial) freedom from prior restraint in publishing contains, within in, the potential for protecting a wide range of communication. Specifically, I propose a reading of Milton that emphasizes his laudatory attitude towards social communication. First, I begin by suggesting that, because Milton does not argue for freedom of expression based on its own intrinsic good, but rather, grounds his arguments in the beliefs that the exchange of ideas is necessary in order to create a virtuous citizenry—which is necessary for a healthy state—he is able to incorporate social speech into his theory. After all, according to Milton, the process of building good character and virtue is not limited to traditionally political speech between public actors; rather, character development takes place in all spheres of interaction, including (and especially) the social. Thus, Milton can be read to be advocating the protection of social speech on the grounds that it contributes to virtue. Second, at the end of this section, I present Milton's discussion of Truth in "Areopagitica," which provides additional evidence that he understands the value of social communication.

For Milton, good and evil come together in the world – they are inextricable. "Good and evil we know in the field of this world grow up together almost inseparably," he writes, "and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many

cunning resemblances hardly to be discerned, that those confused seeds which were imposed upon Psyche as an incessant labour to cull out, and sort asunder, were not more intermixed."<sup>492</sup> If good and evil are two sides to the same coin, it is impossible to know the one without also knowing the other. Thus, evil ideas serve an important purpose for Milton: Through exposure to evil, one can also locate the good, and thereby access a virtuous path.<sup>493</sup>

Milton's road to virtue requires two steps. First, an individual must be exposed to both good and evil. It is not enough to adopt good, godly ideas if those are the only ideas that a person has ever known. Such an individual might outwardly be following the righteous path, but she can never be truly virtuous. Instead, experience with a diversity of ideas—including bad or evil ideas—is necessary for the creation of good people. As John Durham Peters explains in *Courting the Abyss: Free Speech and the Liberal Tradition*, "[w]ithout contraries, there is no knowledge; without knowledge, there is no virtue. In this Milton offers a beautifully clear justification for liberty of publication: diverse writings and arguments teach us good and evil—or good via evil."<sup>494</sup>

Second, once a person has seen good and been tempted by evil, in order to be considered virtuous, she must freely and independently choose the good.<sup>495</sup> As Milton writes,

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<sup>492</sup> Milton, "Areopagitica," pp. 20.

<sup>493</sup> Evil ideas are distinct in their ability to promote good. Comparing evil books to bad meats, Milton writes that, while both may fulfill an immediate need, only the former are likely to teach a valuable lesson: "For books are as meats and viands are; some of good, some of evil substance; and yet God, in that unapocryphal vision, said without exception, RISE, PETER, KILL AND EAT, leaving the choice to each man's discretion. Wholesome meats to a vitiated stomach differ little or nothing from unwholesome; and best books to a naughty mind are not unapplicable to occasions of evil. Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate" (Ibid., pp. 9).

<sup>494</sup> John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: The University of Chicago Press, 2005), pp. 78.

<sup>495</sup> Milton does not, however, advocate going out and truly experiencing all the vice in the world in order to be able to choose virtue. Rather, he thinks that this is one of the most important functions of books: they allow us to see what the world has to offer without actually committing sin. "Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we

“[h]e that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian. ... I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary but slinks out of the race, where that immortal garland is to be run for, not without dust and heat.”<sup>496</sup> For Milton, virtue cannot be imposed from up above. One cannot be told how to be virtuous; one must actively choose to be virtuous. And if the world were suddenly free from all vice, people would also be the worse for it because they would never be free to make the virtuous choice. “They are not skillful considerers of human things,” Milton writes, “who imagine to remove sin by removing the matter of sin.”<sup>497</sup> It is impossible to abolish sin without also abolishing the opportunity to attain virtue.

And virtue, of course, is an important goal for Milton. Virtue is necessary, not only for its positive relationship to individual happiness and personal salvation, but also because of a secondary advantage: its influence on good citizenship. A successful state requires a virtuous citizenry, Milton believes. As Vincent Blasi explains in his essay, “Free Speech and Good Character: From Milton to Brandeis to the Present,” Milton argues that only citizens who possess “strength of will, acuteness of perception, ingenuity, self-discipline, engagement, breadth of vision, perseverance” will have the fortitude to keep the state in line.<sup>498</sup> All harm, he explains, “even that harm that flows from malignant political energy, can best be contained and repaired by a citizenry that is energized in a countervailing way: intellectually independent, morally engaged,

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more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read” (Milton, “Areopagitica,” pp. 10).

<sup>496</sup> Ibid., pp. 10.

<sup>497</sup> Ibid., pp. 23.

<sup>498</sup> Vincent Blasi, “Free Speech and Good Character: From Milton to Brandeis to the Present,” in *Eternally Vigilant: Free Speech in the Modern Era* (Lee C. Bollinger and Geoffrey R. Stone (eds.)) (Chicago: University of Chicago Press, 2002), pp. 64.

politically resilient, not afraid to speak out or stand to up.”<sup>499</sup> In other words, it is only a virtuous citizenry that is likely to confront the state and promote vitality.<sup>500</sup>

That is why it is so important to Milton that policies be adopted to encourage the development of virtue. And freedom of expression, Milton believes, is absolutely essential to this process. Not only is freedom of expression a divine—and thus, irrefutable—right, but by permitting ideas to be expressed, the state ensures that the population will be exposed to both the good and evil that make virtue possible.<sup>501</sup> If books are censored before publication, if the public cannot expose itself to a variety of ideas, individuals will be robbed of the opportunity to choose the virtuous path. Not only do they suffer as individual souls, but the health of the state suffers as well.

This does not mean, however, that Milton wanted all ideas to be free. As stated above, Milton’s vision of freedom of expression is limited in terms of its content, proscribing arguments in favor of Catholicism and royalism, as well limiting the reception of scholarly ideas that might unsettle the general public. But Milton’s freedom of expression is also relatively expansive in terms of form and context. Because Milton does not value freedom of expression primarily as a political tool, but rather, as a method of building virtue, he does not limit his theory to those kinds of speech that consider only political topics and take place in public settings. Instead, Milton wishes to promote *any* exchange of ideas that might promote virtue, and that opens him up to looking at social speech.

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<sup>499</sup> Ibid., pp. 65.

<sup>500</sup> As Blasi argues, “Milton’s case for free expression depends in no small degree on his observation... that vitality is the defining quality of a political community, and that vitality cannot be maintained—stagnation will inevitably set in—if the prescriptions of Custom and Authority are allowed to go unchallenged” (Blasi, “Milton’s Areopagitica and the First Amendment”).

<sup>501</sup> “I conceive therefore, that when God did enlarge the universal diet of man’s body, saving ever the rules of temperance, he then also, as before, left arbitrary the dieting and repasting of our minds; as wherein every mature man might have to exercise his own leading capacity” (Milton, “Areopagitica,” pp. 9).

Indeed, people do not learn to be virtuous solely through reading serious political texts and internalizing grand ideas about the public good. Building good character and virtue is an inherently intimate task. More often than not, people develop their character through socialization and intimate interactions. Milton asserts at least this much when, midway through “Areopagitica,” he mocks the idea of using prior censorship to help shape public morals. To do so, he argues, would require an impossible infrastructure – one that is capable of censoring all daily activities, as they *all* play a role in the development of character:

If we think to regulate printing, thereby to rectify manners, we must regulate all recreation and pastimes, all that is delightful to man. No music must be heard, no song be set or sung, but what is grave and Doric. There must be licensing dancers, that no gesture, motion, or deportment be taught our youth but what by their allowance shall be thought honest; for such Plato was provided of. It will ask more than the work of twenty licensers to examine all the lutes, the violins, and the guitars in every house; they must not be suffered to prattle as they do, but must be licensed what they may say. And who shall silence all the airs and madrigals that whisper softness in chambers? The windows also, and the balconies must be thought on; there are shrewd books, with dangerous frontpieces, set to sale; who shall prohibit them, shall twenty licensers? The villages also must have their visitors to inquire what lectures the bagpipe and the rebeck reads, even to the ballatry and the gamut of every municipal fiddler, for these are the countryman’s Arcadias, and his Monte Mayors.<sup>502</sup>

In this passage, Milton is arguing that the myriad ways in which people express themselves and share their ideas—music, dancing, lyric poetry—influence the people that the audiences or recipients will become.

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<sup>502</sup> Ibid., pp. 12-13.

Milton then goes on, in the next paragraph, to remark more explicitly upon the absurdity of allowing or expecting licensers to regulate the intimate and social spheres:

Next, what more national corruption, for which England hears ill abroad, than household gluttony: who shall be the rectors of our daily rioting? And what shall be done to inhibit the multitudes that frequent those houses where drunkenness is sold and harboured? Our garments also should be referred to the licensing of some more sober workmasters to see them cut into less wanton garb. Who shall regulate all the mixed conversation of our youth, male and female together, as is the fashion of this country? Who shall still appoint what shall still be discoursed, what presumed, and no further? Lastly, who shall forbid and separate all idle resort, all evil company?<sup>503</sup>

In other words, it is no more the business of the state to dictate which books a person may read than it is its responsibility to tell individuals how much they may eat, what they may wear or who they may talk to. All of these aspects of daily life build character (and are also expressive of it), and ought to be free from extreme state coercion.

Taken together, these two passages suggest that Milton's argument against the prior censorship of books can be extended to apply to social speech and communication as well. Indeed, Milton explicitly states that there is no real difference between the effects of reading a book and the effects of everyday social interactions on a person's moral character – both activities are highly formative. "And albeit whatever thing we hear or see, sitting, walking, travelling, or conversing, may be fitly called our book," Milton writes, "and is of the same effect that writings are, yet grant the thing to be prohibited were only books, it appears that this Order hitherto is far insufficient to the end which it intends."<sup>504</sup> If books must exist freely so that individuals may use them to become good people, and if everyday interactions serve the same

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<sup>503</sup> Ibid., pp. 13.

<sup>504</sup> Ibid., pp. 14.



purpose as books, it seems fair to conclude that Milton's case for freedom can be extended to social speech.

A second, subtler place in Milton's writings where one can find his appreciation for traditionally apolitical ideas and communication is in his statements on Truth. The free thought, writing and speech that Milton encourages is all meant to get people closer to Truth. While Milton accepts that humankind may never actually discover the whole Truth of the universe, he believes that to search for it is a divine task. And it is not an easy one. As Milton explains, fragments of Truth have been scattered all over the universe, and it is Man's responsibility to assemble the pieces:

Truth indeed came once into the world with her divine Master, and was a perfect shape most glorious to look on: but when he ascended, and his Apostles after him were laid asleep, then straight arose a wicked race of deceivers, who, as that story goes of the virgin Truth, hewed her lovely form into a thousand pieces, and scattered them to the four winds. From that time ever since, the sad friends of Truth, such as durst appear, imitating the careful search that Isis made for the mangled body of Osiris, went up and down gathering up limb by limb, still as they could find them.<sup>505</sup>

With Truth scattered all about, it is unlikely that humans will be able to discover it simply by listening to public figures or reading political texts. Rather, it should be expected that people would find pieces of truth in all aspects of life, from the unusual to the most mundane.

Therefore, Milton believes that humans should constantly be striving towards Truth in their everyday interactions. And that search is never-ending. Even if parts of the Truth are discovered, if they are not constantly exercised and practiced, they will atrophy. "Well knows he who uses to consider, that our faith and knowledge thrives by exercise, as well as our limbs and complexion," Milton writes. "Truth is compared in Scripture to a streaming fountain; if her waters

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<sup>505</sup> Ibid., pp. 22.

flow not in perpetual progression, they sicken into a muddy pool of conformity and tradition.”<sup>506</sup>

Thus, Milton provides a way for people to find value in their everyday interactions and conversations – even these small acts are contributing to the larger goal of discovering and strengthening divine Truth.

In sum, Milton’s theory of freedom of expression may actually be both more and less restrictive than it is commonly seen to be. It is more restrictive in that it is neither content neutral, nor does it value expression for its own intrinsic good. However, Milton’s theory is also less restrictive than its usage in contemporary political theories of speech and American jurisprudence may suggest. Because he considers free and open expression to be valuable as a tool for building good, virtuous character traits among the citizenry—which is necessary to the health of a state—Milton is able to incorporate all speech that serves this purpose into his theory. And as his discussion of the influential role that art, music, food, etc. plays in character development implies, Milton is likely to have considered social communication among those expressions that merit protection. This position is underscored by his passages on the discovery of Truth, which further suggest that Milton believed that there is great value in social speech.

### **III. John Stuart Mill on the social pursuit of truth and republican character:**

In his most famous essay on freedom of speech, “On Liberty,” John Stuart Mill makes a powerful argument in favor of this fundamental freedom – Mill chooses to emphasize freedom of speech because he believes it is the liberty from which all others spring. And freedom of speech, for Mill, is not merely the ability to verbalize one’s thoughts and opinions without external restraint; rather, it also contains the ability to *think* unreservedly. Mill supports this understanding of freedom of speech from the beginning of his essay, “On Liberty,” when he introduces “the

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<sup>506</sup> Ibid., pp. 20.

Liberty of Thought: from which it is impossible to separate the cognate liberty of speaking and of writing” in the final paragraph of the introduction.<sup>507</sup>

It is important to note, however, that although “On Liberty” is Mill’s most famous and oft-quoted essay on freedom of speech, it is not sufficient to appeal solely to that work when trying to understand Mill’s views on the subject. While that essay is his most forceful and direct treatment of the subject, “On Liberty” also represents what was perhaps a unique and controversial moment in Mill’s thought. In *On Liberty and Liberalism: The Case of John Stuart Mill*, Gertrude Himmelfarb suggests that there may actually have been two Mills: the Mill from “On Liberty” and the “other Mill.”<sup>508</sup> The Mill of “On Liberty,” she argues, was strongly influenced by Harriet Taylor’s more radically liberal views. The other Mill was perhaps less optimistic about a liberty in which all are all “pursuing their own good in their own way.” Indeed, this Mill actually rejects the anarchy of unqualified freedom and demands government intervention to right social wrongs.

While other Millian commentators have offered different explanations for the discrepancies between “On Liberty” and his other works, most agree that “On Liberty” is somewhat exceptional in its liberalism.<sup>509</sup> Thus, in order to most accurately represent Mill’s political thought, it is important to look, not only at “On Liberty,” but also at his writings as a whole. And when his works are examined in their entirety, one finds that Mill is not only someone who is deeply concerned with the individual and the political, but he also has a strong conception of the social. Indeed, even in “On Liberty,” it is the acts of speaking and writing—*both of which are inherently social*—that Mill chooses to highlight.

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<sup>507</sup> Mill, “On Liberty,” pp. 19.

<sup>508</sup> Gertrude Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (San Francisco: ICS Press, 1990), pp. 41.

<sup>509</sup> See, for example, Isaiah Berlin, “John Stuart Mill and the Ends of Life,” in *Four Essays on Liberty* (New York: Oxford University Press, 1969); Joseph Hamburger, “Individuality and Moral Reform: The Rhetoric of Liberty and the Reality of Restrain in Mill’s *On Liberty*,” in *Political Science Reviewer*, Vol. 24 (1995), pp. 7-70.

In this section, I explore Mill's theory of the social in relation to freedom of speech. I begin by presenting an overview of Mill's theory of freedom of speech, with an emphasis on the limitations that he places upon that liberty. I then challenge traditional readings of Mill that emphasize the role of political, public speech in his theory. While I agree that Mill aims to protect such speech on the basis of its potential contribution to social progress, I suggest that social speech also has a place in his theory. Namely, not only does social speech serve as an important venue for the discovery of truth, but it also contributes to the process of creating good citizens. In both ways, social speech is able to impel society towards progress, which is, indeed, Mill's standard for determining what speech merits protection.

To begin, Mill considers the ability to express oneself openly and unabashedly to be a fundamental trait of human existence. To communicate and share ideas with others is a major element in his image of the good life. However, Mill does not justify his theory of speech on the grounds that it is what makes people happiest. Rather, he values freedom of speech primarily because he believes that a free and open sphere of communication is essential to the discovery of truth and the social progress that results from that endeavor.

As Mill explains, truth can only be discovered if new ideas are generated and allowed to enter into a public forum, where they will be debated, picked apart and tested against existing dogma. Through this process, new truths are discovered and accepted, and old falsehoods are rejected. Thus, legal censorship is especially problematic for Mill because he believes that all speech is potentially valuable. First, he argues that it is impossible to know with certainty that any opinion is untrue.<sup>510</sup> To silence an idea is "an assumption of infallibility," and no matter how intelligent or powerful a person may be, she can never be absolutely sure that she is correct. Thus, it is better to err on the safe side, and allow the expression of all opinions.<sup>511</sup> Second, Mill

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<sup>510</sup> "First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true." (Mill, "On Liberty," pp. 59)

<sup>511</sup> *Ibid.*, pp. 22.

points out that, even if an opinion is not entirely true, it may contain part of the truth.<sup>512</sup> Indeed, he seems to think that this is most often the case with “popular opinions, on subjects not palpable to sense.”<sup>513</sup> Such ideas, he argues “are often true, but seldom or never the whole truth. They are part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjoined from the truths by which they ought to be accompanied and limited.”<sup>514</sup> The existence of even the tiniest morsel of truth, however, is enough to make an idea valuable to Mill. And it is only “by the collision of adverse opinions,” that these partial truths can be revealed. Third, Mill argues that freedom of speech is important because even a true opinion will lose some of its value, becoming a mere prejudice, if it is not subjected to open questioning.<sup>515</sup>

Even entirely false ideas have a place in Mill’s struggle to discover truth. Not only are individuals more likely to abandon erroneous beliefs when they are subjected to an open exchange of ideas, but they also help to secure good ideas. By forcing others to reexamine and reaffirm their beliefs in the process of debate, false ideas ensure that truth does not decline into mere dogma. It is not enough for Mill that one hold an unexamined belief that happens to be true; one must understand why the belief in question is the true one.

This is especially important for Mill, who, at the time of his writing, worried that his Victorian contemporaries had become complacent, unquestioning followers of traditions and custom. And for Mill, there was no worse situation than when people have stopped exploring and questioning the world around them. Thus, he adds a final justification in favor of freedom of speech – discussion helps ensure that the truth remains vital. “And not only this,” he argues, “but

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<sup>512</sup> “Secondly, though that silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied” (Ibid., pp. 59).

<sup>513</sup> Ibid., pp. 52.

<sup>514</sup> Ibid.

<sup>515</sup> “Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds” (Ibid., pp. 59).

fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.”<sup>516</sup> Those ideas that are held to be sacrosanct and are never questioned become dogmas. As a result, their meaning is lost. Freedom of speech must exist, Mill claims, in order to ensure that all ideas are constantly questioned and revisited.

Thus, to silence even one person, Mill argues, is to do a disservice to all – the speaker, as well as the rest of society. As he famously writes in “On Liberty,” “[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”<sup>517</sup>

It is important not to mistake Mill’s enthusiasm for freedom of speech with a belief in the inherent value of all speech, however. Freedom of speech may be important, but it is not an inalienable human right for Mill. Kendall explains that the idea “of a ‘right to freedom of speech, a capacity on the part of every man to say what he pleases that society must respect, because he is *entitled* to it—of a right that men have to live in the kind of society that Mill projects—is a later development. It occurs in different countries for different reasons and under different auspices; but to the extent that it is intended seriously it represents a complete break with Mill.”<sup>518</sup> As stated above, even in “On Liberty,” Mill only presents a consequentialist argument in favor of the principle of free speech: Freedom of speech is not a good in itself; rather, it is a good principle in that it enables society to achieve valuable ends. In other words, Mill claims that societies ought

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<sup>516</sup> Ibid., pp. 59.

<sup>517</sup> Ibid., pp. 21.

<sup>518</sup> Kendall, “The ‘Open Society’ and its Fallacies,” pp. 976.

to embrace this liberty, not for its own sake, but more importantly, because he believes that the free and open exchange of ideas is necessary to achieve social progress.

This logic leads to a significant exception in Mill's theory: If free speech is justified on the basis that it leads to social progress, then the principle should only apply to that speech, which furthers this goal. And a close examination of Mill's body of work suggests that he actually imagined a wide realm of communication that *did not merit free speech protection*.

For example, Mill argues that censorship may be justified when speech violates his Harm Principle, which states: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant."<sup>519</sup> However, because harm is so contingent upon context, this caveat can be made to apply to any virtually any speech.<sup>520</sup> Take, for instance, Mill's example of the corn-dealer critics.<sup>521</sup> When they are merely expressing their ideas, they are behaving legitimately; when those same ideas are expressed pointedly and in order to incite an angry mob, however, the speakers have crossed a line and no longer have claims to protection. Thus, for Mill, speech's immunity from censorship largely depends on the way it is perceived.

Mill's intellectually snobbish tendencies also tend to limit the scope of his theory of freedom of speech. Despite his grand rhetoric about the importance of freedom for all in "On Liberty," there are also more restrictive, elitist themes that permeate his theory of freedom of speech. Indeed, Mill believes that, for the majority of people, to be free does not necessarily

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<sup>519</sup> Mill, "On Liberty," pp. 14.

<sup>520</sup> See Nancy J. Hirschmann, *Class, Gender, and Freedom in Modern Political Theory* (Princeton: Princeton University Press, 2008): "Mill takes a conceptual approach to freedom, even in his central liberty of thought and expression. That is, because of the ways in which expression can lead to action, the context of speech is important. 'Even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression as positive instigation of some mischievous act'" ( pp. 223).

<sup>521</sup> Mill, "On Liberty," pp. 62.

equate to participation in any communicative endeavors; rather, for the average individual, a central aspect of freedom is the ability and desire to be guided by one's superiors. In his January 9<sup>th</sup>, 1831 essay, "The Spirit of the Age," Mill argues that society is constantly "enlarging the stock of the truth."<sup>522</sup> But this is only because the *wisest men* of each age are able to build upon the knowledge gleaned by the *wisest men* of previous ages.<sup>523</sup> Note that he credits intellectual elites with progress, and not society as a whole. Mill argues that, because "the multitude (by which I mean the majority of all ranks)" are only capable of reflexively accept the truths of their age, they do not benefit from the knowledge that was developed before their time.<sup>524</sup> Thus, they are no closer to understanding truth than the inhabitants of previous ages. To the extent that the masses are closer to truth, "it is only in so far as they are guided and influenced by the authority of the wisest among them."<sup>525</sup>

This means that the pursuit of progress is not just about promoting freedom of speech for the geniuses, so that they might explore ideas – it is also about developing a population that can accept genius. "Many have let themselves be guided (which in their best times they have always done) by the counsels and influence of a more highly gifted and instructed One or Few," Mill explains.<sup>526</sup> "The initiation of all wise or noble things, comes and must come from some individual. The honour and glory of the average man is that he is capable of following that initiative; that he can respond internally to wise and noble things, and be led to them with his eyes open."<sup>527</sup> Mill believed that one of the problems of the age in which he lived was that people had

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<sup>522</sup> John Stuart Mill, "The Spirit of the Age, I Examiner, 9 January, 1831," in *The Collected Works of John Stuart Mill, Volume XXII – Newspaper Writings December 1822-July 1831 Part I*, Ann Robson and John Robson (eds.) (Toronto: University of Toronto Press, 1986). Available at <http://oll.libertyfund.org/title/256/50800>, pp. 9.

<sup>523</sup> "The wisest men in every age generally surpass in wisdom the wisest men of any preceding age, because the wisest men possess and profit by the constantly increasing accumulation of the ideas of all ages..." (Ibid.).

<sup>524</sup> Ibid.

<sup>525</sup> Ibid.

<sup>526</sup> Mill, "On Liberty," pp. 74.

<sup>527</sup> Ibid.



lost the ability or willingness to follow leaders.<sup>528</sup> Either the majority of people did not have the natural propensity to follow their superiors (opting to join in the tyranny of the majority instead), or society was simply lacking in good leaders.

Even in “On Liberty,” a careful reading reveals hints that Mill does not actually mean for everyone to be equally free to speak. “Genius can only breathe freely in an *atmosphere* of freedom,” he writes.<sup>529</sup> “Persons of genius are, *ex vi termini*, more individual than other people—less capable, consequently, of fitting themselves, without harmful compression, into any of the small number of moulds which society provides in order to save its members the trouble of forming their own character.”<sup>530</sup> As Hirschmann points out, if Mill believes that “people of genius are ‘more individual,’ then average men and women must be less so, and ignorant laborers even less.”<sup>531</sup> Because the more individual (eccentric) people are likely to contribute disproportionately to the discovery of truth, it appears that freedom of speech is more important for elites than the people at large.

It is important to note, however, that Mill’s elitism is not based on any ideas of inherent inferiority based on ascriptive characteristics (e.g. race or sex). On the contrary, Mill argues that everyone, in principle, has the potential to contribute to intelligent discourse. But despite this theoretical equality, Mill believes that circumstances and cultural influences can cause people to develop in ways that may prevent many from attaining their intellectual potential. In other words, despite their capacity for intelligence, Mill argues, he does not believe that “the body of the people... will ever have sufficient opportunities of study and experience, to become themselves familiarly conversant with all the inquiries which lead to truths by which it is good that they should

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<sup>528</sup> Mill argues that this is because he is writing during an age of transition. “In all other conditions of mankind, the uninstructed have faith in the instructed. In an age of transition, the divisions among the instructed nullify their authority, and the uninstructed lose their faith in them” (Mill, “The Spirit of the Age, II,” pp. 9).

<sup>529</sup> Mill, “On Liberty,” pp. 72.

<sup>530</sup> Ibid.

<sup>531</sup> Hirschmann, *Gender, Class, and Freedom*, pp. 251.

regulate their conduct, and to receive into their own minds the whole of the evidence from which those truths have been collected, which is necessary for their establishment.”<sup>532</sup>

And as far as Mill is concerned, this is an acceptable state of affairs. While it might be nice if all people were capable of deep philosophical thought, such a society would be unsustainable, he argues. The world needs laborers, and people who must work are not going to have the time to experience the world or study logic – at best, they will learn as much as they can about their own existence. So while “it is right that every man should attempt to understand his interest and his duty... [and] that he should follow his reason as far as his reason will carry him, and cultivate the faculty as highly as possible... reason itself will teach most men that they must, in the last resort, fall back upon the authority of still more cultivated minds, as the ultimate sanction of the convictions of their reason itself.”<sup>533</sup> In other words, people should know their places. Those who do not have the opportunity to adequately develop their mental acuity should learn, instead, how to listen to the intellectual betters.

These elitist elements do not necessarily threaten Mill’s conception of freedom of speech—since no one can know ahead of time who will be the geniuses, Mill generally insists that it is best to err on the side of caution and allow a wide range of free speech—but they do suggest that Mill may not have been quite as liberal as he is often portrayed to be. Whereas the libertarian reading of Mill’s arguments for freedom of speech paints that freedom as nearly absolute, even in “On Liberty,” Mill does not present himself as a champion of *all* speech. He does not defend free speech at all costs, but, again, only that speech, which is likely to further the goal of social progress.

In practice, this limitation is often understood to mean that Mill’s freedom of speech is only meant to apply to traditionally political speech that takes place in a public forum. After all, if the goal of free speech is to push society forward, it would make sense that that speech, which

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<sup>532</sup> Mill, “The Spirit of the Age,” pp. 12.

<sup>533</sup> *Ibid.*, pp. 15.

concerns issues of public importance and takes place between political actors, ought to merit protection. And certainly, I do not mean to argue that this prevailing interpretation of Mill's theory of free speech is incorrect. For the most part, those who argue that Mill was primarily concerned with speech between public figures and about political issues can and do find a compelling case within "On Liberty." In this essay, Mill clearly does appear to privilege public, political speech. And when one considers Mill's more conservative writings on speech (i.e. his 1825 *Westminster Review* article and his "Spirit of the Age" essays of the 1830's, in which he frets over the negative consequences of a freedom of speech open to all), Mill also appears to profess a lack of faith in the common man.<sup>534</sup>

Nevertheless, I do mean to show that there is more to Mill's theory of freedom of speech than the protection of political, public speech, which is typically emphasized. Specifically, I argue that, when Mill's theory of freedom of speech is read in conjunction with his theory of the social, it creates an impression of a philosopher who deeply valued and respected the political power of social communication. Mill believes that, by both serving as a mechanism through which truth is discovered, and also by influencing the development of character traits that may encourage good citizenship, social speech has an important role to play in the push towards social progress. As such, it merits special consideration under his theory of freedom of speech. For the remainder of this section, I explore these two functions of social speech. First, I revisit Mill's argument for freedom of speech on the basis that it is necessary for the discovery of truth, in order to show that social speech is a necessary element of that process. Second, I review Mill's theory of social constructivism in order to explain how social interactions and pressures may come to shape the character traits that define good citizenship.

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<sup>534</sup> As Himmelfarb characterizes these essays, "far from being an absolute good, freedom of discussion appeared, in these articles, as at best a very mixed good, at worst a necessary evil; and rather than furthering the advance of truth, it was seen as hindering, as often as not, the acquisition of truth and, still more, of wisdom" (*On Liberty and Liberalism*, pp. 41).

Mill believes that the discovery of truth is necessarily a social endeavor, as evidenced by his emphasis on the importance of communication in attaining that goal. Certainly, new ideas come from individuals, but idea formation is not a wholly personal activity; rather, it is the result of social connections. Exposure to the arguments of others enables a person to truly reflect on her own belief system and experiences, bolstering correct ideas and revising those that are proven wrong.<sup>535</sup> According to Mill, this is because events and thoughts can only be rightly interpreted through discussions with others. "He is capable of rectifying his mistakes, by discussion and experience," Mill explains.<sup>536</sup> "Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning."<sup>537</sup> A life lived in isolation from the opinions of others renders the proper development of ideas impossible.

This is the case in the political realm, but it is also true for more informal, social conversations. Even in a person's most intimate affairs, it is difficult for her to make good decisions when she has no other advice or perspectives from which to draw than her own. As Mill explains, "it is also a maxim of experience, that in the multitude of counselors there is wisdom; and that a man seldom judges right, even in his own concerns, still less in those of the public, when he makes habitual use of no knowledge but his own, or that of some single advisor."<sup>538</sup> Experience and private reflection simply are not enough for an individual to make

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<sup>535</sup> "To discuss, and to question established opinions, are merely two phrases for the same thing. When all opinions are questioned, it is in time found out what are those which will not bear a close examination. Ancient doctrines are then put upon their proofs; and those which were originally errors, or have become so by change of circumstances, are thrown aside. Discussion does this. It is by discussion, also, that true opinions are discovered and diffused. But that is not so certain a consequence of it as the weakening of error" (Mill, "The Spirit of the Age," pp. 8).

<sup>536</sup> Mill, "On Liberty," pp. 24-25.

<sup>537</sup> Ibid., pp. 25.

<sup>538</sup> John Stuart Mill, "Considerations on Representative Government," in *On Liberty and Other Essays*. John Gray (ed.) (New York: Oxford University Press, 1998), pp. 395.

sense of her experiences. It is through social speech that she comes to understand the world and move human knowledge forward in the discovery of truth.

But that is not the only reason why social speech is important for Mill. Mill suspects that, even in eras of intellectual stagnation, there will always be those geniuses who thrive and push forward the development of new ideas. He writes: "There have been, and may again be great individual thinkers, in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere, an intellectually active people."<sup>539</sup> The problem, when people are not encouraged to freely and openly express their thoughts and opinions, is not just that new ideas will be slow coming, but that, without these social interactions, the average citizen will not develop the kind of active character necessary for good governance and social progress.

Mill believes that humans are social beings. As he explains in "Utilitarianism," mankind is naturally imbued with "the desire to be in unity with our fellow creatures, which is already a powerful principle in human nature, and happily one of those which tend to become stronger, even without express inculcation, from the influences of advancing civilization."<sup>540</sup> As a result of this desire, people tend to want to engage with one another. And as a social constructivist, Mill believes that one's interactions with others ultimately have profound effects on her individual development.

Indeed, Mill's understanding of the social is closely intertwined with his concept of individualism. The one cannot exist without the other, and individuals are constantly being shaped by their social circumstances while they are, at the same time, shaping those same structures. As Karen Zivi explains in her essay, "Cultivating Character: John Stuart Mill and the Subject of Rights," "Mill never conceived of the individual as completely extractable or isolatable from society. To attribute such a concept of the subject to Mill... is to miss his recognition that individuals are never purely willing or self-interested, but are, rather, constituted through social

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<sup>539</sup> Ibid., pp. 39.

<sup>540</sup> Mill, "Utilitarianism," pp. 164.

networks and thus vulnerable to both the positive and negative influences of society.”<sup>541</sup> In other words, Mill argues that an individual’s relationship to the whole affects the kind of person that she will become. It is through interpersonal interactions that people learn and develop the character traits that define them as individuals.<sup>542</sup>

In “The Subjection of Women,” for example, Mill provides an account of how people are socialized into fitting their social positions.<sup>543</sup> Through exposure to societal expectations and norms—as well as formal education—Mill shows how women, in particular, may come to see themselves as the intellectual, moral and physical inferiors of men.<sup>544</sup> Women do not just believe this, but they also internalize these expectations, becoming exactly what the world expects them to be.<sup>545</sup> Thus, women are both produced by and reproducers of the social arrangements they were born into. As Hirschmann explains, for Mill, “[t]he average woman has so internalized the tyranny of ‘common public opinion’ as to be its ‘auxiliary’; the critical and analytical abilities that might allow her to see through it have atrophied so atrociously (if they were ever developed at all) that she seems incapable of even questioning, let alone rejecting, it.”<sup>546</sup>

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<sup>541</sup> Karen Zivi, “Cultivating Character: John Stuart Mill and the Subject of Rights,” in *American Journal of Political Science*. Vol. 50, No. 1 (January, 2006), pp. 52.

<sup>542</sup> See Bruce J. Baum, “J. S. Mill on Freedom and Power,” in *Polity*, Vol. 31, No. 2 (Winter, 1998).

<sup>543</sup> John Stuart Mill, “The Subjection of Women,” in *On Liberty and Other Essays*. John Gray (ed.) (New York: Oxford University Press, 1998), pp. 225.

<sup>544</sup> “A dominant theme in ‘The Subjection of Women’ is that women are how and who they are because of a patriarchal culture that made them. Restraints on liberty can thus come from the very structure of society itself, which can both limit and enhance capacities; and it can prevent people not only from acting on certain desires but from having such desires in the first place” (Hirschmann, *The Subject of Liberty*, pp. 62).

<sup>545</sup> Mill argues that these social constructs ultimately harm, not only women, but men as well. As he explains, conflict and discussion are necessary for people to fully develop their mental and moral capacities. When women are not the equals of men, men are not challenged within their homes, and they begin to deteriorate: “Even a really superior man almost always begins to deteriorate when he is habitually (as the phrase is) king of his company: and in his most habitual company the husband who has a wife inferior to him is always so” (Mill, “The Subjection of Women,” pp. 574).

<sup>546</sup> Hirschmann, *The Subject of Liberty*, pp. 63.

And as Mill explains, everything that an individual does contributes to this process of personal and societal development. As he writes in *A System of Logic*, “our mental states, and our mental capacities and susceptibilities, are modified, either for a time or permanently, by every thing which happens to us in life.”<sup>547</sup> Thus, Mill clearly means to include all interactions—even the most intimate experiences of the social sphere—among those that shape individual identity. Indeed, his statements on moral reprobation suggest that Mill believes that one’s social relationships not only can, but *ought to be* actively utilized to positively impact the moral development of her character.<sup>548</sup>

Throughout his writings, Mill argues that there is only so much that the law should proscribe – thoughts, opinions and self-regarding actions are generally off limits. This does not mean, however, that Mill believes that a poor moral character and the actions that are reflected by it ought to be left alone. As he explains in “Utilitarianism,” “the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but also into that of any kind of wrong. We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience.”<sup>549</sup> In other words, to call someone wrong is to admit that she ought to be punished in some way. When that wrong takes the form of a moral failing, and it is therefore inappropriate for the state to act, it is up to the social sphere to provide sanctions.

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<sup>547</sup> Mill, *A System of Logic, Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation*, 8<sup>th</sup> Ed (New York: Harper & Brothers, Publishers, 1882), pp. 1048. Available at: <http://www.gutenberg.org/files/27942/27942-pdf.pdf>

<sup>548</sup> “Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter. They should be for ever stimulating each other to increased exercise of their higher faculties, and increased direction of their feelings and aims towards wise instead of foolish, elevating instead of degrading, objects and contemplations” (Mill, “On Liberty,” pp. 84).

<sup>549</sup> Mill, “Utilitarianism,” pp. 184.

This principle of the social enforcement of morality can also be found in “On Liberty.” As Mill explains, acts that are injurious to others (i.e. “[e]ncroachment on their rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury”) merit, if not always moral retribution and punishment, at least moral reprobation.<sup>550</sup> Going even further, Mill argues that it is “not only these acts, but the dispositions which lead to them, [that] are properly immoral, and fit subjects of disapprobation which may lead to abhorrence.”<sup>551</sup> Thus, Mill believes that individuals should be punished in the social sphere for any number of asocial (or wicked) character traits, including cruelty, spite, envy, greed, vanity, etc.<sup>552</sup>

This desire for social punishment does not come out of any spitefulness or vengeance on Mill’s part; rather, he argues that people should be socially chastised for their moral failures so that they might improve themselves. Mill believes that social pressures are an extremely powerful and effective force—even more so that state actions—in compelling individuals to modify their behaviors.<sup>553</sup> Even the mere threat of social sanctions is often enough to impact the way that an individual chooses to live her life. As Mill explains, most people are afraid of

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<sup>550</sup> Mill, “On Liberty,” pp. 87. “When... a person is led to violate a distinct and assignable obligation to any other person or persons,” he writes, “the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term” (Ibid., pp. 90).

<sup>551</sup> Ibid., pp. 87.

<sup>552</sup> “Cruelty of disposition; malice and ill nature; that most anti-social and odious of all passions, envy; dissimulation and insincerity; irascibility on sufficient cause, and resentment disproportioned to the provocation; the love of domineering over others; the desire to engross more than one’s share of advantages...; the pride which derives gratification from the abasement of others; the egotism which thinks self and its concerns are more important than everything else, and decides all doubtful questions in its own favor;—these are moral vices, and constitute a bad and odious moral character: unlike the self-regarding faults previously mentioned, which are not properly immoralities, and to whatever pitch they may be carried, do not constitute wickedness” (Ibid.).

<sup>553</sup> “Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself” (Ibid., pp. 8-9).



experiencing the displeasure of their social peers, and will actively avoid it if they are aware how to do so. “Though doing no wrong to any one, a person may so act as to compel us to judge him, and feel to him, as a fool, or as a being of an inferior order,” Mill writes, “and since this judgment and feeling are a fact which he would prefer to avoid, it is doing him a service to warn him of it beforehand, as of any other disagreeable consequence to which he exposes himself.”<sup>554</sup> In other words, by simply laying out societal expectations, a community can generally ensure that its members will try to adopt and conform to them, whether consciously or unconsciously. Thus, communication in the social sphere significantly influences individual moral character.

And by shaping the morality of individuals, interactions in the social sphere also necessarily impact the development of good citizenship. Indeed, Mill admits as much in “The Subjection of Women,” when he writes that the family—the original social community—acts as the first school of citizenship: “The family, justly constituted, would be the real school of the virtues of freedom... It will always be a school of obedience for the children, of command for the parents. What is needed is, that it should be a school of sympathy in equality, of living together in love, without power on one side or obedience on the other.” In this passage, not only does Mill claim that the family unit is a primary forum for learning the rules of citizenship, but he also suggests that this social institution might be structured in ways that encourage character traits that are more conducive to good republican citizenship.<sup>555</sup>

It is important to remember that Mill is not simply engaged in a descriptive pursuit, but a normative one as well.<sup>556</sup> As he explains in *A System of Logic*, the science of ethology should not

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<sup>554</sup> Ibid., pp. 86.

<sup>555</sup> For a more elitist reading of Mill’s views on education, see Maurice Cowling, *Mill and Liberalism*, Second Edition (New York: Cambridge University Press, 1990).

<sup>556</sup> See George R. Wright, “A Rationale from J. S. Mill for the Free Speech Clause,” in *The Supreme Court Review*, Vol. 1985 (1985), pp. 149-178: “The end is social progress through individual character development. Without suggesting, of course, that good character should generally be legally enforced, Mill believed that character could be better or worse, higher or lower, and his approach to free speech is inseparable from this assumption” (pp. 158); See also Zivi, “Cultivating Character”: “His point is less to construct impermeable barriers between

only look at how characters are formed, but should also attempt to show how to build the kinds of citizens that serve social ends: “When the circumstances of an individual or of a nation are in any considerable degree under our control, we may, by our knowledge of tendencies, be enabled to shape those circumstances in a manner much more favorable to the ends we desire, than the shape which they would of themselves assume. This is the limit of our power; but within this limit the power is a most important one.”<sup>557</sup> The circumstances to which Mill refers in this passage are varied, but he would certainly agree that social arrangements can and should be manipulated in order to create good citizens.

One way that Mill thinks social institutions can be structured to encourage good citizenship is by promoting an atmosphere of free speech. As Harry Clor explains, “[w]hat is most interesting about Mill’s case is the centrality of its concern for the development of human character; the crux of the argument is that liberty promotes better human beings.”<sup>558</sup> A standard of freedom of speech, Mill believes, encourages individuals to communicate with one another in the social sphere, thus enabling them to cultivate characters that are active, inquisitive, thoughtful, rational and willing to speak up against authority and custom.<sup>559</sup> Free and open social speech also encourages mental acuity and intellectual curiosity, both of which are highly valued by Mill.<sup>560</sup> And, of course, all of these character traits are not only goods in themselves, but they are also necessary for citizens to possess if they are to engage in the discovery of truth and the push towards social progress that Mill aims for.

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individuals and society than it is to distinguish the kinds of social arrangements that may retard individual development from those that might cultivate character more favorably” (pp. 54).

<sup>557</sup> Mill, *A System of Logic*, pp. 1055.

<sup>558</sup> Harry M. Clor, “Mill and Millians on Liberty and Moral Character,” in *The Review of Politics*, Vol. 47, No. 1 (January, 1985), pp. 4.

<sup>559</sup> See Andrew Valls, “Self-Development and the Liberal State: The Cases of John Stuart Mill and Wilhelm Humboldt,” in *The Review of Politics*, Vol. 61, No. 2 (Spring 1999), pp. 253.

<sup>560</sup> As Hirschmann explains, Mill “loathes the mediocre masses who conform to common opinion and fail to think for themselves, for this makes way for the antithesis of individual liberty, namely the tyranny of the majority” (Hirschmann, *The Subject of Liberty*, pp. 63-64).

Freedom of speech in the social sphere does not only create citizens that are likely to be good at accessing truth, however. Just as importantly, Mill believes that these communicative interactions ultimately encourage individuals to become compassionate, unselfish and interested in protecting the greater good. By engaging with others at a social level, he explains, individuals come to associate their own interests with the interests of the community.

So long as they are co-operating, their ends are identified with those of others; there is at least a temporary feeling that the interests of others are their own interests. Not only does all the strengthening of social ties, and all healthy growth of society, give to each individual a stronger personal interests in practically consulting the welfare of others; it also leads him to identify his *feelings* more and more with their good, or at least with an even greater degree of practical consideration for it. He comes, as though instinctively, to be conscious of himself as a being who *of course* pays regard to others. The good of others becomes a thing to him naturally and necessarily to be attended to, like any of the physical conditions of our existence.<sup>561</sup>

Thus, individuals who engage in social speech become the kinds of good republican citizens who act and think in terms of the collective good, not just their own immediate, individualistic whims.

And this is extremely important to Mill's conception of morality. Mill considers selfishness to be one of the greatest human vices, and relates it to the lower pleasures. An association between one's individual good and the good of all, on the other hand, is Mill's standard for utility: "[T]he utilitarian standard... is not the agent's own greatest happiness, but the greatest amount of happiness altogether; and if it may possibly be doubted whether a noble character is always the happier for its nobleness, there can be no doubt that it makes other people happier, and that the world in general is immensely a gainer by it."<sup>562</sup> In other words, when an individual values the good of others above her own, overall happiness in the world increases. And although it may not,

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<sup>561</sup> Mill, "Utilitarianism," pp. 165.

<sup>562</sup> *Ibid.*, pp. 142.

in every instance, increase the happiness of the individual who may be sacrificing her immediate wants for the good of the community, Mill does seem to think that it will contribute to that individual's ability to be happy in the long run.<sup>563</sup>

Furthermore, not only is a community-minded attitude good for the moral health of the individual, but it also highly conducive to good republican governance. As Mill explains in "Considerations on Representative Government," a successful polity depends on the virtuosity of its citizens. "If we ask ourselves on what causes and conditions good government in all its senses, from the humblest to the most exalted, depends," he writes, "we find that the principle of them, the one which transcends all others, is the qualities of the human beings composing the society over which the government is exercised."<sup>564</sup> When a state contains good citizens, who value the good of all, it can rest assured that those individuals will make political choices that benefit its long-term success.

Thus, Mill believed that it was extremely important—not only to the individual, but also to the state—to cultivate republican virtue and combat selfishness among citizens. In fact, as Joseph Hamburger explains, "[s]o great was his wish to stamp out selfishness that the achievement of moral reform coexisted with and sometimes superseded individual liberty."<sup>565</sup> And it was as part of this endeavor that Mill developed his theory of freedom of speech.

In sum, Mill's statements on the social can be used to enhance the theory of freedom of speech that he presents in "On Liberty." It may be true that public, political speech makes the most obvious contribution to progress and the public good by advancing the search for political truths, but it is difficult to say that social speech does not also contribute to this process.

Furthermore, as I explain, the pursuit of truth is not the primary Millian justification for freedom of

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<sup>563</sup> In "Utilitarianism," Mill states that people need two things to be happy: 1) a feeling of community and 2) mental cultivation. Both of these goods can only be fully achieved through social interactions. See *ibid.*, pp. 144-145.

<sup>564</sup> Mill, "Considerations on Representative Government," pp. 225.

<sup>565</sup> Joseph Hamburger, *John Stuart Mill on Liberty and Control* (Princeton: Princeton University Press, 2001), pp. 133.

speech. Freedom of speech is important to Mill in that it promotes social progress. To the extent that social speech not only contributes to the pursuit of truth, but also helps individuals develop the character traits that make for good citizens (i.e. inquisitiveness, compassion, selflessness, etc.), it serves an important role in achieving that end.

#### **IV. Conclusion:**

In this chapter, I have explored the two most oft-quoted classical theorists of freedom of expression, and the so-called fathers of the Anglo-American free speech tradition: John Milton and John Stuart Mill. I have shown that, while both theorists certainly do value political speech about public ends, they both also have a clear understanding of the political implications of informal, social communication.

In "Areopagitica," Milton argues that freedom from prior restraint in publishing is necessary because it leads to the development of good character. People must have the opportunity to confront both good and evil ideas in order for them to be able to freely choose the good, and thus be considered truly virtuous. Milton suggests that this may occur in any and all spheres of human interaction, including (and perhaps especially) the social. Likewise, it is evident throughout Mill's work that he views the social as inextricably entwined with both individual and political development. It is through social interaction and communication, Mill argues, that we both discover truth and also cultivate good citizenship characteristics. By engaging in free and open speech in civil society individuals develop character traits (i.e. intellectual curiosity, distrust of authority and assertiveness) which encourages them to think and act in ways that promote social progress. They also learn to see the common good and to identify their own good with that of the community. This selfless, community-minded mentality is a vital element of any functioning republic.

Unfortunately, as discussed in Chapters Two and Three, as contemporary theorists of speech have taken up Milton and Mill's writings, their references to social communication have often been lost or overlooked. Specifically, deliberative democratic and legal theory tend to utilize Milton and Mill to emphasize the importance of public, political speech while (explicitly or implicitly) diminishing the role of social speech. Orthodox deliberative democrats restrict themselves to studying only that speech, which achieves deliberative ends. Although deliberative democratic theories vary considerably, they all share a vision of deliberation that emphasizes values such as rationality, perfect information, politeness, public significance and a shared goal of consensus. As these traits are, by and large, uncharacteristic of social speech, such theories rarely explicitly address the everyday, casual conversations that define most human interaction. Similarly, legal theorists fail to consider social speech to the extent that they tend to limit their interest to communication that either encourages democratic self-governance or that which will bring about truth and progress. As a result, they overlook social interactions and focus on those speech activities that clearly engage issues of public importance.

This does not necessarily need to be the case, however. In Chapter Five, I will draw from the social aspects of Milton and Mill's theories—as well as numerous other sources in philosophy, psychology, communications, etc.—in order to develop my own political theory of social speech.

## CHAPTER 5

A THEORY OF SOCIAL SPEECH: THE FOUR MECHANISMS THAT TRANSFORM  
EVERYDAY TALK INTO POLITICAL ACTION

*“The greater the multiplicity of small affairs, the more do men, even without knowing it, acquire facility in prosecuting great undertakings in common.”*

- Alexis de Tocqueville, *Democracy in America, Vol. II*<sup>566</sup>

*“Can a group that comes together initially sharing only jokes and consumer takes ever become an incubator of citizenship, of the sort that Aristotle and de Tocqueville described? There is good reason to think so...”*

- Nina Eliasoph, *Avoiding Politics*<sup>567</sup>

As I have explained in the previous chapters, despite their reliance upon modern theorists who espouse the political value of social interactions and communication (i.e. John Milton and John Stuart Mill), deliberative democratic theorists and American legal theorists have mostly ignored or discounted day-to-day, informal conversation when developing their justifications for freedom of speech. The result has been an overall weakening of these theories. Not only do deliberative democratic and American legal theories fail to represent the empirical realities of speech, but they also miss out on the political implications of an entire sphere of communication – social speech.

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<sup>566</sup> Alexis de Tocqueville, *Democracy in America: Volume II*, Henry Reeve (trans.) (New York: D. Appleton and Company, 1899), pp. 602.

<sup>567</sup> Eliasoph, *Avoiding politics: How Americans produce apathy in everyday life* (New York: Cambridge University Press, 1998), pp. 87-88.

As I show throughout this project, casual, quotidian communications represent the majority—if not the entirety—of what most liberal democratic citizens understand as speech. And this is not likely to change any time soon. As technology has evolved and communicative norms have changed, a greater portion of communication seems to be characterized by informal, social speech than ever before. Specifically, with mass communication replacing more classic models of face-to-face interaction, the informal, seemingly apolitical speech that is indicative of these high-tech social spaces has come to play a larger role in the lives of average citizens. Furthermore, as the distance between the least and the most advantaged Americans has increased in recent decades, the desire to retreat within the private and social spheres seems to have increased as well. Thus, while social speech has always existed—in homes, coffee shops, etc.—it is becoming an increasingly dominant form of communication. So by limiting their focus only to legal or political forms of speech, deliberative democratic and legal theorists ultimately end up excluding a great deal of human interaction.

The failure of deliberative democratic and American legal theories of speech to accurately represent the full breadth of communicative experiences is not merely an empirical problem, however. The lack of attention to social speech means that contemporary theories of speech also frequently omit what Lawrence R. Jacobs, Ray Lomax Cook and Michael X. Delli Carpini refer to as the “indirect effects of discursive participation on the public policy process.”<sup>568</sup> Too often, contemporary theorists overlook social conversation as a political force because they are overly focused on identifying concrete political outcomes.<sup>569</sup> But there are other, more subtle ways in which social speech can and does affect liberal democratic citizenship and political

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<sup>568</sup> Lawrence R. Jacobs, Ray Lomax Cook and Michael X. Delli Carpini, *Talking Together: Public Deliberation and Political Participation in America* (Chicago: The University of Chicago Press, 2009), pp. 87.

<sup>569</sup> Note that social speech does often result in concrete political outcomes. As Robert Wuthnow’s study of small group discussions shows, participation in informal discursive groups is positively correlated with an increase in time and money that an individual devotes to organizations committed to the issues under discussion. See Robert Wuthnow, *Sharing the Journey: Support Groups and America’s New Quest for Community* (New York, Free Press, 1994).



outcomes. In particular, even allowing that certain aspects of identity may be genetically or biologically determined, one's experiences of social speech helps to forge her political identity from early childhood. This political identity then goes on to shape all of an individual's political choices in life, from her interest in particular public policy issues to her willingness to participate in the electoral process to her conception of what constitutes her community. Thus, not only does social speech facilitate or spur traditional political action and expression, but it also represents political action in its own right. And by not adequately addressing social speech, many prominent contemporary theories of speech fail to capture the full range of political action.

In this chapter, I seek to address these weaknesses and incoherencies by supplementing deliberative democratic and American legal theories of speech with my own theory of speech – one that addresses and incorporates that speech, which is commonly found in the social sphere. First, I provide a brief overview of what I mean by “speech” and, specifically, “social speech.” Next, I develop and expand upon my argument that, when individuals communicate in civil society, discussing intimate topics and areas of shared interest, they are actually serving distinct and valuable political ends. Specifically, I identify and describe four interrelated mechanisms that connect social speech to political outcomes: 1) Informal communication is a mechanism for creating the kind of character traits that make better or worse democratic citizens; 2) This form of speech builds social capital and trust (based on mutual interests, hopes and objectives), which can make politics run smoother among those to whom it applies; 3) Social interactions impart democratic knowledge, teaching people what it means to be citizens of their particular communities; and 4) More than any other kind of speech, social speech ties individuals together emotionally and helps them build the cognitive borders of their communities. Depending on the form and content of social speech, I argue, each of these mechanisms may have positive or negative implications for the political health of a community. Finally, at the end of this chapter, I discuss two discrete advantages of a theory of social speech over those theories that focus *primarily* on political and public speech. Namely, I argue that a theory of social speech not only

provides a more complete, inclusiveness picture of human communication (by including such forms of speech as rhetoric, testimony and story-telling), but it also able to address many of the problems of inequality that plague other contemporary theories of speech.

It is important to note that I do not mean to explore social speech for its own intrinsic goodness. Instead, I am primarily concerned with the way that speech—in all its forms and locations—can inform democracy in both positive and negative ways. This is a goal that I share with many of the classical and contemporary theorists I discuss in the previous chapters.

#### **I. What is social speech? A brief review.**

As I explained in Chapter One, by speech, I am referring to all forms of conscious, deliberate communication, including: spoken words, written words, actions, etc. What matters for this theory's understanding of speech is that individuals are communicating and engaging *with* one another. They are neither being talked *at* nor are they speaking to themselves.

Second, by *social* speech, I am referring to both the content and context of speech. Social speech is extremely inclusive in terms of its content. It encompasses subjects that are frequently considered too personal for the public sphere, and are more appropriate to casual conversations between friends, family, acquaintances and colleagues. While subjects that directly deal with public issues may be included, social speech generally consists of more personal or social issues. In other words, social speech addresses topics that are generally considered trivial, sentimental, emotional, etc., and may be better expressed through such forms as rhetoric, story-telling, etc., rather than through ideal rational deliberation.

In terms of context, social speech is most commonly associated with civil society. Social conversations occur between *private* individuals, and they generally take place outside of the traditional public sphere and formal political institutions (i.e. Congress, town halls, political

programs on television). To the extent that this kind of communication does occur within the public sphere, it is only when political actors are interacting outside of their official capacities that they can be said to be engaging in social speech.<sup>570</sup> Most often, however, when thinking about what constitutes social speech, one imagines the kind of interactions that take place in private, semi-private or social locations, such as coffee shops, sports bars, the Internet and the kitchen table.

In short, social speech is how private people share their thoughts, feelings and opinions with one another. It includes everything from rivals arguing over a sporting event to neighbors bragging to one another about their children's latest accomplishments to strangers posting on an online message board to the familial advice doled out around a kitchen table. The only interactions that this theory of social speech excludes are those that are most frequently studied by political scientists: public deliberation concerning political issues.<sup>571</sup>

## II. The four democratic mechanisms of social speech:

Now that I have clarified what I mean when I refer to social speech, I turn to a discussion of how social speech actually influences liberal democratic citizenship and political outcomes. As stated above, I have identified four related mechanisms through which, I believe, informal, everyday conversation not only impacts traditional political action, *but also actually constitutes political action*. These mechanisms can be defined up as follows:

1. Character development
2. Social capital formation

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<sup>570</sup> However, social speech also often serves as a precursor to more traditional political actions. See Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 2003): "World leaders meeting at a summit will frequently devote an initial session to getting to know one another in very much this [informal, personal] fashion, before they get down to the business of bargaining and exchanging" (pp. 184).

<sup>571</sup> See Ch. 1 for a diagram depicting social speech.

3. Cultural and political training
4. Boundary forging

While there is a significant amount of overlap between these four mechanisms, I argue that they each signify a unique and discrete function of social speech. Mechanism #1: Character development, for instance, refers to social speech's ability to influence and breed character traits that make for better or worse liberal democratic citizens. On the other hand, Mechanism #2: Social capital formation concerns the tendency of social speech to establish conditions of social capital and trust within a community. And Mechanism #3: Cultural and political training refers to the training in one's unique political culture that takes place when an individual engages in social speech. Finally, Mechanism #4: Boundary forging refers to the effect that social speech has on construction of boundaries between imagined communities.

In this section, I introduce and elaborate upon each of these four mechanisms. I pay particular attention to the ways by which each mechanism may result in either a positive or a negative impact on liberal democratic citizenship and political outcomes, depending on the form and content of social speech. Later, in Chapter Six, I apply this framework to three examples of social speech in order to illustrate how these mechanisms function in real world conditions.

#### *A. Mechanism #1: Character development*

It is important to remember that character is not stagnant and it is not developed in a vacuum. Rather, as an individual goes through life, her character is in a state of constant evolution, responding and adapting to her relationships with others and her lived experiences. In other words, human beings are socially constructed – they develop their individual personalities

largely as the result of their interactions with the world around them.<sup>572</sup> And as verbal animals, many of these formative human interactions take place through speech. As the primary means through which individuals express themselves, relate to one another and formulate ideas, speech plays a particularly powerful role in character development. This is true regardless of the content of speech or the location where it takes place. All speech—from the most traditionally political to the most informal and social—is capable of leaving its mark on the characters of all those who engage in it.

Social speech, however—as compared to the kind of public, political deliberation that usually defines theories of freedom of speech—represents an especially influential mechanism for character development. This is the result of three defining characteristics of social speech: intimacy, inescapability and interactivity. First, because social speech both comes from within an individual's own community (involving her neighbors, peers, friends, coworkers, etc.), and also includes personal, private topics of conversation, it tends to be experienced as an intimate act. The relatively high degree of intimacy inherent in social speech means that such interactions are likely to result in a deeper, more profound impact on character development than more formal, removed expressions of traditionally political speech. Second, social speech represents a constant influence, which is impossible to escape. It can take place anywhere and at any time, doggedly following people throughout their daily lives. The only way for an individual to truly escape the influence of social speech is for her to avoid others altogether. But as long as she does engage with the community, the persistent, inescapable power of social speech will continue to guide the progress of her character on a daily basis. Finally, social speech is, by nature, interactive (as opposed to passive), which largely accounts for its especially educative

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<sup>572</sup> See Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton: Princeton University Press, 2002). As Cohen explains, this is a dynamic process, involving the interaction between external, social forces and internal, individual choices. “While people do not invent the traditions, patterns or norms into which they are at first socialized,” she writes, “as they become individualized they do invent and reinvent the unity of their lives and their unique identities (of course in interactive, communicative processes)” (Ibid., pp. 49).

effects. Unlike traditional forms of political speech, in which individuals tend to act as mere *recipients* of information, social speech encourages them to serve as *active participants* in the process of communication. This participatory aspect of social speech makes its impact on character development especially potent.

These three characteristics of social speech—intimacy, inescapability and interactivity—explain why individuals tend to absorb the experience of informal, everyday conversation more fully than other forms of communication. After all, building character is an inherently intimate task. It goes straight to the heart of human development. So not only are the messages that are expressed through social speech more enduring, but the lessons learned through participation also tend to be more impactful and durable. Thus, while social speech may, at first glance, appear benign, it actually exerts significant influence on the characters of all those that it touches.

Many political theorists have recognized the potential for social interactions, in particular, to influence individual character development. Indeed, the social constructivist argument for character development—emphasizing the special role played by informal, everyday communication—dates at least as far back as the fathers of free speech theory: John Milton and John Stuart Mill. For both Milton and Mill, however, it is not enough to simply observe that social interactions influence character development. Rather, both theorists, noting this relationship, aim to structure institutions and social arrangements in such a way as to promote the development of politically advantageous character traits.

To briefly summarize my arguments in Chapter Four, Milton and Mill argue that one's character is born out of the interaction between the individual and society. First, Milton believes that developing one's character is simultaneously a private/intimate and a social experience. Focusing on the importance of building a "virtuous" character, he argues that people cannot learn virtuosity entirely on their own. Instead, Milton claims that virtuous character traits can only be born out of the interaction between ordinary social activities and private reflection. As individuals

respond to the stimuli and people around them, they learn to distinguish good from bad, virtuous from evil. This sorting process, to the extent that it is performed correctly, is what makes a good person. But in order to make these determinants, individuals must first be given the opportunity to expose themselves to everyday interactions and social conversations.<sup>573</sup> Similarly, Mill believes that one's character is a function of both personal and social influences. Individuals, he argues, must communicate with one another in order to build the rational, active, selfless character traits that are necessary for a well functioning republican government aimed at social progress. This is true for speech in the political realm, but it is also true for more informal conversations as well. As Mill explains, even in our most intimate affairs, it is difficult for a person to make good decisions when she has no other advice or perspectives from which to draw than her own; rather, individuals need discussion in order to make the most of their lived experiences.

While both Milton and Mill tend to focus on the positive potentialities of social interactions, it is important to note that neither theorist is arguing that just any social discussion will suffice for the purpose of developing *politically advantageous character traits*. While all social speech has the capacity to significantly affect the personalities of those who engage in it, those effects may be either positive or negative from the perspective of particular political arrangements. After all, certain forms of state require certain kinds of citizenries (with a prevalence of certain character traits) in order to function properly. And different experiences of social speech—depending on its form and content—can result in different kinds of character traits, each of which may be more or less beneficial in an individual political context.

For the remainder of this section, I examine the impact of social speech on character development within the context of a liberal democratic state. I show that, depending on its

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<sup>573</sup> As I discussed in Chapter Four, at the very least, Milton's argument against *a priori* censorship in *Areopagitica* indicates that he would not support efforts by the state to limit exposure to social communication. If, as he claims, the free publication of books is required for individuals to become good people (because it exposes them to new ideas), and if everyday interactions serve the same purpose as books, it seems fair to conclude that Milton's argument for freedom of speech should extend to the private and social spheres.

content and form, social speech will have a tendency to mold the personalities of those who engage in it in ways that may work to either the benefit or the detrimental of all members of a liberal democratic community. I begin by looking at the kinds of character traits that are required of liberal democratic citizens in order to maintain a well functioning political system (e.g. confidence, courage, curiosity, etc.), and I consider the ways that a certain type of social speech (i.e. respectful, inclusive, encouraging social speech) can be used to help achieve these characteristics among ordinary individuals. I then end this section by addressing the negative potentialities of social speech from the perspective of character development. Namely, I consider the argument that divisive, derogatory social speech may result in character traits that are anathema to liberal democratic ends (e.g. aggressiveness, passivity, insecurity, etc.).

First, however, I would like to reiterate the point that different forms of state thrive with different types of populaces. In a liberal democratic state, for example, qualities such as self-control, respect, selflessness, curiosity, engagement and a willingness to question authority/custom are required of citizens if they are going to be capable of and willing to properly perform the political functions that liberal democratic states demand of them (e.g. voting, protesting, providing campaign contributions). More generally, if a liberal democratic system is to be successful, it must be populated by citizens that are endowed with both a Miltonian “virtuous” character, and also a Millian “active” character.

As Harry M. Clor explains in *Public Morality and Liberal Society: Essays on Decency, Law, and Pornography*, personal virtuosity is necessary for liberal democracies in two ways.<sup>574</sup> First, because such a regime is founded upon the notion of self-governance, democratic rulers must expect that citizens will, at least on occasion, govern themselves. In these instances, Clor argues, the regime “needs reasonable assurance that most people most of the time will be capable of self-control and [will be] prepared to desist from, at least, the grosser forms of

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<sup>574</sup> See Harry M. Clor, *Public Morality and Liberal Society: Essays on Decency, Law, and Pornography* (Notre Dame: University of Notre Dame Press, 1996).



incivility.”<sup>575</sup> In other words, before they can entrust their citizens with meaningful political power, liberal democratic states must be confident that they will generally behave with restraint and respect towards their compatriots. Second, and “more directly political,” Clor claims that “a republican polity needs citizens of respectable character because vital public policies affecting everyone will be determined by the consent of those citizens.”<sup>576</sup> Thus, he believes that liberal democratic citizens must be capable of following Immanuel Kant’s categorical imperative – they must view one another as ends in themselves, and not simply as means to an end.<sup>577</sup> “Our kind of polity depends substantially upon mutual respect among citizens,” Clor explains, “persons who view each other pornographically, or as mere objects and opportunities for self-gratification, are unfit for any sustained cooperation in the conduct of civil affairs.”<sup>578</sup> In other words, it is not enough for liberal democratic citizens to be virtuous in the sense of recognizing “good” and “evil,” but they must also maintain a sense of republican virtue, understanding that the general welfare is more important than (or, more accurately, constitutive of) their private self-interests.

Virtuousness only represents one half of good liberal democratic citizenship, however. In order for individual citizens to engage in a participatory political system, they must also display an active character. In his essay, “Free Speech and Good Character: From Milton to Brandeis to the Present,” Vincent Blasi supports this viewpoint, suggesting that successful liberal democratic states must possess an active citizenry, one characterized by a willingness to get involved in community affairs, to take risks and to question authority.<sup>579</sup> And not only must liberal democratic citizens be willing to participate actively in the political process, but they must also be capable of doing so respectfully and effectively. These positive character traits—which Blasi claims are

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<sup>575</sup> Ibid., pp. 68.

<sup>576</sup> Ibid.

<sup>577</sup> See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Mary Gregor (trans.) (New York: Cambridge University Press, 1997).

<sup>578</sup> Clor, *Public Morality and Liberal Society*, pp. 68.

<sup>579</sup> See Vincent Blasi, “Free Speech and Good Character: From Milton to Brandeis to the Present,” in *Eternally Vigilant: Free Speech in the Modern Era*. Lee C. Bollinger and Geoffrey R. Stone (eds.) (Chicago: The University of Chicago Press, 2002), pp. 86-90.

developed as the consequence of living in a society that promotes a general respect for freedom of speech—may be useful across a wide range of political regimes, but they are *especially* necessary for liberal democratic states. This is due to three elements of governance, he argues, which, while not exclusive to democratic states, are essential to their healthy functioning: 1) checking; 2) compromise; and 3) adaptation.<sup>580</sup>

First, Blasi argues that democracy's system of checks and balances, because it presupposes the potential for abuse by powerful actors, only works if "citizen guardians" can boast four active character traits: independent mindedness, distrust of authority, perseverance and the ability to judge on the grounds of evidence and argument. The first two character traits— independence of mind and distrust of authority—are important protectors against government abuse because "abuses can usually be rationalized, excused, or ignored by observers who are temperamentally inclined not to question their inertia-driven perceptions of regularity and good faith."<sup>581</sup> Citizens who are independently minded and skeptical of authority, however, are less likely to blindly accept the choices made by state actors. Rather, such individuals are prone to vigilance and suspicion regarding government action. When these independent, mistrustful democratic citizens do find that wrongdoings have occurred, it is important that they then be willing to speak out against the state. That is why Blasi also suggests that perseverance is essential to civilian checks on government action. "Miscreant officials seldom go quietly once their transgressions are brought to light," Blasi explains.<sup>582</sup> In order to affect changes against corruption, citizens must be willing and able to fight persistently and tirelessly against those in power, many of who may have considerable resources available to them in order to protect their

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<sup>580</sup> In addition to these three "collective endeavors"—checking, compromise and adaptation—Blasi identifies three other capacities that are *specifically* necessary for the proper functioning of democratic states: 1) willingness to participate in collective acts; 2) responsibility for social outcomes; and 3) collective energy, resilience and aspiration. Each of these essential democratic traits, Blasi argues, stems from the "ethic of distrust" that speech tends to foster. See *Ibid.*, pp. 90.

<sup>581</sup> *Ibid.*, pp. 87.

<sup>582</sup> *Ibid.*

position. They must also be able to appeal to the rationality of their fellow citizens. As Blasi writes, “a populace accustomed to judging on grounds of evidence and argument rather than preconception or loyalty is more likely to heed the whistleblower.”<sup>583</sup> Again, when citizens are trained to blindly follow their political leaders, they are less likely to take note of rebellious voices.

Second, Blasi highlights the role that compromise plays in achieving collective ends within a democratic state, and argues that it takes a certain kind of citizen to accept and work within such a cooperative system of governance. When citizens lack hopefulness, self-confidence, and a sense of perspective, democratic compromise is unachievable. “[C]ompromise is built on hopes,” Blasi explains. “It is easier to stay engaged, to find value in that half a loaf, if tomorrow may bring change for the better.”<sup>584</sup> He also adds that compromise tends to be contingent upon “the self-confidence and sense of perspective of those who are asked to settle for less.”<sup>585</sup> Those who lack these traits are less capable of achieving meaningful compromise with others. And where the ability to compromise effectively is lacking, such individuals are often unable to properly negotiate their differences. This may promote feelings of resentfulness of alienation, resulting in serious negative repercussions for the democratic well being of all.<sup>586</sup>

Third, Blasi emphasizes the importance of liberal democratic citizens having a “dynamic frame of reference” and a general receptivity to change in order to be adaptable to changing circumstances.<sup>587</sup> Good judgment and creativity are also essential when navigating a rapidly changing environment. Indeed, in a constantly evolving world, “heavy reliance on tradition or authority” will only get an individual so far; instead, “[w]hat is needed is perceptiveness, boldness, independence of mind, the willingness to experiment, flexibility—in short, the capacity to make

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<sup>583</sup> Ibid.

<sup>584</sup> Ibid., pp. 88.

<sup>585</sup> Ibid.

<sup>586</sup> Ibid., pp. 87-88.

<sup>587</sup> Ibid., pp. 88.

choices.”<sup>588</sup> And while an easy adaptability is useful for members of all political states, Blasi claims that the ability to adapt easily is especially necessary of democratic citizens.<sup>589</sup>

Fortunately, social speech may serve as a useful mechanism for establishing all of these democratically advantageous character traits among private citizens. As described above, individuals develop their character traits (at least in part) through regular participation in social speech activities. Through the process of communicating freely with other community members, individuals are likely to learn useful social skills, such as cooperation, openness and empathy. And when social speech is characterized by positive, respectful and community-minded dialogue, these individuals are also likely to develop a number of corresponding democratic character traits, including: confidence, independence of judgment, willingness to take initiative, diligence, courage, self-awareness, resilience, respect for others, openness to new ideas, curiosity, creativity, distrust of authority and respect for empirical evidence.<sup>590</sup> While these virtuous and active character traits may not be sufficient to constitute good democratic citizenship, they are necessary in liberal democratic societies that expect their citizens to be involved, compassionate and passionate. And as social speech participants develop a habit of interacting with others and receiving positive, nurturing feedback regarding those interactions, they gain both the strength and courage to engage with the wider political world, as well as the capacity to do so according to liberal democratic values.

Social speech does not always result in the formation of these positive democratic character traits, however. Although some social speech is likely to result in individual characteristics that are advantageous for liberal democratic governance (e.g. confidence, mutual

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<sup>588</sup> Ibid., pp. 88-89.

<sup>589</sup> It is unclear, however, why Blasi believes that adaptability is more important in a liberal democratic state than any other form of political community.

<sup>590</sup> This list of character traits borrows from both Vincent Blasi’s account of the relationship between a broad policy of freedom of speech and the development of democratic characters, as well as Steven Heyman’s critique of that argument. For more information, see *ibid.*, pp. 84; Steven Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008), pp. 60.

respect and perseverance), it is important to emphasize the possibility that social speech can potentially result in character traits that make participation in democratic politics more difficult. When social speech is characterized by divisive and demeaning messaging, for example, any positive outcomes resulting from a policy of freedom of speech may be virtually nullified. Rather than grow into either the “virtuous” beings that Clor describes or the “active” characters that Blasi envisions, individuals who regularly participate in this kind of negative social speech may be apt to grow into adults who are ill equipped for participation in liberal democratic political life.

In his seminal work, *The Nature of Prejudice*, Gordon W. Allport suggests a number of potential negative effects on individual character, which can result from exposure to mean, harassing speech, especially when it takes place within civil society. These include: ego defenses, obsessive concern, denial of membership, withdrawal and passivity, clowning, strengthening in-group ties, slyness and cunning, identification with dominant group (self-hate), aggression against own group, prejudice against out-groups, sympathy, fighting back (militancy), enhanced striving, symbolic status striving, neuroticism, the self-fulfilling prophecy.<sup>591</sup> While these psychological responses to negative social speech may initially appear somewhat disconnected, each item in Allport's list can be grouped into one of three categories of character traits that are detrimental to liberal democratic governance: 1) aggressiveness; 2) isolationist; and 3) insecurity.

As Allport explains, when an individual feels herself to be either rejected or attacked within her social sphere, she “is not likely to develop dignity and poise;” rather, she tends to develop defense mechanisms and a defensive character.<sup>592</sup> “Like a dwarf in a world of giants,” Allport explains, “[s]he cannot fight on equal terms.”<sup>593</sup> Thus, such an individual may respond to social assaults by becoming one of three types of people. She may grow aggressive, lashing out

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<sup>591</sup> See Gordon W. Allport, *The Nature of Prejudice* (Cambridge, MA: Perseus Books, 1979), pp. 142-160.

<sup>592</sup> *Ibid.*, pp. 142.

<sup>593</sup> *Ibid.*

against the community that has rejected her. She might “cheat the giants when [s]he can,” thus allowing her to experience some fleeting revenge, or she might “in desperation occasionally push some giant off the sidewalk or throw a rock at him,” in order to release frustration.<sup>594</sup>

Alternatively, she may respond to her social circumstances by becoming introverted and isolating herself, either as an individual or within a community of equivalent social rejects. In other words, she might withdraw, “speaking little to the giants and never honestly.”<sup>595</sup> Finally, this individual might react to negative social speech by growing overly insecure. She might eventually come to absorb the message that she is unworthy and unwelcome in society, and thus, she might either “begin acting the part that the giant expects,” or adopt her “master’s own uncomplimentary view of dwarfs.”<sup>596</sup>

When an individual feels like she has been deemed unworthy of being treated with equal respect and dignity by her peers, she is likely to start to doubt her own autonomy and personal efficacy. This lack of confidence makes it unlikely that such an individual will believe that she has the right (much less the power) to try to determine political outcomes. She may not even have the desire to cooperate and engage with a community that has rejected her. Or she may choose to participate, but with destructive militancy and anger. Regardless of which path she takes, an individual on the receiving end of negative social speech is likely to have a more difficult time engaging in traditional political activities than one who has enjoyed positive, encouraging social speech. After all, aggressiveness, isolationism and insecurity, while they may be reasonable responses to negative social speech, are not conducive to participatory, self-governing political procedures.

It is important to note, however, that I am not arguing that the type of social speech one is exposed to is either perfectly or entirely determinative of her character. Certain individuals will be

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<sup>594</sup> Ibid., pp. 142-143.

<sup>595</sup> Ibid., pp. 142.

<sup>596</sup> Ibid., pp. 143.

able to shrug off negative social speech and go on to develop character traits that are highly conducive to liberal democratic political systems; others may experience nothing but kind, nurturing social speech and still end up as introverted, passive or abrasive individuals. Indeed, character development is surely influenced by a number of factors, only one of which is social speech. However, among those factors, social speech, as an ongoing reflection of one's entire social environment, is likely to have an especially influential effect on form that her character takes.

*B. Mechanism #2: Social capital formation*

Social speech does not just affect the personal characteristics of individuals; it also influences the ways in which they relate to one another. Thus, in this section, I consider a second mechanism by which social speech tends to affect liberal democratic citizenship and political outcomes: social capital formation. First, I argue that, by engaging in positive, encouraging social speech, individuals may amass social capital, which then facilitates cooperative and coordinated democratic action. Essentially, when individuals learn to trust, respect and empathize with one another through their individual, social interactions, they can then begin to extend those feelings towards their mutual community. In the second half of this section, however, I suggest that this might be an overly optimistic way of looking at social capital formation. As I point out, not all social speech is positive or encouraging. Much of the social speech that an individual will encounter in life is of a nastier, more confrontational nature. In those cases, social speech is more likely to breed distrust than trust, disrespect than respect, and estrangement than empathy. And even when social speech is of a positive nature, the resulting social capital still has its limitations. An individual may transfer her personal feelings of trust, respect and empathy, which she has developed through her social group, to a social capital that applies to a larger community, but the extent of that expansion will always be limited by what she considers to be

her *relevant* community. If her social groups tend to exclude members of particular demographic groups, for example, she is unlikely to think of members of that group as part of her relevant community. She is also, therefore, unlikely to afford them social capital.

To begin, however, I would first like to define the concept of social capital. Robert D. Putnam has famously put forth a theory of social capital that both highlights the role that social interactions play in establishing the generalized trust, respect and empathy, and also emphasizes the importance of these sentiments for the proper functioning of democratic states. In his 1994 article, "Social Capital and Public Affairs," Putnam defines social capital in relation to physical and human capital, claiming that all three types of capital serve as "tools and training that enhance individual productivity."<sup>597</sup> Social capital, however, specifically "refers to features of social organization, such as networks, norms, and trust, that facilitate coordination and cooperation for mutual benefit."<sup>598</sup> In other words, social capital is the set of underlying expectations, faiths and good will that make common action possible.

This social capital, Putnam argues, can be developed in various ways, through any number of social encounters. While his own research often addresses the role that membership in more traditionally political organizations and associations plays in building social capital, importantly, Putnam also finds that participation in informal, social activities increases the amount of social capital present within a given political community. Specifically, he argues that participation in seemingly apolitical social clubs tends to increase social capital significantly. In his Italian experiments, for example, Putnam finds that the political success of a region is highly correlated with not just the overtly political involvement of its citizens, but also with their participation in social organizations, such as "choral societies and literary circles, Lions Clubs,

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<sup>597</sup> Robert D. Putnam, "Social Capital and Public Affairs," in *Bulletin of the American Academy of Arts and Sciences*, Vol. 47, No. 8 (May, 1994), pp. 6.

<sup>598</sup> *Ibid.*, pp. 6-7.



and soccer clubs.”<sup>599</sup> Even membership in a group as benign as a literary club, Putnam claims, is likely to lead to increased political action and awareness. “Intense personal, intellectual, and occasionally even political bonds are forged in these lively discussions,” he claims. “Regular participants become more involved in wider community affairs as well, moving from Dante to Doing.”<sup>600</sup>

The reason for this connection is that, when an individual positively engages with others at a social level, she is not only likely to be acquiring feelings of trust, respect and empathy for those *particular* others, but she is also developing those sentiments *generally*. These generalized feelings of trust, respect and empathy can then be mentally expanded so as to apply to the wider political community. As Robert J. Boeckmann and Tom R. Tyler suggest in their article, “Trust, Respect, and the Psychology of Political Engagement,” discrete, individual feelings of social capital often lead to broad notions of social capital. By participating in community activities, individuals not only come to trust and understand one another, but also the community at large. “When a person engages in activities with members of his or her community,” the authors write, “it leads to a sense of trust that transcends the immediate encounter.”<sup>601</sup> This larger concept of trust, born out of individual actions, then influences one’s political choices.

And it does not matter how small or insignificant a social interaction may appear – each and every instance of social speech provides an opportunity to build social capital. In *Bowling Alone: The Collapse and Revival of American Community*, Putnam cites several seemingly trivial examples of social speech—including “getting together for drinks after work, having coffee with the regulars at the diner, playing poker every Tuesday night, gossiping with the next-door

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<sup>599</sup> Ibid., pp. 8.

<sup>600</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster Paperbacks, 2000), pp. 149.

<sup>601</sup> See Robert J. Boeckmann and Tom R. Tyler, “Trust, Respect, and the Psychology of Political Engagement,” in *Journal of Applied Social Psychology*, Vol. 32 (2002), pp. 2079. See also Kurt Lewin, “Group Decision and Social Change,” in *Readings in Social Psychology*, T.M. Newcomb and E.L. Hartley (eds.) (New York: Henry Holt, 1947), pp. 340-344.

neighbor, having friends over to watch TV, sharing a barbeque picnic on a hot summer evening, even simply nodding to another regular jogger on the same daily route”—in order to make exactly this point, that every social interaction may ultimately come to inform a sense of community trust, respect and empathy.<sup>602</sup> “Like pennies dropped in a cookie jar,” he writes, “each of these encounters is a tiny investment in social capital.”<sup>603</sup> In other words, regardless of what people are saying and where, as long as they continue to talk and engage with one another at a social level, they are inherently contributing towards the trust, respect and empathy that constitute social capital.

Putnam’s theory of social capital can be summed up as follows: As individuals come to associate and communicate with one another at an informal, social level, they are simultaneously developing the wider connections that are necessary within a participatory, democratic form of governance.<sup>604</sup> And because social speech is so ubiquitous—especially as compared to more traditional forms of political speech—it serves as one of the most influential forces in the construction of social capital.

Putnam does worry, however, that, while social speech has always been an important aspect of traditional American life, it has recently become less and less prevalent.<sup>605</sup> He claims that nearly all demographic groups—men and women; urban, suburban and rural; wealthy, poor and middle class; black, white and all other racial groups; northerners and southerners; etc.—

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<sup>602</sup> Putnam, *Bowling Alone*, pp. 93. See also Robert D. Putnam, “Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America,” in *PS: Political Science and Politics*, Vol. 28, No. 4 (December, 1995), pp. 664-683: “Bowling in a league or having coffee with a friend embodies and creates social capital, though these are not acts of political participation” (pp. 665).

<sup>603</sup> Putnam, *Bowling Alone*, pp. 93.

<sup>604</sup> See Putnam, “Social Capital and Public Affairs,” pp. 665. See also Allport, *The Nature of Prejudice*.

<sup>605</sup> Putnam, *Bowling Alone*, pp. 95.

have recently witnessed declining trends in civic engagement.<sup>606</sup> As a result, he believes that social capital has been diminishing as well, thus causing democracy to suffer.

In the years since Putnam published his first articles on social capital, however, many researchers have come to question both his data and his lamentations about the current state of socializing in the United States.<sup>607</sup> Some critics suggest that social interactions may actually be more common now than Putnam admits, pointing out that Americans are still more likely to join voluntary associations than citizens of other nations.<sup>608</sup> Others believe that Putnam may be judging contemporary Americans misleadingly and unfairly, by comparing them to Americans during the boom of civic involvement—which took place in the 1950’s—but was not indicative of any period before or after.<sup>609</sup> And even if Putnam is right, and people truly are engaging in civic organizations less often, several theorists of social capital have pointed out that Americans may still be partaking in civic conversations of a more informal, social nature. Robert Wuthnow, for example, suggests that less structured, more casual associations (e.g. support groups, neighborhood gatherings and spirituals meetings) may have taken the place of the traditional Elks, PTA’s and bowling leagues.<sup>610</sup> And if one were to add “Internet groups” to that list of loosely

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<sup>606</sup> The only “notable exception to this uniformity, however, involves age. In all our statistical analyses,” Putnam writes, “age is second only to education as a predictor of all forms of civic engagement and trust” (“Tuning In, Tuning Out,” pp. 673).

<sup>607</sup> Indeed, even Putnam has, at points, admitted that contemporary Americans do still engage in social activities with remarkable frequency (even if these communications and associations do not occur as often as he would like). See Putnam, *Bowling Alone*, pp. 97.

<sup>608</sup> See Robert J. Samuelson, “Join the Club,” in *Washington Post National Weekly Addition* (April 1996), pp. 15-21; Everett Carl Ladd, *The Ladd Report: Startling New Research Shows How an Explosion of Voluntary Groups, Activities, and Charitable Donations Is Transforming Our Towns and Cities* (New York: Free Press, 1999). See also Paul Dekker and Andries van den Broek, “Civil Society in Comparative Perspective: Involvement in Voluntary Associations in North America and Western Europe,” in *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, Vol. 9 (1998), pp. 24.

<sup>609</sup> See Theda Skocpol, “Unraveling from Above,” in *American Prospect*, Vol. 15 (1996), pp. 20-25; Michael Schudson, “What If Civic Life Didn’t Die?” in *American Prospect*, Vol. 25 (1996), pp. 17-20; Michael Schudson, *The Good Citizen: A History of American Civic Life* (New York: Free Press, 1998).

<sup>610</sup> Robert Wuthnow, *Loose Connections: Joining Together in America’s Fragmented Communities* (Cambridge: Harvard University Press, 1998).

structured, casual associations in which people have been participating, Wuthnow's claims sound even more probable.

Thus, it is likely that, while the form of social interactions may have shifted, its prevalence has not – social speech continues to play an important role in the everyday lives of private citizens. And as such, it influences the development of social capital, thereby resulting significant impacts on democratic politics. For the remainder of this section, I discuss what I consider to be the three facets of social capital—trust, respect and empathy—which, as a product of social speech, come to affect liberal democratic citizenship and political outcomes in both positive and negative ways.

Putnam claims that social capital facilitates political action in at least three ways. Networks of civic engagement, he claims: 1) “foster sturdy norms of generalized reciprocity; I’ll do this for you now, in the expectation that down the road you or someone else will return the favor”;<sup>611</sup> 2) “facilitate coordination and communication and amplify information about the trustworthiness of other individuals”;<sup>612</sup> and 3) embody past success at collaboration, which can serve as a cultural template for future collaboration.<sup>613</sup> All three of these functions essentially boil down to the same claim, however – that social speech teaches individuals to trust, respect and care for one another *enough* so that they can overcome collective action problems and engage in long term, mutually beneficial political activities.

First, trust is an important element of any political system that demands that citizens make personal sacrifices in the short term, in hopes of receiving communal benefits in the long term. In other words, trust helps to alleviate the fear that would otherwise paralyze liberal democratic states. After all, why would a rational individual invest the time and effort into becoming an educated voter if she does not have faith that her compatriots will do the same?

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<sup>611</sup> Putnam, “Social Capital and Public Affairs,” pp. 9.

<sup>612</sup> Ibid.

<sup>613</sup> Ibid., pp. 9-10.

Why would she willingly pay into Social Security as a young adult if she does not believe that others will contribute to these funds when it is her time to collect? Why would she participate in a rally if she thinks that she might be the only one to show up? Trust is what makes it possible for individuals to act against their immediate self-interests, in the expectation that their sacrifices will ultimately be worthwhile.

Thus, trust in one's fellow citizens serves as a facilitator for democratic political action. As James S. Coleman theorizes in "Social Capital in the Creation of Human Capital," where social trust is present, that sentiment is likely to "facilitate productive activity" much in the same way as physical and human capital.<sup>614</sup> As a result, "a group within which there is extensive trustworthiness and extensive trust is able to accomplish much more than a comparable group without that trustworthiness and trust."<sup>615</sup> And, indeed, generalized trust does appear to be positively correlated with participation in traditional political activities. People are more likely to participate in the political process when they have trust in their compatriots. Boechmann and Tyler, for example, find that a generalized sense of trust, developed through social interactions, spurs greater participation in traditional political activities, including voting.<sup>616</sup> More broadly, in *The Civic Culture Revisited*, Gabriel Abraham Almond and Sydney Verba report a reliable association between interpersonal trust and healthy democratic states.<sup>617</sup>

A similar positive relationship has also been found to exist between respect and traditional political action. In communities defined by a general sense of mutual respect, individuals are more willing to cooperate with unknown and potentially distant others. This is true in two respects. First, those who feel respect towards fellow members of their community are

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<sup>614</sup> James S. Coleman, "Social Capital in the Creation of Human Capital," in *The American Journal of Sociology*, Vol. 94, Supplement: Organizations and Institutions: Sociological and Economic Approaches to the Analysis of Social Structure (1988), pp. S101.

<sup>615</sup> *Ibid.*, pp. S101.

<sup>616</sup> Boechmann and Tyler, "Trust, Respect, and the Psychology of Political Engagement," pp. 2079.

<sup>617</sup> Gabriel Abraham Almond and Sydney Verba, *The Civic Culture Revisited* (Newbury Park, CA: Sage, 1989).

more likely to engage in collective action.<sup>618</sup> Second, those who feel as if their community is respecting them and their needs are more likely to not only participate voluntarily in communal affairs, but also to make personal sacrifices in order to aid the group.<sup>619</sup>

Finally, the empathy aspect of social capital plays a significant role in determining democratic outcomes. To the extent that social speech is able to build empathy between members of a community, those individuals are able to understand and appreciate the wants and needs of one another. This insight then colors political action.

Benjamin Barber's theory of "strong democratic talk" may help to shed some light on the relationship between empathy and political action. While his vision of strong democratic talk is too restrictive to apply to all social speech, several aspects of his theory can easily be extended to apply to social speech as well.<sup>620</sup> In particular, his treatment of the "affiliation and affection" functions of strong democratic talk is useful in order to understand how empathy—brought about through social speech—may come to affect democratic political action.

Barber admits that "[t]alk of every kind—cognitive, prudential, exploratory, conversational, and affective—can enhance empathy."<sup>621</sup> Thus, while he specifically writes about strong democratic talk, one might infer that the ability to breed empathy can apply to any number of communicative types, including social speech. And not only is social speech capable of

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<sup>618</sup> See Boechmann and Tyler, "Trust, Respect, and the Psychology of Political Engagement," pp. 2083.

<sup>619</sup> See *Ibid.* See also Heather J. Smith and Tom R. Tyler, "Choosing the Right Pond: The Impact of Group Membership on Self-Esteem and Group-Oriented Behavior," in *Journal of Experimental Social Psychology*, Vol. 33 (1997), pp. 146-170.

<sup>620</sup> Strong democratic talk, he argues, differs from other speech in three ways. First, it involves both listening and speaking. For communication to constitute strong democratic talk, it is not enough that people be speaking – they must be *speaking to someone*. Second, strong democratic talk is both affective and cognitive. This means that speakers may employ both logic and, more importantly, rhetoric in order to appeal to emotional sensibilities and form feelings of community among participants. Third, strong democratic talk requires both reflection and action. It is not enough for the strong democratic speaker to theorize abstractly – she must also be thinking in terms of the practical applications of what she says. See Barber, *Strong Democracy*, pp. 173-177.

<sup>621</sup> *Ibid.*, pp. 188.

producing empathy, but empathy, according to Barber, is also a uniquely important prerequisite for reaching lasting political consensus. “Empathy has a politically miraculous power to enlarge perspectives and expand consciousness in a fashion that not so much accommodates as transcends private interests and the antagonisms they breed,” Barber writes.<sup>622</sup> By affirming feelings of commonality and affection among community members, empathy allows individuals to recognize that they are not the only ones with needs that must be fulfilled, and to appreciate the value of working together in order to attain the best possible political outcomes for all.

Barber is quick to distinguish between natural empathy and political empathy, however. “[T]he attachments we feel toward natural kith and kin can be constricting and parochializing,” he explains. “[T]hey can exclude and subvert rather than nourish citizenship.”<sup>623</sup> The empathy derived from communication, on the other hand, “arouses feelings that attach precisely to ‘strangers,’ to those who do not belong to our private families or clubs or churches.”<sup>624</sup> In other words, empathy turns strangers into people who matter. It makes the “other’s” interests relevant to one’s own self-interest.

Unfortunately, social speech is not always (or even equally) successful at building social capital. As indicated by Barber, speech *can* enhance empathy. That does not mean that it always will. And although polite, considerate social speech may be likely to breed generalized feelings of trust and respect, other, more negative, forms of social speech may lead to the opposite result: distrust, skepticism and contempt for others.<sup>625</sup> In general, when social speech is mean or derogatory, it is highly unlikely that participants will develop generalized feelings of trust, respect or empathy.

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<sup>622</sup> Ibid., pp. 189.

<sup>623</sup> Ibid.

<sup>624</sup> Ibid.

<sup>625</sup> Studies suggest that people’s judgment about their social status, as well as their feelings of self-worth and self-esteem, are enhanced when they experience polite and respectful treatment. See Tom R. Tyler, Paul Degoey and Heather J. Smith, “Understanding Why the Justice of Group Procedures Matters,” in *Journal of Personality and Social Psychology*, Vol. 70 (1996), pp. 913-930.

Furthermore, even in an ideal situation—in which social speech is characterized by positive, inclusive dialogue—social speech is still limited in its capacity to bridge social capital across different demographic groups. Much of the time, when individuals engage in social speech, they are communicating with people who are like them, either in terms of background, viewpoint or geographical location. As Eric M. Uslaner explains, often, “membership in voluntary organizations and informal socializing has no need to tap faith in people who are different from ourselves. We socialize with people we already know.”<sup>626</sup> And in these all-too-frequent cases, while individuals may be building social capital amongst themselves and then applying it to a wider community, they are not necessarily expanding their trust, respect and empathy to everyone. Positive individual encounters may evolve into a broader articulation of social capital, as Putnam argues, but individuals will only really extend that social capital to those that they consider part of their relevant groups. And if certain socioeconomic groups are systematically omitted from an individual’s social encounters, then she is unlikely to psychologically associate members of those groups with her community, and therefore, also unlikely to afford them her social capital.

This limitation has revealed itself in a number of empirical studies, which have sought to challenge Putnam’s generally rosy picture of social capital.<sup>627</sup> In “Social-Capital Formation and American Fraternal Association: New Empirical Evidence,” for example, Jason Kaufman and David Weintraub look at several American fraternal organizations to better understand the extent to which voluntary social interactions are capable of bridging social capital across various socioeconomic dimensions. The authors theorize that, “[b]y indoctrinating members in the practice of self-governance, individual accountability, institutional loyalty, and an ethos of mutual

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<sup>626</sup> Eric M. Uslaner, “Producing and Consuming Trust,” in *Political Science Quarterly*, Vol. 115, No. 4 (Winter, 2000-2001), pp. 570.

<sup>627</sup> See Dietlind Stolle, “Bowling Together, Bowling Alone: The Development of Generalized Trust in Voluntary Associations,” *Political Psychology*, Vol. 19 (September, 1998); Nancy L. Rosenblum, *Membership and Morals* (Princeton: Princeton University Press, 1998).



aid, fraternal participation might well promote political participation.”<sup>628</sup> But while they do discover that social interactions help to build democratic values across certain dimensions (i.e. class and geographical space), Kaufman and Weintraub also find that participation in informal, voluntary associations has not been an effective means for encouraging social capital across ethnicity, race or gender.

Much of the reason for this failing, the authors suggest, is that voluntary associations are likely to be both officially restrictive and also self-selecting.<sup>629</sup> And, as stated above, if a particular group is consistently excluded from social gatherings, then any resulting social capital will likely disregard members of that community. Thus, while positive social speech might lead to the development of social capital, it may often only manifest in the form of small, local, relatively homogenous communities.

The potential segmentation of social capital is clearly troublesome from the perspective of democratic citizenship and political outcomes. To the extent that social speech may encourage discrete, non-intersecting spheres of social capital—that will often reflect socioeconomic groupings—it is likely to worsen any preexisting political antagonisms between these groups. If an individual feels generalized trust, respect and empathy only for her relevant community (but, through her social interactions, has developed a narrow idea of what constitutes that community), she is likely to have significant trouble striking compromises when she enters the political sphere and encounters members of her community who might be less like her.

Even if the segmentation of social capital did not pose a threat to political compromise and cooperation, it would still represent a problem for liberal democratic states. After all, every community’s social capital is not equal. All positive social speech may potentially breed social capital, but the existence of certain social structures is likely to result in different variations of

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<sup>628</sup> Jason Kaufman and David Weintraub, “Social-Capital Formation and American Fraternal Association: New Empirical Evidence,” in *The Journal of Interdisciplinary History*, Vol. 35, No. 1 (Summer, 2004), pp. 2.

<sup>629</sup> *Ibid.*, pp. 35-36.

social capital. And some of these variations may be more politically effective than others.<sup>630</sup>

Especially for members of already disadvantaged groups, the intragroup social capital that these individuals develop through their social institutions may not be as useful in terms of facilitating political action as the social capital that is developed among members of more advantaged groups. Deborah J. Warr, for example, looking at women and minorities, finds that social capital actually does very little for members of these groups.<sup>631</sup> Low-income women, she argues, develop social capital through their everyday interactions, generally with other low-income women. The result is a form of social capital, which is not only different from the social capital established by their male and/or wealthy counterparts, but may also be of less political value.

I revisit these issues later in this chapter, in the section for Mechanism #4: Boundary forging. Even at this point, however, it should be clear that the inequality inherent in the process of social capital development represents a major concern for the liberal democratic values of equality and inclusiveness. In its most positive, nurturing form, social speech may help individuals create the kind of social capital that then facilitates democratic politics; however, even then, as long as socioeconomic groups are not perfectly integrated within the social sphere, it is unlikely that the resulting social capital will be adequately broad to include all members of a political community.

### C. Mechanism #3: Cultural and political training

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<sup>630</sup> See Coleman, "Social Capital in the Creation of Human Capital": "All social relations and social structures facilitate some forms of social capital; actors establish relations purposefully and continue them when they continue to provide benefits. Certain kinds of social structure, however, are especially important in facilitating some forms of social capital" (pp. S105).

<sup>631</sup> Deborah J. Warr, "Gender, Class, and the Art and Craft of Social Capital," in *The Sociological Quarterly*, Vol. 47, No. 3 (Summer, 2006), pp. 497-520. See also Ronald La Due Lake and Robert Huckfeldt, "Social Capital, Social Networks, and Political Participation," in *Political Psychology*, Vol. 19, No. 3 (1998), pp. 567-584.

In order for democracies to flourish, they must breed the right kind of citizens, and they must also maintain some degree of social capital. As stated above, it is unrealistic to assume that a rational individual—even one with a virtuous, active character—will willingly take on the personal sacrifices of participating in a liberal democratic state if she does not believe that her compatriots will do so as well. And it is difficult to imagine how she will be able to cooperate and compromise with others in order to achieve mutual ends if the political sphere of her community does not boast an atmosphere of trust, respect and understanding.

There is more to democratic political participation than having the right character traits and believing in one's fellow citizens, however. Before they can become capable of participating fully and effectively in political affairs, citizens must first learn the skill sets, values and underlying assumptions applicable to their unique political communities. This knowledge represents not only an individual intrinsic good (as individuals feel personally connected to the polis), but it is also necessary for the ongoing health and existence of the democratic community as a whole. After all, it is both technically and philosophically impossible for the liberal democratic state machinery to thrive without a citizenry that is informed of its norms, standards and procedures, and can therefore act in accordance with them. As Amy Gutmann and Dennis Thompson aver, "democracy cannot thrive without a well-educated citizenry."<sup>632</sup> And as Gutmann and Thompson explain, education, in this case, refers not only to knowledge about institutions and public policy, but also a familiarity with community-wide understandings of the acceptable range of definitions for ideas such as truth, fairness, justness and the good.<sup>633</sup>

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<sup>632</sup> Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004), pp. 35.

<sup>633</sup> Education, of course, also refers to the attainment of more traditional political knowledge. As Michele P. Claibourn and Paul S. Martin explain, however, even seemingly non-political groups still provide political information. See Michele P. Claibourn and Paul S. Martin, "The Third Face of Social Capital: How Membership in Voluntary Associations Improves Policy Accountability," in *Political Research Quarterly*, Vol. 60, No. 2 (June, 2001), pp. 192-201: "When members of a group chat informally about politics and current affairs they are likely to pass along quality

There are many ways through which democratic citizens acquire this knowledge and learn what it means to belong to their unique societies and political systems. They memorize their national historical myths in school at a young age. They are told of their responsibility to vote through political advertisements during campaign seasons. They celebrate national holidays *en masse* throughout their lives, frequently even when living abroad. Unfortunately, political scientists who study civic education have often overlooked one of the most common and influential methods of cultural and political training – social communication and interactions.<sup>634</sup>

In this section, building upon Andrew Perrin’s work on the “democratic imagination,” I suggest that even the simplest, most casual speech acts, when seen as part of an ongoing process of socialization, actually function as important informal venues for cultural and political training.<sup>635</sup> Not only do these encounters educate individuals about the norms, practices and expectations of their communities, but they also have the potential to literally train people in good democratic citizenship. By enabling individuals to practice at communication and compromise, social speech endows them with the skills necessary to participate in liberal democratic politics. This does not mean that social speech will always necessarily result in positive outcomes for liberal democratic citizenship, however. Where social speech contains negative, derogatory or

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information. Hence, participation in voluntary associations increases the likelihood of exposure to others with relevant political information” (pp. 194).

<sup>634</sup> Not all political scientists have neglected social speech, however. Eliasoph, for example, has repeatedly claimed that social participation generates and spreads community knowledge. “While not exclusively or even primarily politically motivated,” she explains, “these [sociable] gatherings offer the familiarity that is a necessary precondition for some kinds of public life. Sociable familiar gatherings can create an infinitely nuanced stock of common sense and feeling, common knowledge and myths, common style; rhythm and manners; background knowledge for how to act and how to be” (Eliasoph, *Avoiding politics*, pp. 12).

<sup>635</sup> See Norman H. Nie, Jane Junn and Kenneth Stehlik-Barry, *Education and Democratic Citizenship in America* (Chicago: The University of Chicago Press, 1996). In this book, Nie, Junn and Stehlik-Barry explain how formal education teaches citizens, not only the skills, but also the values and norms necessary for living in a democracy: “[F]ormal education encourages cognitive development and enables citizens to understand the long-term trade-offs necessary in democracy. In this way, more formal education adds continuously to the extent to which citizens exhibit characteristics of enlightenment in an addictive or cumulative fashion” (Ibid., pp. 6). While this study focuses on formal education, its conclusions may also apply to informal educational experiences, such as social speech.

discriminatory messaging, it is likely that participants will develop narrow democratic imaginations, constrained by thoughts of what they cannot or should not do or aspire to. And where social speech is structured in such a way as to exclude some or privilege certain kinds of speech, it becomes difficult for participants to learn how to cooperate and connect with others in ways that would be beneficial for democratic politics. Thus, depending on its content and form, social speech affects the cultural and political of individuals in both positive and negative ways.

To begin, social interactions are important mechanisms for learning what is appropriate within a given political community. Indeed, it is through informal, everyday communication that an individual comes to appreciate the full scope of her unique political environment. In his book, *Citizen Speak: The Democratic Imagination in American Life*, Perrin draws heavily from sociology's study of culture and political psychology in order to explain the connection between an individual's social speech experiences and her democratic imagination – or her understanding of “what is possible, important, right, and feasible.”<sup>636</sup> One does not learn a group's accepted standards and practices privately, through mere reflection, he argues; rather, this knowledge base is developed through interactions with others. And although all speech—including political or public speech—may result in certain educative effects, Perrin notes that social speech is especially likely to contribute to the foundational knowledge required for democratic citizenship.

While traditionally political talk informs the democratic imagination, Perrin argues, it does so in an inconsistent (and often negative) manner. He claims that certain kinds of political talk (e.g. negative campaigning), because they “tend to increase cynicism about politics and thereby decrease participation,” actually decrease “the breadth of the democratic imagination (and of democratic practice).”<sup>637</sup> Social speech, on the other hand, not only helps to form the democratic imagination, but it also tends to increase its breadth. Through informal, everyday interactions,

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<sup>636</sup> Andrew Perrin, *Citizen Speak: The Democratic Imagination in American Life* (Chicago: The University of Chicago Press, 2006), pp. 2.

<sup>637</sup> *Ibid.*, pp. 43. See also Stephen Ansolabehere and Shanto Iyengar, *Going Negative: How Attack Ads Shrink and Polarize the Electorate* (New York: Free Press, 1995).

individuals are able to gain a real sense of what it means to be a part of their communities, beginning from an early age. As Perrin writes, one's "conversation with others at work, at home, in schools, organizations, associations, and neighborhoods, and through media like newspapers, television, movies, books, and the Internet" are a vital factor in teaching her about her community and how to navigate it.<sup>638</sup>

Thus, one's chosen social group (the people with whom an individual engages in social speech) has a unique and distinctive influence on the scope of her democratic imagination. As Perrin explains, group settings serve "to constrain and enable citizens' democratic imaginations. A key element of this idea is that *the same citizens, placed in different political microcultures, may think, talk, and practice citizenship differently.*"<sup>639</sup> Exposure to different people, locations and ideas, therefore, may lead to vastly different potential imaginings.<sup>640</sup> This partly explains why members of different social groups may have divergent opinions about the same political phenomena. It also suggests that one's social group is extremely important in determining not only the type of democratic citizen she will become, but also the content of her political beliefs.

At the same time that one's social group is teaching participants about their communities, social interactions are also forging new understandings of the community and revising old ones. In other words, when individuals are communicating with one another at an informal level, they are not only learning their community's standards and practices, but they are also helping to generate those understandings at the same time. Thus, the democratic imagination is more than just a necessary precondition for meaningful political action – the process of forming one's democratic imagination, through social speech, can also be seen as a political action in its own right. By contributing to the social construction of shared meanings and understandings of a

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<sup>638</sup> Perrin, *Citizen Speak*, pp. 2.

<sup>639</sup> *Ibid.*, pp. 130.

<sup>640</sup> It is important to note that Perrin does not believe the democratic imagination to be a fixed entity; rather, it is constantly evolving and reforming as citizens "learn and forget cultural elements over time" (*Ibid.*, pp. 8). See also Charles Tilly, *Popular Contention in Britain, 1758-1834* (Cambridge: Harvard University Press, 1995).

particular community, individuals may not be *directly* affecting the electoral process, but they are influencing it *indirectly* by fostering discourse.<sup>641</sup>

Of course, as Perrin explains, social speech does also have a more direct and obvious on political outcomes as well. As explained above, the socially constructed democratic imagination is “the set of resources and experiences that Americans ‘think with.’”<sup>642</sup> Thus, it informs an individual’s political views at the very core. As Perrin claims, the democratic imagination determines an individual’s understanding of: 1) the range and scope of her public sphere; 2) the gamut of possible political outcomes; and 3) the list of acceptable and legitimate actions that she might undertake in order to achieve these outcomes.<sup>643</sup> In other words, it is like a kind of “repertoire,” from which individuals draw in order to make their political decisions.<sup>644</sup>

Similarly, one might compare this foundational knowledge to a lens, through which individuals see the political world and their relationship to others within it. Thus, individuals rely upon their democratic imaginations in order to determine, not only what they can do, but also what it is they want out of life. When they are designing their own image of the good life (both in a moral sense and also in terms of their individual self-interest), individuals necessarily consult their personal repertoires to determine which values and goals are worthwhile, and which are not.<sup>645</sup> In other words, having learned not only which principles are prized by her community, but also what is feasible to achieve, the individual comes to shape her own wants and expectations according to those standards.

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<sup>641</sup> See Jacobs, Cook and Delli Carpini, *Talking Together*: “This emphasis on discourse and civil society redefines politics from an instrumental means for achieving the fixed goals of isolated and anonymous individuals to a process of collective and public communication for expressing and reconciling deep moral differences and reconnecting individuals to what they share” (pp. 90-91).

<sup>642</sup> Perrin, *Citizen Speak*, pp. 20. See also Michael Schudson, *Watergate in American History: How We Remember, Forget, and Reconstruct the Past* (New York: Basic Books, 1992).

<sup>643</sup> Perrin, *Citizen Speak*, pp. 20.

<sup>644</sup> Ibid. See also Ann Swidler, “Culture in Action: Symbols and Strategies,” in *American Sociological Review*, Vol. 51 (1986), pp. 273-286.

<sup>645</sup> See Eliasoph, *Avoiding Politics*; Christian S. Smith, *Moral, Believing Animals: Human Personhood and Culture* (Oxford: Oxford University press, 2003).

Like Perrin, I agree that social speech ought to be considered a political act, both intrinsically and also in recognition of its influence on more traditional political actions. To the extent that social speech colors the political landscape through a dynamic process of determining ideas about what is good, right, proper and important, those who take part in such discourses are certainly behaving politically. As Richard Rorty explains, “[w]hat binds societies together are common vocabularies and common hopes.”<sup>646</sup> Any activities that conspire to determine the structure of these vocabularies and hopes are thereby political. Furthermore, the common vocabulary of right and wrong, good and bad, expected and undesirable, possible and impossible, which is generated (and regenerated) and then garnered through social speech eventually comes to serve as the context in which all other political decisions are made. Indeed, it is difficult to imagine how one might engage in civic affairs in the United States, for example, without first picking up American norms of civility and politeness, Lockean liberal values or pop culture representations of chattel slavery. While one does not necessarily have to adopt or accept all of this information, to participate in American politics, she does need to be aware of its existence. Thus, social speech, by helping to build these disparate knowledge bases, makes possible and promotes democratic participation.

Nevertheless, despite the merits of Perrin’s theory of the democratic imagination, I suggest that there are two significant omissions from Perrin’s book, which ought to be added in order to present a more complete picture of the role that social speech plays in the cultural and political training of liberal democratic citizens. First, in focusing so intently on the importance of repertoires, Perrin neglects a second, more literal sense in which social speech could be said to provide individuals with the training necessary for full and equal participation in political life. After all, social speech not only provides individuals with information, but it also offers them the opportunity to actually *practice* at communication and compromise – proficiencies that are

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<sup>646</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University, 2008), pp. 86.



essential in a liberal democratic state. My second criticism of Perrin's theory is that, while he accepts that political speech may have a negative impact on the democratic imagination, he fails to address the negative potentialities in social speech. I suggest that social speech, to the extent that it may reflect a society's discriminatory and authoritarian themes, is likely to teach participants these same anti-democratic values and practices. This information, once absorbed, may severely limit an individual's desire and aptitude for political participation.

First, it is important to address the literal sense in which social speech provides training for liberal democratic citizenship. As suggested above—in the section for Mechanism #1: Character development—the ideal liberal democratic citizen is not expected to behave as a mere bystander to the political process; rather, she ought to actively participate in politics. In order to be capable of doing so, however, she must first be taught *how* to participate.

At the heart of all citizenship activities are civic skills and capabilities (i.e. communication and compromise), which are honed through regular participation in social communication. Often, an individual who is engaging in social speech might not even notice that she is training these talents – but she is still developing them all the same. For example, by regularly communicating with others in a social context, an individual is likely to be exposed to new ideas and arguments, which she might then be called upon to *evaluate*. In order to ensure that she is heard among her social peers, that same individual might also need to, not only *express* her views effectively, but also *negotiate* them with others. And because it is likely that one's social speech partners are part of her social group—and therefore subject to prolonged and repeated interactions—she might frequently be forced to *compromise*, *cooperate* and *strike deals*.

Each of these skills—assessing new arguments and information, negotiating with others and cooperating—is essential for performing vital democratic political functions. After all, how can one cast an intelligent vote if she has not learned how to evaluate the candidates'

arguments? How can she protest effectively if she has not learned how to make herself heard?

How can she accept a majoritarian electoral outcome if she has not learned compromise?

Unfortunately, not all social speech actually results in a civic education that is quite so conducive to liberal democratic citizenship. After all, social speech not only influences the political sphere, but it is also, at the same time, shaped by political institutions. If those institutions do not adequately represent the liberal democratic values of equality and inclusiveness, it is probable that social speech will fail to teach those principles as well. These deficiencies may harm democratic citizenship in two ways: 1) shaping the democratic imagination in such a way that it represents illiberal ideologies; and 2) providing training that hinders one's abilities to engage in democratic politics.

First, reflecting back on Perrin's discussion of the democratic imagination, it seems likely that social speech, which is hateful, derogatory or restrictive, may severely and negatively impact an individual's understanding of "what is possible, important, right, and feasible." Namely, such negative social speech may cause its targets to feel limited in their opportunities and expectations. It may also lead those who are in more privileged positions to develop an inflated sense of what they deserve as compared to others. As a result, both sets of individuals will make choices in their personal and political lives that reflect preexisting power imbalances, thus exacerbating the problem of inequality. These choices may range from exclusion to isolation, from antagonism to passivity, from anger to fear. And while these reactions may accurately reflect the true norms, standards and practices of an individual political community—and in that sense, social speech is providing valuable civic information—they are working against the ideals of liberal democracy. Ergo, inegalitarian, derogatory social speech is also providing a negative affect of liberal democracy.

Second, although it is widely accepted that a healthy civic culture requires some "training" in democracy outside of the formal, national process, it is important to understand that the form

this “training” takes matters in terms of the results for citizenship. As Carole Pateman explains in *Participation and Democratic Theory*, in order for informal education to result in positive democratic outcomes, such communication must take place within democratic structures.<sup>647</sup> “There is something paradoxical in calling socialization inside existing organizations and associations, most of which, especially industrial ones, are oligarchical and hierarchical, a training explicitly in *democracy*,” she writes.<sup>648</sup> In order to acquire training explicitly in democracy, Pateman argues, an individual must first have some experiences with similar institutions at a more social or personal level.

And empirically, this does appear to be the case. Social experiences and interactions, when they take place within liberal democratic structures, do seem to lead to greater feelings of political efficacy and competence than social speech that takes occurs within a more authoritarian arrangement. In *The Civic Culture*, for example, Almond and Verba explain that this is because individuals tend to export the experiences and expectations of their social interactions to into a political context.<sup>649</sup> “[I]f in most social situations the individual finds himself subservient to some authority figure,” they explain, “it is likely that he will expect such an authority relationship in the political sphere. On the other hand, if outside the political sphere he has opportunities to participate in a wide range of social decisions, he will probably expect to participate in political decisions as well.”<sup>650</sup> Not only do the authors argue that the latter individual will expect to play a more active role in his own governance than the former individual, but they also claim that he will be better equipped to do so.

Drawing from their cross-cultural study of political attitudes and behaviors in the United States, Great Britain, Germany, Italy and Mexico, Almond and Verba find that an individual’s

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<sup>647</sup> Carole Pateman, *Participation and Democratic Theory* (New York: Cambridge University Press, 1970).

<sup>648</sup> *Ibid.*, pp. 45.

<sup>649</sup> Gabriel Abraham Almond and Sydney Verba, *The Civic Culture* (Boston: Little Brown & Co., 1965).

<sup>650</sup> *Ibid.*, pp. 271-272.

remembered opportunities for participation in the family and at school are positively correlated with a high score on the political competence scale in all five countries.<sup>651</sup> And while the positive correlation between opportunities for participatory involvement in the social sphere and political competence may be true at all levels of human development, the authors find that adult experiences of involvement in the workplace display a notably higher correlation with political competence than other forms of social interaction.<sup>652</sup> Thus, it appears that having the opportunity to participate in one's home, school and (especially) workplace increases the probability that an individual will display a high level of political competence. This political competence, according to Almond and Verba, then significantly increases the chances that an individual will engage effectively in politics.<sup>653</sup>

Unfortunately, opportunities for participation in the social sphere are not equally distributed among socioeconomic groups. Upper and middle class individuals, for example, are more likely to have both grown up within a participatory family structure and also to have received a more engaging education than those individuals on the lower end of the socioeconomic scale.<sup>654</sup> And in terms of the workplace, in all five countries that they study, Almond and Verba find that lower income individuals are more likely to report feeling both that they are not consulted about on-the-job decisions, and also that they are not free to complain about decision that had been made, than were higher income individuals.<sup>655</sup> This discrepancy between democratic social experiences means that upper and middle class individuals are likely to be better suited to political action than lower class individuals, who may not have receive similar training. Indeed, if lower income individuals are less likely to gain the experience of participation in the social sphere

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<sup>651</sup> Ibid., pp. 284.

<sup>652</sup> "The structure of authority at the workplace is probably the most significant—and salient—structure of that kind with which the average man finds himself in daily contact" (Ibid., pp. 294).

<sup>653</sup> Almond and Verba claim that "in many ways... the belief in one's competence is a key political attitude" (Ibid., pp. 140).

<sup>654</sup> Ibid., pp. 284.

<sup>655</sup> Ibid., pp. 280-283.

than higher income individuals, it only stands to reason that they will then, on the whole, be less prepared for political participation as well.

There are, of course, a number of institutions in the social sphere that provide valuable political and social training for lower income individuals, which I discuss in Chapters Six and Seven. Churches, for example, have long played an important role in teaching residents of poorer communities the skills they need to engage with the wider political world. Similarly, community groups have been proven to present excellent opportunities for civic education. In their study of the relationship between socioeconomic status and political participation, Henry E. Brady, Verba and Kay Lehmann Schlozman find that “[c]ivic skills are less stratified by SES [socioeconomic status]” than one might expect from previous research, and that this is at least “partly because social characteristics such as affiliation with ‘congregational’ churches are not highly correlated with SES and these affiliations serve as training ground for civic skills.”<sup>656</sup>

Nevertheless, it remains worrisome that the positive and negative training effects of social speech are not necessarily equally distributed among socioeconomic groups. To the extent that members of the least advantaged groups are likely to receive a civic education, which makes their political participation more challenging than that, which members of the most advantaged groups receive, social speech can be said to be unfairly diminishing their abilities as democratic citizens. And to the extent that the democratic imaginations of all individuals are handicapped by illiberal themes within the social sphere, social speech may actually be working against democratic political outcomes. Thus, it is important to keep in mind that, although social speech may serve a highly useful function in providing individuals with the cultural and political training required of liberal democratic citizenship, the outcome of social speech is highly contingent on its content, tone and structure.

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<sup>656</sup> Henry E. Brady, Sidney Verba and Kay Lehman Schlozman, “Beyond Ses: A Resource Model of Political Participation,” in *The American Political Science Review*, Vol. 89, No. 2 (June, 1995), pp. 271. The civic skills referenced in their analysis include: knowledge, interest, attention, efficacy and trust.

*D. Mechanism #4: Boundary forging*

Finally, the last liberal democratic function of social speech that I address in this chapter is its ability to not only help individuals draw the boundaries between political communities, but also to define the relationships within those communities. By participating in social speech, individuals are unconsciously forging the frontiers of their communities – drawing a line between the “us” and the “them.” These distinctions are especially important in societies that demand a great deal of their citizens (i.e. modern liberal democracies). As Michael Sandel expresses it, when citizens are asked to make personal sacrifices for the good of their political communities, “the question remains why do *these* persons, the ones who happen to live in my country, have a claim on my concern that others do not.”<sup>657</sup> The answer, this section suggests, is that we tend to feel a connection to *these* people because we feel like we are one of them – we all share a past, present and future. So while we may not care about each individual member of our political communities, we do believe that *these* people, as a part of an “us,” merit certain sacrifices. *Those* other people, on the other hand—those strangers, foreigners, etc.—do not merit the same consideration because we do not feel a similar psychological attachment to them. We do not feel that our fates are intertwined with and interdependent of those others to nearly the same degree.

It is important to note that, although social speech’s boundary forging mechanism overlaps considerably with the social capital formation mechanism, they are not, in fact, the same thing. Social capital is what (ideally) springs up among members of a community. It is how they relate to one another once they already are an “us.” Boundary forging, on the other hand, is how individuals become an “us” in the first place. The forces that unite a community are highly related to those that promote trust, respect and empathy within that community, but these are, indeed, two separate processes.

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<sup>657</sup> Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996), pp. 17.

While I discussed social capital at length earlier in this chapter (see Mechanism #2: Social capital formation), in this section, I focus exclusively on social speech role in the process of boundary formation. First, I explain how, through everyday speech, individuals come to develop and acknowledge the psychological boundaries of their political communities. By highlighting commonalities and mutualities, I argue, social speech delineates what is “us” and what is “them.” And because it is often intimate and personal, social speech goes beyond the function of merely establishing in-groups and out-groups, and it actually creates affective attachments to the “us.” In other words, not only does social speech help individuals identify members of their communities, but it also serves to build affective connections to those within their communities. Second, I explore two implications of a strong sense of community – one individual and one political. On the individual level, I argue that people tend to be happier when they feel like they are a part of a community. By learning to associate one’s individual good with the good of her community, that person is likely to live a more fulfilling life than one who has not reached those same conclusions. On a political level, I argue that a positive, friendship-based association with one’s community makes an individual more likely to participate in politics, pursue community ends, vie for unanimous political results and (potentially) represent herself authentically. Third, I present two arguments regarding the negative aspects of boundary forging: 1) It creates outsiders (either members of out-groups or members of in-groups who feel marginalized), who are likely to be excluded from politics; and 2) To the extent that boundaries are drawn along the lines of friendship, they may unfairly silence certain segments of a community.

To begin, the affective connection to what constitutes “us” and the disconnection from “them” is not naturally inherent among people living within the same geographical boundaries. There are fairly effortless ways to establish these relationships, however. Individuals may not be born automatically loving those with whom they share national borders (nor are state efforts particularly effective at instilling such affections on their own), but people do eventually learn to differentiate between “us” and “them”—and ultimately emotionally connect with “us”—through

their social interactions and communications. Indeed, this may be the most significant political function of social speech. As Katherine Cramer Walsh argues in *Talking about Politics: Informal Groups and Social Identity in American Life*, when people speak to one another informally, the primary political implication of that speech “is not simply the exchange of information about policy stances. Instead, the fundamental, politically relevant act is the communication of information about the kind of people individuals perceive themselves to be and the collective of group and community boundaries.”<sup>658</sup>

This information about who “us” is and what that means might often reveal itself subtly, but it is also embedded within virtual every imaginable instance of social speech. As Joseph Epstein explains in his book, *Gossip: The Untrivial Pursuit*, informal, even the most seemingly frivolous communication (i.e. gossip) creates social bonds by placing both the speaker and the recipient in collusion with one another.<sup>659</sup> It provides an implicit acknowledgement of one’s participation in a shared culture with commonly understood norms and standards. “But to accept gossip from another person is also to enter into intimacy of a complex kind,” Epstein writes, “the bestowal of the gossip along with its acceptance implies the acknowledgement that we are both men and women of the world, both operate in the same moral universe, both find the same things funny, outrageous, insuperable.”<sup>660</sup> In other words, seemingly innocuous, everyday conversation enables individuals to both identify within a community and also to determine who else is a member of that community. Social speech highlights commonalities, bringing those similarities to the foreground.

In Barber’s terms—discussed above in the section for Mechanism #2: Social capital formation—when “two neighbors [are] talking for the first time over a fence, or two college

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<sup>658</sup> Katherine Cramer Walsh, *Talking about Politics: Informal Groups and Social Identity in American Life* (Chicago: The University of Chicago Press, 2004), pp. 42.

<sup>659</sup> See Joseph Epstein, *Gossip: The Untrivial Pursuit* (New York: Houghton Mifflin Harcourt, 2011): “Listening to gossip can be likened to receiving stolen goods; it puts you in immediate collusion with the person conveying the gossip to you” (pp. 3).

<sup>660</sup> *Ibid.*, pp. 58.



freshmen [are] talking over a first cup of coffee,” they are not just getting to know one another, but they are also “exploring their mutuality” at a deeper level as well.<sup>661</sup> Even the banalities of everyday talk, by representing a common and tacitly acknowledged standard of behavior, help to identify a shared culture.<sup>662</sup> In the process of “getting to know *you*,” a social speaker is also automatically “getting to know *us*” – she is exploring the “common context, traits, circumstances, or passions that make of two separate identities one singular *we*.”<sup>663</sup> And, of course, this is a dynamic process. At the same time that individuals are learning commonalities and defining who is “us,” they are also contributing to that dialogue, thereby influencing the composition of “us.”

Naturally, most people will eventually grow to feel a connection to “us.” And that connection—based upon a common history, a common set of norms, a common purpose, etc.—is not just rational, but it is emotional as well. Social speech, due to its tendency to manifest with a relatively personal style and tone, takes information about individual commonalities and transforms them into a larger sense of a community. As Barber explains, although we may “convey information, articulate interests, and pursue arguments” through words, “it is through tone, color, volume, and inflection that we feel, affect, and touch each other.”<sup>664</sup> And it is there that social speech has the upper hand over other forms of speech. Through the use of these rhetorical devices, social speech is able to build real, affective communities.

It is important to note, however, that social speech, by itself, is only part of how communities are developed and defined. The process of determining an “us” is not entirely

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<sup>661</sup> Barber, *Strong Democracy*, pp. 184.

<sup>662</sup> “And our talk is peppered with ritual speech: greetings and goodbyes, prayers and incantations, exclamations and expletives, all of which in their banality and conventionality express and reinforce the daily structures of common life” (Ibid., pp. 187).

<sup>663</sup> Ibid., pp. 184.

<sup>664</sup> Ibid., pp. 187. Note that Barber distinguishes the discovering commonalities function of speech from its tendency to develop a sense of affection: “Although conversation clearly can help to build friendship and nourish affection and thus to knit together a viable community, the exploration of mutuality through conversation is a function of talk that is distinct from that of promoting affection and affiliation. Such exploration does allow the me to become self-conscious, and it can nurture an empathy of self and other, but knowing others and caring for them are not psychologically or sociologically synonymous” (Ibid., pp. 185).

bottom-up; rather, it involves the interaction between both bottom-up and top-down forces.

Indeed, the social interactions that are so important in building communities are influenced by, and take place within the context of, top-down government decisions structuring membership.

And just as communities are built through the intersection of individual and state actions, so too do the personal ties that one feels to her perceived community serve important purposes at both a personal and a political level. At the individual level, humans—as social beings—have a tendency to not only understand themselves in relation to others, but they also *want* to feel like they are part of a group. By providing them with that feeling of membership, social speech enables individuals to achieve a more desirable state of being, and helps to ward off the psychological damage posed by social isolation. And at the political level, affective connections to a community not only increase the likelihood that an individual will participate in democratic government, but they also help to ensure that when she does so, she will be willing to make the personal sacrifices necessary to benefit the whole. Furthermore, since politics occurs in the unit of the state, any actions that contribute to the outlines of those states—who should be included and who should be excluded—are likely to have significant geopolitical consequences. Thus, social speech becomes political action in its own right.

Before discussing the more directly political implications of social speech's boundary forging mechanism, it is important to examine the effects that this process has on the individual. As I discussed earlier in this chapter—and in more in depth in Chapter Four—John Stuart Mill's theory of the individual suggests that a person can only truly understand herself, as an individual, within a social context. In other words, one's individual identity cannot be wholly divorced from her social identity. As people go through life, their prior individual identities (to the extent that they exist) confront group dynamics, thus influencing those dynamics and being influenced by them.

The importance of one's social identity cannot be overemphasized. Not only does it fundamentally affect the choices that an individual makes in life by providing her with information about what is appropriate for "someone like me" to believe and to do, but it may also serve as her very *raison d'être*.<sup>665</sup> The desire to feel like a member of a social group represents an essential aspect of human existence. Without such human connections, an individual may not only fail to develop a full sense of self, but she may eventually come to find life not worth living.

In the first real study of its kind, *Suicide: A Study in Sociology*, Emile Durkheim explores the potentially severe negative consequences of social isolationism.<sup>666</sup> As the title of his book suggests, Durkheim specifically explores the extreme example of suicide. Rather than examining individual cases of suicide in order to determine their immediate and proximate causes, Durkheim looks at the phenomenon of suicide more generally. He finds that different societies have different aptitudes for suicide at different periods in history.<sup>667</sup> And while populations may fluctuate (thus varying the number of suicides that occur in a community over time), Durkheim shows that suicide rates remain relatively constant within a given society.<sup>668</sup>

In order to explain both the differing suicide rates across societies and also the relative consistency within them, Durkheim believes that suicide must be the result of a social phenomenon. He claims that suicide is not simply an individual problem—as it had previously been understood to be—but rather, a community's suicide rate is contingent upon social factors.<sup>669</sup> Specifically, where the norms of a community encourage individuals to feel like they are integrated into a strong, coherent group, those individuals are likely to be more resilient against suicidal tendencies. On the other hand, societies that do not inspire such feelings of belonging tend to breed members that are more vulnerable to suicide.

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<sup>665</sup> Walsh, *Talking About Politics*, pp. 23.

<sup>666</sup> Emile Durkheim, *Suicide: A Study in Sociology*, John A. Spaulding and George Simpson (trans.) (New York: The Free Press, 1979).

<sup>667</sup> *Ibid.*, pp. 46.

<sup>668</sup> *Ibid.*, pp. 148-149.

<sup>669</sup> *Ibid.*, pp. 51.

This relationship is due to the fact that feelings of community and camaraderie tend to breed a more communal, and less individualistic, personal ethos, Durkheim claims. The less that an individual feels connected to her community and “the less he depends on them, the more he consequently depends only on himself and recognizes no other rules of conduct than what are founded on his private interests.”<sup>670</sup> In other words, a person with an entirely individualistic worldview may feel she has “no reason to endure life’s sufferings patiently,” and may choose to take self-interested action; on the other hand, an individual who feels emotionally connected to her community may “cling to life more resolutely... so as not to betray interests they put before their own.”<sup>671</sup> Thus, Durkheim finds that predominantly Catholic societies tend to exhibit lower suicide rates than predominantly Protestant societies<sup>672</sup>; married people tend to commit suicide less often than single people<sup>673</sup>; and those in the midst of political turmoil are less likely to commit suicide than those in a stable political system.<sup>674</sup>

Although Durkheim’s theory has been amended over the years, its main points still remain the standard for the study of sociology: People who feel like they belong to a community are more likely to equate their personal good with the good of all. These people then not only make choices in consideration of the good of all but they also, tend to find themselves more personally fulfilled. As Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler and

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<sup>670</sup> Ibid., pp. 209.

<sup>671</sup> Ibid., pp. 209-210.

<sup>672</sup> Durkheim claims that Protestants are especially vulnerable to suicide because their religion is less cohesive and structured—and therefore, develops less of a sense of community—than other religions (e.g. Catholicism). Ibid., pp. 158-170.

<sup>673</sup> Ibid., pp. 175.

<sup>674</sup> Durkheim suggests that this is because social turmoil may cause individuals to recognize joint interests and thereby strengthen community bonds: “These facts are therefore susceptible of only one interpretation; namely, that great social disturbances and great popular wars rouse collective sentiments, stimulate partisan spirit and patriotism, political and national faith, alike, and concentrating activity toward a single end, at least temporarily cause a stronger integration of society. The salutary influences which we have just shown to exist is due not to the crisis but to the struggle it occasions. As they force men to close ranks and confront the common danger, the individual thinks less of himself and more of the common cause. Besides, it is comprehensible that this integration may not be purely momentary but may sometimes outlive its immediate causes, especially when it is intense” (Ibid., pp. 208).

Steven M. Tipton discover in their study of middle-class American life, the “quest for purely private fulfillment is illusory: it often ends in emptiness instead.”<sup>675</sup> Those who equate their private interests with the public good, on the other hand, “evinced an individualism that is not empty but is full of content drawn from an active identification with communities and traditions.”<sup>676</sup>

Durkheim’s theory has significant implications for political theory as well. If those who feel disconnected from their communities are less likely to consider the interests of others when making decisions regarding their lives, it stands to reason that those same individuals would be less likely to consider the wants and needs of others when making decisions about their political lives. And the corollary is also probable. If individuals who feel like true members of a community are more likely to act in terms of the good of the whole, then they are also more likely to consider group interests when acting in a political capacity.

In practice, this means that individuals who, through social speech, have come to identify with a particular community are more likely to not only participate in democratic political action, but those within the community are also more likely to pursue liberal, egalitarian ends when they do so. Laboratory studies of social communication have shown that participants who come to associate their individual interests with those of their group are significantly more likely to engage in cooperative actions.<sup>677</sup> Caroline Kelly and Sara Breinlinger, for example, have found this to be

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<sup>675</sup> Robert N. Bellah, Richard Madsen, William M. Sullivan, Ann Swidler, and Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 2008), pp. 163.

<sup>676</sup> *Ibid.*

<sup>677</sup> See Gary Bornstein, “The Free-Rider Problem in Intergroup Conflicts over Step-Level and Continuous Public Goods,” in *Journal of Personality and Social Psychology*, Vol. 62, No. 4 (1992), pp. 597-606; Robyn M. Dawes, Alphons J. C. van de Kragt, and John M. Orbell, “Cooperation for the Benefit of Us: Not Me, or My Conscience,” in *Beyond Self-Interest*, Jane Mansfield (ed.) (Chicago: University of Chicago Press, 1997), pp. 97-110; John M. Orbell, Alphons J. van de Kragt, and Robyn M. Dawes. “Explaining Discussion-Induced Cooperation,” in *Journal of Personality and Social Psychology*, Vol. 54, No. 5 (1988), pp. 811-819; Elinor Ostrom, “A Behavioral Approach to the Rational Choice Theory of Collective Action,” in *American Political Science Review*, Vol. 92 (1998), pp. 1-22; David Sally, “Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992,” in *Rationality and Society*, Vol. 7 (1995), pp. 58-92.

the case with women.<sup>678</sup> The more that an individual female was able to self-identify as a member of the community “women,” the more likely she was to be politically engaged.<sup>679</sup> Similarly, in “Opinion-based group membership as a predictor of commitment to political action,” Ana-Maria Bliuc, Craig McGarthy, Katherine Reynolds and Daniela Muntele show that identification with a group is a good predictor of political behavioral intentions.<sup>680</sup> Although their study looks specifically at the relationship between political action and feelings of membership in an opinion-based group, the authors do present several finding that can be applied to group membership, more generally.<sup>681</sup> Namely, they find that the more that an individual sees herself as a member of particular groups, the more likely it is that she will be willing to act “in line with the norms of these groups.”<sup>682</sup>

In other words, not only do Bliuc, McGarty, Reynolds and Muntele find that individuals are more likely to engage in political action when they feel an emotional connection to their particular communities, but they also suggest that these individuals are more likely to act in ways that reflect their groups’ needs and preferences when they do perform politically. If one feels both personally connected to and invested in the fate of a certain people, it makes sense that she would want to pursue that group’s interests to the best of her ability.

Similarly, Jane J. Mansbridge has found that, when members of a defined community feel a positive affective connection to other members of their group, the result is often favorable to democratic political outcomes. In her study of “Selby,” Vermont, Mansbridge explores the unitary

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<sup>678</sup> Caroline Kelly and Sara Breinlinger, “Identity and Injustice: Exploring Women’s Participation in Collective Action,” in *Journal of Community & Applied Social Psychology*, Vol. 5 (1995), pp. 41-57.

<sup>679</sup> In their study of multiple factors affecting political involvement, their measure of identification with the female community had the greatest link to political action.). See *ibid.*

<sup>680</sup> Ana-Maria Bliuc, Craig McGarty, Katherine Reynolds and Daniela Muntele, “Opinion-based group membership as a predictor of commitment to political action,” in *European Journal of Social Psychology*, Vol. 37 (2007), pp. 19-37.

<sup>681</sup> These findings, the authors warn, apply to non-opinion-based groups as well, although the links between general group membership and political action are weaker.

<sup>682</sup> *Ibid.*, pp. 20.

democracy/consensus model, finding that such a model only successfully exists where the community is founded on the idea of friendship (i.e. equality, mutual enjoyment and a sense of shared good).<sup>683</sup> When community members feel like they are not merely compatriots, but actual friends who share a positive emotional bond, they tend to be more excited and eager to work together amicably and with a common goal in mind. As Mansbridge explains,

Friends are equals. They choose to spend their time together. They share common values. They expand in each other's company. So, too, in a democracy based on friendship, participants are equal in status; the costs of participation, of which some make so much, do not feel heavy. Citizens "fly to the assemblies" as if to meet their friends. They value the time they spend on common affairs. They share a common good, and are able, as a consequence, to make their decisions unanimously.<sup>684</sup>

Essentially, when individuals feel a positive personal connection to members of their political community, politics becomes easier. By clearly defining the "us"—but *only* in a positively, friendly manner—social interactions not only make citizens more excited about participating in local politics, but they also encourage them to pursue cooperative measures and democratic outcomes.

Indeed, this is exactly what Mansbridge witnesses in the town of Selby – friendship being used as a conduit to good democratic governance. As she explains, much of the amiability she observed at town meetings was the result of preexisting personal relationships, built up in social

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<sup>683</sup> Jane J. Mansbridge, *Beyond Adversary Democracy* (Chicago: University of Chicago Press), pp. 1983, pp. 8. Selby, VT is not, however, a *perfect* example of unitary democracy. As Mansbridge explains, "Selby is small, and its citizens govern themselves by coming together once or more a year in a face-to-face assembly—the town meeting. These two facts lead Selby's citizens in a unitary direction. But Selby's citizens are not all alike. They have differing interests. As Americans, moreover, they have inherited a primarily adversary tradition. Selby thus throws into visible relief the struggle in any democracy between unitary and adversary forces" (Ibid., pp. 39).

<sup>684</sup> Ibid., pp. 9.

settings.<sup>685</sup> The residents of Selby all spent significant amounts of time informally and spontaneously socializing with one another, at places like the general store, before entering the political arena.<sup>686</sup> After a while, these informal interactions made it easier for the diverse townspeople to locate common interests. And through their common interests, the residents of Selby were able to establish a sense of “us” (also, necessarily, creating a “them”), complete with a kind of private vocabulary, which they then carried over into the political realm. There were unspoken understandings based on traditional behaviors. There were private jokes that relieve tensions. There was the casual use of nicknames and teasing that puts people at ease, even when acting in their political capacities.<sup>687</sup> All of these elements served to amplify feelings of unity and friendliness.

Thus, because of their positive social and intimate relationships, many of the residents of Selby seemed to want to try to get along and work together when they entered a political context. Although they could not abandon their adversarial tendencies completely, the citizens of Selby worked hard not to be at odds with one another in their town meetings. As a result, town meetings tended to produce more unitary political outcomes. As Mansbridge explains, the residents of Selby “want to be friends, and can sometimes find policies that approach a common

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<sup>685</sup> “The face-to-face character of the town meeting deepens the ties that bind members of the town together. Citizens who see one another at a meeting realize that their opponents are human” (Mansbridge, *Beyond Adversary Democracy*, pp. 74).

<sup>686</sup> “At the register [of Tyson’s general store], someone passes a few words to the storekeeper’s wife. A couple of men gather at the gas pump as one fills his pickup. At the store’s lunch counter in the morning, at noon, or after work, the men stop in for coffee, hoping to see someone they know” (Ibid., pp. 41).

<sup>687</sup> “The informality in Selby’s town meeting includes using first names and joking. Wallace Tyson makes a sally about his wife’s ‘huge’ salary, calls out a comment on Harvey Simonds (‘If his figures aren’t right, I’ll get him later!’), or, in another town meeting, jokes about the three women who had been town auditors for years (‘I nominate Leona Bussiere because if Leona didn’t do it, Ethel Quimby would be out in the cold!’). These witticisms, not very funny to an outsider, relieve the tension and remind the townspeople that they are all friends, all in on the joke” (Ibid., pp. 66).



interest.”<sup>688</sup> The more that they are in regular social contact with one another, the greater “their desire to settle things unanimously.”<sup>689</sup>

Not only does friendship appear to facilitate political action and unanimous outcomes, as Mansbridge claims, but it may also contribute to liberal democratic policymaking in another way as well – by promoting authenticity. It is possible that, when members of a community feel like they are friends, they become more willing to express themselves openly and honestly than they otherwise might be. As a result of this more authentic expression of wants and interests, the state becomes more capable of representing its citizen’s true needs. As Nina Eliasoph claims, for many Americans, it is only when they are among friends that they feel like they freely express personal opinions of political value. “Most of the time,” she explains of her study of social speech, “intimate, late night, moonlit conversations were the only places other than interviews where that kind of discussion [about political discontent] could happen.”<sup>690</sup> When Eliasoph’s subjects were around others with whom they did not feel a close, positive affective connection, however, “such discussion was almost always considered inappropriate and out of place.”<sup>691</sup>

According to Eliasoph’s studies, the cocoon of friendship is one of the few communicative spaces within which individuals are willing to let their rhetorical guards down and open up. Noting that her subjects often “sounded *better* backstage than frontstage,” Eliasoph theorizes that individuals may not feel as if they have to perform as much when they are with a private group of friends as when they are speaking in a more formal, public capacity.<sup>692</sup> Thus, they can admit what they do not know, remain receptive to new ideas and stray from orthodoxy. As Eliasoph

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<sup>688</sup> Ibid., pp. 46.

<sup>689</sup> Ibid.

<sup>690</sup> Eliasoph, *Avoiding politics*, pp. 7.

<sup>691</sup> Ibid.

<sup>692</sup> In this case, “better” refers to an inclusiveness and wideness of ideas. “In a strange process of political evaporation, every group fell into this strictly patterned shift in discourse: what was announced aloud was less open to debate, less aimed at expressing connection to the wider world, less public-spirited, more insistently selfish, than what was whispered” (Ibid.). See also Nina Eliasoph, “Making a Fragile Public: A Talk-Centered Study of Citizenship and Power,” in *Sociological Theory*, Vol. 14, No. 3 (November, 1996), pp. 263.

writes, “[a] person freely spouting ideas in a bar can argue both sides at once just for the sake of making a good argument, try out half-baked ideas on an audience that is not poised for immediate action, write the mental rough draft before the idea congeals into a platform.”<sup>693</sup> In these friendly, playful spaces, there may, indeed, be less risk in experimenting with controversial or half-baked ideas. Thus, individuals become freer to explore—and eventually express—their true feelings.

Unfortunately, despite these potential advantages—greater participation in politics, more community-minded decision making, a focus on attaining unanimous political outcomes and a propensity towards authenticity—it is important to note that the relationship between an individual's ties to a defined community and her political choices is not always positive. Many of the studies cited above presuppose that, to the extent that a connection to one's community exists, it must be a positive connection. Affective attachment, however, is not necessarily the same as affection. Through conversation, individuals may get to know and understand one another as compatriots, but that does not mean that they will necessarily like what they know and understand. And it is only when one's connection to her community is characterized by *positive* feelings of attachment that the boundary forging mechanism of social speech is likely to breed useful results for democratic citizenship and political outcomes. The rest of the time, an individual's personal connection to her community may lead to significantly more disappointing results.

For the remainder of this section, I examine the negative potentialities of boundary forging. First, I look at the ways in which a well-defined community modeled on friendship is necessarily exclusionary. The focus on in-group friendship only draws attention to the fact that some people are *not* friends. This may be because they are either: 1) members of an out-group or 2) outsiders within their in-group. In either case, those who fall outside the boundaries of

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<sup>693</sup> Eliasoph, *Avoiding Politics*, pp. 88.

friendship often find their interests poorly represented. This leads to my second democratic critique of a friendship model, which is that, it may not actually increase authenticity. In contrast to Eliasoph's theory, I argue that individuals are perhaps just as likely to feel the need to perform when they are among friends as they are when they are among strangers (although the content of that performance may differ). Thus, it is difficult to claim that a friendship model makes individuals more likely to share their true interests with the political body.

To begin, it is important to remember that the creation of an in-group necessarily implies the existence of an out-group. One cannot have an "us" without also having a distinct "them." And although drawing a sharp line between in-groups and out-groups can go a long way in establishing cohesion, love and solidarity among members of the in-groups, it is also likely to breed negative feelings towards members of out-groups. As Walsh explains, this dark side of community building comes hand-in-hand with its more positive functions:

Whether in the corner store, the craft guild, or other settings that allow people to talk informally, Americans work out who they will include in the psychological communities that they use to make sense of politics. Part of this is the 'good stuff' of maintaining friendships and a sense of place. But part of it is the less-than-honorable thoughts and actions that Americans—regardless of ideological stripe—create and perpetuate through making connections to some groups while actively distancing themselves from others.<sup>694</sup>

Indeed, it is not enough for there to be a clear "us" and "them." To the extent that an individual feels an emotional connection to the "us," she is often likely to demonize the "them."<sup>695</sup>

These antagonisms, unfortunately, compromise the democratic value of inclusiveness. In an increasingly global world, in which the consequences of one community's actions cannot be completely divorced from the circumstances of other communities, it would be to the advantage of

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<sup>694</sup> Walsh, *Talking about Politics*, pp. 169.

<sup>695</sup> This may happen in the other direction as well. The more that one demonizes the out-group, the more likely that she will recognize and take pride in her in-group.

all to take into account the wants of needs of as wide a political network as possible. As long as the divisions between in-groups and out-groups remain strong, however, such political consideration remains unlikely.

Still, it is not just members of out-groups who face exclusion when social speech is used to create powerful, enduring bonds of community. Oftentimes, those on the inside of an in-group will find themselves unrepresented within the political process as well. This is perhaps even more likely when an in-group is brought together in the model of friendship. Although friendship may empower some individuals to participate more honestly and more actively in politics, many, motivated by the desire to achieve unanimity, may feel pressured into repressing their opinions and ideas. Still others may find themselves less likely to participate out of the fear of negative social reprisals. And unfortunately, there may be a correlation between one's socioeconomic status and the likelihood that she will be silenced by her community in some way, with those individuals who are less well off feeling greater social pressures than those who are more advantaged.

As Mansbridge explains, even in Selby, not everyone is well represented at all times. Friendship-based communities tend to encourage members to resist adversarial actions and pursue unanimity. The problem with unanimity, however, is that unless everyone truly is of one mind, some individuals must be silenced in order to achieve it. This silencing may take place voluntarily or involuntarily, but in either case, the preferences of certain community members are necessarily going to be excluded.

The desire for unanimity is not the only cause for silencing within a friendship-based community, however. Often, as Mansbridge describes, the residents of Selby were too *afraid* to speak up amongst their "friends." There was a common fear among many town meeting participants that they would be laughed at or treated with disrespect were they to voice their opinions. Take Mansbridge's interview with Selby native, Edith Hurley, as an example. Hurley

explained how the intimidation that she experienced in town hall meetings came out of a fear of feeling marginalized and belittled. “They all sit there, and they listen while you’re talking,” she said, “but the minute you leave the room or something, they laugh behind your back and poke fun at it because you did open your mouth.”<sup>696</sup> Whether this fear of mockery was justifiable or not, it did have enough salience to Hurley to keep her from participating in town affairs.

When Hurley explained her experiences to Mansbridge, she was hardly new to Selby, having been a resident for years. Like many others in Selby, she felt like her marginalization was based primarily on her lower socioeconomic status. As Hurley explained to Mansbridge, the social division in Selby was primarily based upon differences in wealth and social class, with the more well off members of the community feeling included and the less well off members of the community feeling excluded.<sup>697</sup> In other words, those in a more privileged socioeconomic position were more likely to feel like insiders, and were, therefore, more comfortable participating in town meetings. Lower income individuals, on the other hand, were more likely to feel like outsiders. This meant that they more often harbored a fear of public ridicule, which encouraged them to stay relatively quiet.<sup>698</sup> The disparity between the social comfort level experienced by more advantaged members of the community and that, which was felt by the less advantaged members of the community, meant that the latter ended up with only minimal input into village politics.

Mansbridge’s findings are, of course, not entirely specific to the town of Selby. It is common for those in a relatively poor socioeconomic position to have a more difficult time being absorbed into their in-groups as their more advantaged neighbors. As outsiders within their in-groups, the former individuals not only risk having their needs discounted by their wider

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<sup>696</sup> Mansbridge, *Beyond Adversary Democracy*, pp. 62.

<sup>697</sup> See *ibid.*, pp. 100-102 and pp. 107-110.

<sup>698</sup> “In speaking at meetings,” Mansbridge explains, people in lower socioeconomic classes “feel more subject to ridicule (remember the comments, ‘They’ll say ‘She’s a fool!’; ‘I haven’t got the education to decide on that stuff’; ‘If you go there and speak up, they make fun of you’) and are less likely to convince anyone” (*ibid.*, pp. 109).

communities, but they may also choose to silence themselves when they may have otherwise spoken up.

This points to a second way in which social speech—by encouraging the forging of community boundaries based on friendship—may jeopardize the liberal democratic desire to ensure full and accurate representation of a populace. While some individuals may feel like they are able to fully express their most authentic selves when they are among friends, the majority of people would probably admit that there is a performative element to these social interactions as well. Even Eliasoph notes this phenomenon in her analysis of “The Buffalo Club.” Members of this friendship-based group were “*haunted* by an overwhelming sense of social inequality and political powerlessness,” she explains.<sup>699</sup> This meant that, when they were together, Buffalo Club members often had to try to appear as irreverent and separate from the wider world as possible. Being that the exclusion of political topics from this group was not always the result of a natural inclination, but rather, it was done actively and self-consciously, suggests that members were not necessarily being as authentic among their friends and the rest of Eliasoph’s research would suggest. It also casts some doubt on the accuracy with which the other social groups that she studies actually represent the true beliefs of their members.

Thus, while it is clear that there is an inherent democratic value to the kind of boundary forming that social speech encourages, it is important to note that there are also several negative aspects to this process. Social speech that makes some people feel included but makes others feel excluded hardly contributes to the democratic goals of inclusiveness and equality. To the extent that these groups are often divided along socioeconomic lines, boundary forging potentially poses a significant problem for democratic governance.

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<sup>699</sup> Eliasoph, “Making a Fragile Public,” pp. 279.

### III. Advantages of a theory of social speech – Increasing inclusiveness and addressing inequality:

Taken together, these four aspects of social speech—1) Character development; 2) Social capital formation; 3) Cultural and political training; and 4) Boundary forging—provide ample justification for including them in a political theory of speech. By addressing and incorporating these functions of informal, everyday conversation, the theory of social speech that I have presented is able to capture a wide range of political action and consequences that is missing from deliberative democratic and American legal theories of speech. In the final sections of this chapter, however, I suggest two additional advantages of my theory of social speech over the contemporary models I discussed in Chapters Two and Three: 1) It is relatively inclusive; and 2) It better addresses the problem of inequality.

The first and most obvious advantage of a theory of social speech is that it is able to address the realities of communication. While it is a valuable endeavor to create perfect models of speech that people *should* follow, throughout this project, I have been more interested in looking at how individuals actually *do* interact. And when one examines the ways in which people truly are communicating with one another, it appears that they do not tend to behave according to the ideals described by deliberative and legal theorists. Individuals may incorporate reason into their arguments and behave with some decorum, but they are also likely to utilize more emotional appeals as well. This “emotional speech” may incorporate any number of techniques for evoking a response, including rhetoric, testimony and narrative. Unfortunately, because it does not strictly adhere to the values of impartiality, publicity and autonomy that characterize ideal deliberation, “emotional” speech is frequently omitted from contemporary models of speech, even when it takes occurs in more traditional political communication. The theory of social speech, on the other hand, embraces these oft-utilized forms of communication.

A second advantage of including the intimate, private and social in a theory of speech is that it addresses the problem of inequality that plagues deliberative and jurisprudential models. Despite best wishes, all citizens are not born with absolute natural equality. Differences in educational opportunities, lifestyles and economic means further exacerbate any preexisting natural inequalities along socioeconomic and gendered lines. Specifically, whereas wealthy, white males are more likely to receive a lifelong training that makes them relatively well-suited to rational deliberation, those who are less well off, less white and less male are more likely to rely on other, less traditionally political forms of communication. Deliberative democratic and American legal theorists, by favoring rational, reasoned, political dialogue, further elevate the social standing of those who already most advantaged in society. What is worse, because these theorists tend to work with ideal, abstract theories, they are often unable to acknowledge or account for their implicit favoritism. The theory of social speech, on the other hand, by beginning from an empirical observation of speech, is able to underscore inequalities where they occur.

*A. Increasing inclusiveness:*

Very little of everyday communication actually takes the form of formal political deliberation, characterized by rational, considered dialogue. Rather, for the most part, when individuals speak to one another, they are generally engaging in social speech. And as I have described throughout this chapter, social speech tends to employ more informal, affective communicative devices – or, what I have called, “emotional speech.” Individuals not only find that this type of communication tends to come more naturally to them, but they also quickly learn that it is one of the most effective tools for expressing themselves and relating their ideas to others. Sympathetic appeals enable individuals to communicate their experiences, opinions and arguments to others in instances where rational, dispassionate discourse would be inappropriate or insufficient. For example, in social settings—where a formal debate might seem out of place—



individuals are likely to communicate using emotional speech. And when an individual is grappling with a subject that cannot adequately be expressed through a mere telling of facts and figures (e.g. racism), emotional appeals often present a better option for relating a full picture of the phenomenon.

But the social sphere is not the only appropriate venue for emotional speech. In the political sphere, public actors also often find themselves utilizing less formally rational discursive tools in order to persuade an audience, share an insight or relate an experience. Indeed, in practice, the same emotional speech that is so indicative of social speech often find expression through more traditionally political speech as well. However, despite its prevalence in both social and political interactions, emotional speech is often absented from contemporary deliberative democratic and jurisprudential theories of speech. As a result, not only do such theories fail to address the realities of everyday communication, but they also omit a large portion of political speech as well.

In this section, I discuss the functionality of emotional speech. Building off of Lynn Sanders' essay, "Against Deliberation," I have identified three forms of emotional speech that play a central role in both everyday communication and also more traditional political speech, but are, nevertheless, frequently disregarded in contemporary theories of speech: 1) rhetoric, 2) testimony and 3) story-telling.<sup>700</sup> I argue that each of these types of emotional speech contribute towards liberal political outcomes and democratic goals in different ways – from expressing respect for difference and individuality, to honoring unorthodox ideas, to uniting communities in empathy. Given these functions, I believe that it is necessary for any comprehensive political theory of speech to at least address emotional speech. And because the theory of social speech presented in this project necessarily incorporates and validates emotional speech, I would argue

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<sup>700</sup> See Lynn M. Sanders, "Against Deliberation," in *Political Theory*, Vol. 25, No. 3 (June, 1997), pp. 347-376.

that this gives it a significant advantage over other, more restrictive contemporary theories of speech.

First, despite its negative connotations, rhetoric has served a useful purpose in communication, dating at least as far back as Aristotle.<sup>701</sup> In essence, rhetoric is a tool of persuasion. As Henry Richardson defines it, “[p]ersuasive rhetoric is the art of employing language so as to bring about changes in one’s audience’s practical commitments, especially by making appeal to their emotions.”<sup>702</sup> More concretely, rhetoric enables a speaker to acknowledge personal differences in her audience, tailoring her arguments and appeals to the passions and partialities of each individual.<sup>703</sup>

This represents a significant deviation from a more formal, deliberative approach. Whereas reason-based appeals assume sameness—requiring a speaker to appeal to some abstract rational actor—rhetoric respects difference. As Bryan Garsten explains, when individuals reason, they appeal to all audiences the same way; with rhetoric, on the other hand, they appeal to people’s particularities. “When we try to persuade,” he writes, “we use the arguments, images, and emotions most likely to appeal to the particular audience in front of us. Rhetoricians who teach the art of persuasion have always instructed their students to treat

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<sup>701</sup> In modern and contemporary political theory and practice, rhetoric has often been conflated with manipulation, deception and pandering. See Bryan Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Cambridge, MA: Harvard University Press, 2006). As Garsten explains, “[p]olitical theorists tend to focus on reasonable dialogues of justification rather than passionate exchanges of rhetoric. While actual politicians have not abandoned persuasion (how could they?), they prefer not to acknowledge their art. They understand that when they hear an argument described as ‘rhetorical,’ it is being either decried as manipulative or dismissed as superficial” (Ibid., pp. 3).

<sup>702</sup> Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (New York: Oxford University Press, 2002), pp. 90.

<sup>703</sup> It is through this respect for others that rhetoric serves as not only a useful communicative tool, but also as a means for uniting communities and (potentially) breaking down class barriers. See Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford, CA: Stanford University Press, 1993).

different audiences differently, to study their distinctive and peculiar passions and their particular commitments, sentiments, and beliefs.”<sup>704</sup>

This individualized approach is not only normatively appealing—in that it forces the speaker “to display a certain respect” for different perspectives and judgments—but it is also relatively effective in terms of persuading one’s audience to modify its beliefs.<sup>705</sup> Indeed, rhetoric is a practical tool, one that begins from the assumption that most people look very little like the ideal deliberative citizen, and then addresses them as they are (i.e. “opinionated, self-interested, sentimental, partial to their friends and family, and often unreasonable”).<sup>706</sup> As Garsten explains, rhetoricians “engage with others wherever they stand and... begin [their] argument there, as opposed to simply asserting that they would adopt [the rhetoricians’] opinion if they were more reasonable.”<sup>707</sup> This more realistic approach tends to have a greater resonance with audiences than the more “one size fits all” attitude of rational deliberation.

Second, testimony also has a long history in politics, especially within Black churches in the United States.<sup>708</sup> Like rhetoric, testimony embraces difference. However, testimony goes beyond merely acknowledging and validating difference – it also gives a voice to minority viewpoints. The goal of testimony is not to reach a consensus, but to ensure that all segments of the population are heard and “to include and represent a fuller range of critical voices.”<sup>709</sup> As a result of this inclusiveness, “perspectives not obviously rooted in common ground and not necessarily voiced in a calmly rational way” receive an audience through testimony that they may not have been able to attain in a more formal deliberative model.<sup>710</sup>

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<sup>704</sup> Garsten, *Saving Persuasion*, pp. 5.

<sup>705</sup> *Ibid.*, pp. .3.

<sup>706</sup> *Ibid.*, pp. 4-5.

<sup>707</sup> *Ibid.*, pp. 3.

<sup>708</sup> Sanders, “Against Deliberation,” pp. 370.

<sup>709</sup> *Ibid.*, pp. 371.

<sup>710</sup> *Ibid.*, pp. 372.

Finally, much like testimony, story-telling (i.e. narrative) offers a pathway for less orthodox viewpoints and perspectives to enter the political sphere. Individuals often use story-telling in situations where deliberate, factual or rational arguments would not adequately express the issue at hand. Specifically, when one's topic is especially grave, sometimes, a speaker will find that she must rely less on data and more on emotional, personal appeals. And in doing so, she may often find that she is able to establish a deeper connection to her audience than if she were to have used a more data-driven approach.

For example, Kimberly K. Smith's work on slave narratives shows how rational speech may not always be the best method for getting one's point across.<sup>711</sup> In this case, Smith explains, by straying from a factual account and offering more a narrative presentation, slaves were actually able to provide a more truthful representation of slavery – a *morally* truthful representation of slavery.<sup>712</sup> Furthermore, the story-telling model offered slaves the opportunity, not only to share their individual experiences (thus establishing a common body of facts from which to argue), but also to appeal to the emotions of the general public in ways that would not be possible through rational speech alone, thereby accomplishing moral reform.<sup>713</sup> This is because, according to Smith, story-telling tended to breed sympathy and empathy among non-slaves – and those feelings of understanding had powerful public policy results. “[B]ecause sympathy allows one person to share in the experiences of another,” she explains, “it has the power to extend the feeling of the slave's suffering among the public, and thus prompt general resistance to

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<sup>711</sup> See Kimberly K. Smith, *The Dominion of Voice: Riot, Reason, & Romance in Antebellum Politics* (Lawrence, KS: The University of Kansas Press, 1999).

<sup>712</sup> As Smith explains, “even if the story had only a slight connection to its factual basis, it might still be true; romance novels claimed to deal in a different kind of truth than the factual, verifiable sort of truth that politics was supposed to be based on. They purported to teach *moral* truths, general principles of right conduct and its consequences that transcended the actor's specific circumstances” (Ibid., pp. 191).

<sup>713</sup> Ibid., pp. 183-184.

slavery.”<sup>714</sup> In other words, by breeding sympathy, narratives were able to make slave interests more general.

To summarize, rhetoric, testimony and story-telling are all useful and valuable communicative tools. First, by enabling a speaker to respect difference and address individuals as they are (not how they ought to be), rhetoric not only validates the social existence of all people, but it is also highly persuasive. Second, by facilitating the introduction of new and controversial viewpoints into the marketplace of ideas, testimony contributes to greater inclusiveness within both the political and social spheres. Finally, by utilizing a more personal, emotional approach, story-telling not only helps individuals express moral truths but it also enables them to establish the kind of empathy that should ultimately result in greater unity within a community.

Thus, all three forms of emotional speech have particular roles to play within liberal, democratic states. And frequently—both in the political and the social arena—individuals really do utilize emotional speech. Public and private persons use narratives, anecdotes and rhetoric every day in order to get their ideas across in ways that are more persuasive, more touching and less offensive to others. And in light of both its democratic utility and also its prevalence, it would seem as if emotional speech should have earned a place in all democratic political speech theories of speech. Indeed, those are two of the main rationales for developing a theory of social speech that necessarily includes emotional speech. And yet, rhetoric, testimony and story-telling still remain on the periphery of contemporary theories of speech. By omitting emotional speech, many contemporary theories of speech not only fail to address the realities of everyday communication, but they also miss out on several substantial democratic functions of speech.

*B. Addressing inequality:*

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<sup>714</sup> Ibid., pp. 203.

A second advantage of a theory of social speech is that it addresses the problems of inequality that plague deliberative and jurisprudential models of speech. As explained in Chapters Two and Three, the ability to express oneself well and effectively—according to formal, political standards—is not equally distributed among different demographic groups. Specifically, those who are already relatively advantaged from a socioeconomic perspective (e.g. male, wealthy, white) are more likely to have developed the character traits, trust, skills and personal connections that facilitate traditionally political, public speech. Those who begin from a less favorable socioeconomic position (e.g. female, low income, minority), on the other hand, are less likely to have acquired the tools for success in formal deliberation and political discourse.

Unfortunately, by elevating this kind of speech above all others, deliberative democratic and American legal theorists reinforce and perpetuate these inequalities. And by presenting ideal theoretical models that necessarily presuppose some equality of talent in and access to formal, rational, dispassionate discussion, deliberative democratic and American legal theorists are often forced to gloss over these inequalities. The theory of social speech, on the other hand, by looking at how speech actually occurs, is able to account for the inequalities inherent in communication. By drawing attention to social speech, which is practiced by all individuals in all socioeconomic circumstances, the theory of social speech acknowledges and validates the communicative experiences of those groups that have frequently been marginalized in deliberative democratic and American legal theories of speech. It also provides a useful framework for devising methods to alleviate inequalities where they occur.

In this section, I briefly revisit the inequality critiques of both deliberative democratic theory and American legal theory that I presented in Chapters Two and Three, respectively. I then summarize and highlight the ways in which the four mechanisms presented in this chapter address the issue of inequality.

To begin, political and legal theories that elevate rational, researched, dispassionate dialogue above all other forms of communication also implicitly privilege those who are more adept at such speech. Certain individuals, after all, are simply better at engaging in reasoned, reasonable conversation than others. As a result, they have an automatic advantage within deliberative democratic and American legal theories that favor such speech – not only do they perform better within these arenas, but the very fact that their style of speaking is held up as the ideal, also puts them in a superior position, symbolically.

The fact that not all individuals are equally proficient in rational, reasoned speech does not necessarily pose a significant problem from the perspective of inequality, however. The problem only arises when certain groups systematically find themselves without an equal *opportunity* to develop a capacity and fondness for this kind of speech. And unfortunately, while a proficiency in formal, political deliberation may, in some cases, be the result of a natural gift, it more commonly comes about as the result of an individual's fortuitous socioeconomic positioning. For a multitude of reasons, those who are male, white and higher income tend to become more adept at this type of communication than those who are female, minority and lower income. As Sanders writes, those “who are already underrepresented in formal political institutions and who are systematically materially disadvantaged, namely women; racial minorities, especially Blacks; and poorer people,” are especially likely to present their arguments in ways that are less characteristically deliberative.<sup>715</sup> And as a result, members of these less fortunate groups disproportionately find themselves overwhelmed or out-argued in formal, political deliberation. Indeed, many may choose to exclude themselves from speech venues that valorize only this narrow type of communication (thus, implicitly, devaluing all others kinds). In this way, large segments of the population are systematically silenced by a preference for formal, political speech.

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<sup>715</sup> Sanders, “Against Deliberation,” pp. 349.

Unfortunately, not only do deliberative democratic and American legal theorists reinforce and establish inequality by valorizing that speech, which is both characteristic of those who are most advantaged in society and also difficult to attain for the least advantaged, but they are also ill equipped to account for inequality where it occurs. As theories of speech that rely too heavily on the “ideal”—at the expense of descriptiveness—both schools of thought are likely to overlook (or push aside) the power imbalances that inform actual communication. As a result, both deliberative democrats and American legal theorists often inadvertently minimize or discount the experiences of those who are systematically disadvantaged by their communicative schemes.

First, deliberative democratic theorists, because they tend to be more concerned with developing abstractions than describing the way that speech actually occurs between real people, have a tendency to gloss over the unequal distribution of resources and power that influences speech. As Joshua Cohen explains in “Deliberation and Democratic Legitimacy,” for ideal deliberation to function, it requires two forms of equality: formal and substantive.<sup>716</sup> While formal equality refers to equality of opportunity to initiate proposals, criticize and support measures, substantive equality demands that individuals not be constricted by a society’s unequal distribution of power, resources and norms.<sup>717</sup> In other words, in order for deliberative democratic theories to work, the authors must assume that participants in deliberation are free from social influences. They create ideal speech scenarios that only function in a world that is perfectly equal and fair. But in the real world, it is impossible to create an instance of speech that is fully removed from that community’s power dynamics. To ignore that fact is to create theories that may be abstractly appealing, but also fail to capture the full extent of inequality.

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<sup>716</sup> Joshua Cohen, “Deliberation and Democratic Legitimacy,” in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge: Harvard University Press, 2009), pp. 16-37.

<sup>717</sup> “The participants [in ideal deliberation] are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to deliberation, nor does that distribution play an authoritative role in the deliberation. The participants in the deliberative procedure do not regard themselves as bound by the existing system of rights, except insofar as that system establishes the framework of free deliberation among equals” (Ibid., pp. 24).



Second, many American legal theorists are also hindered by their attachment to ideal theory and the assumption of a mythical free and open marketplace of ideas, in which all interested parties are able to participate. To the extent that socioeconomic inequalities exist, they should be eclipsed by the quality of an individual's arguments. In practice, however, it is not always the better or truer argument that triumphs in the marketplace of ideas. While truth may ultimately prevail in the long term, in each individual instance, it is the most *persuasive individual* that tends to win out. And in a forum that values rational, reasoned opinions, expressed in a calm, dispassionate manner, those who are most capable of expressing themselves along these lines (i.e. male, white, wealthy, etc.) are in a better relative position to have their positions accepted.<sup>718</sup> In order to maintain the illusion of a fair and equal marketplace of ideas, however, American legal theorists must pretend that this advantage does not exist. And again, in doing so, they ultimately harm those who are less competitive contributors to the marketplace of ideas.

One of the most significant advantages of a theory of social speech, on the other hand, is that it is able to confront issues of inequality. As a theory that begins by taking an empirical look at communication, it is able to identify and emphasize the ways in which unequal distributions of power influence communicative acts. This is not to say, however, that the theory of social speech is a *solution* to the problems of inequality that plague all communication. Indeed, throughout this chapter, I have highlighted at least four ways in which social speech—by reinforcing a community's preexisting inegalitarian tendencies—may actually exacerbate preexisting power imbalances and inequalities.

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<sup>718</sup> The more often an idea is expressed, the greater the chance it will reach a wide audience, and the deeper it will sink into the consciousness of those who hear it. Thus, those with the resources to make their opinions widely heard (e.g. by buying airtime, putting up advertisements, etc.) have a distinct advantage over those with fewer resources. In other words, those who can afford to spend the time and money it takes to keep up the fight often end up the winners. See John Stockley, "All the Free Speech That Money Can Buy? The Supreme Court Constricts Finance Reform," in *Judging the Constitution: Critical Essays on Judicial Lawmaking*, Michael McCann and Gerald Houseman (eds.) (Boston: Scott, Foresman and Company, 1989).

First, I acknowledged that an individual's social circumstances are instrumental in her character development. In environments where social speech is positive, encouraging and inspirational, individuals are likely to develop the kinds of virtuous and active character traits that are conducive to good democratic citizenship. Where social speech is negative, hurtful and exclusionary, however, individuals are more likely to grow aggressive, isolated and/or insecure. Thus, the quality of one's social circle (by influencing the quality of discussion) comes to fundamentally influence her character in either positive or negative ways. In other words, an individual may find herself more or less competitive in a liberal democratic state based largely on her initial social placement.

Second, I showed how social capital (i.e. the facilitator of political productivity) might not necessarily extend across demographic groups very well. Where there is physical segregation and, therefore, diminished contact within a community—whether intentional or inadvertent—social speech cannot be expected to lead to wide-ranging social capital. And to the extent that social capital exists only within smaller, more homogenous communities, it cannot be assumed that all social capital is equal. In particular, studies have shown that women and minorities often find themselves building up social capital that may be helpful in their day-to-day lives, but carries little influence within the larger political sphere.

Third, I have argued that, where there are significant differences between socioeconomic groups, it is likely that some will receive, through social speech, a cultural and political training that is less conducive to full and equal democratic citizenship than others. Those who find themselves subject to racism, sexism, etc. in the social sphere, for example, are likely to develop a more narrow view of what is possible and desirable in their given societies. These limitations to an individual's democratic imagination profoundly influence the political choices that she makes throughout her life. Furthermore, one's socioeconomic position also determines the structure of that social speech, which she is likely to encounter in life, with not all structures being equal in terms of their likelihood of providing democratic training. Those who are more advantaged are

likely to live within social spheres that are relatively democratic and egalitarian, thus preparing them for life in a participatory, democratic political system; those who are less advantaged, on the other hand, are likely to have had a more authoritarian personal and professional life, which provides a less complete training in democratic citizenship.

Finally, in this chapter, I have recognized the ways in which social speech's boundary forging function may not only reflect preexisting inequalities, but may also actually exacerbate them. Any time that an in-group is formed, an out-group is also created. This distinction is not neutral, however. When, through social speech, an individual comes to identify her community, she is simultaneously building an emotional attachment for this "one singular we," of which she is a part, and a distaste for the "them," from which she is separate. Those negative sentiments towards the "them" may result in serious geopolitical conflicts. On a more micro level, however, the creation of an in-group inevitably leads to internal hierarchies that leave some members feelings like outsiders. An all too often, it is minorities and those who are in some way disadvantaged that find themselves feeling like outsiders.

These kinds of inequalities—resulting from or being magnified by social communication—are inevitable in an unequal society. What is important here is not that the theory of social speech remedies all inequalities, but that it is able to identify and address inegalitarian issues and limitations to speech. It does not hide them under abstractions or minimize them for the sake of articulating an ideal theory. Rather, it acknowledges these problems head on and brings them to the forefront of theoretical discussion. This is necessary for strengthening the liberal democratic ideals of equality and inclusiveness in two ways. First, an honest and open account of social inequality validates the experiences of wide segments of the population, who may have felt themselves unrepresented and devalued by other democratic theories of speech. Second, it is only by recognizing inequalities where they exist that researchers can even begin to develop plans for how to diminish them. And indeed, as I show in Chapter Seven, the knowledge

garnered through a theory of social speech is instrumental in designing programs to help diminish the implications of socioeconomic inequality.

#### **IV. Conclusion:**

As stated above, the theory of social speech presented in these pages is not meant to replace more traditional theories of speech. Rather, the purpose of an explicitly *social* theory of speech is to supplement and improve upon deliberative democratic and American legal theories of speech, which have often been limited in both their inclusiveness and also their ability to handle inequality. By incorporating the kind of communication that defines the lived experience of the vast majority of the general public, I have sought to develop a fuller picture of the role that speech plays in defining liberal democratic citizens and communities.

To summarize, in this chapter, I argued that when people engage with one another in a social manner, there are four separate mechanisms at work, linking that communication to liberal democratic citizenship and political action. First, individuals are developing their potential to be virtuous, active citizens. Second, they are establishing the generalized trust, respect and empathy that are necessary for the healthy functioning of a liberal democratic state. Third, they are determining not only what is possible, important right and feasible within their unique political cultures, but also developing the skills necessary for political participation. And finally, when individuals are engaging in social speech, they are also drawing the imaginary lines between what is their community and what is not.

Throughout this chapter, I have shown that none of these mechanisms are neutral. Depending on the content and form of social speech, each mechanism may result in positive or negative consequences from the perspective of liberal democratic citizenship and political outcomes. And depending on one's socioeconomic position, the social speech that she is

exposed to may skew in one direction or the other. That is why it is so important that *all* individuals maximize their experience with that social speech, which is kind, thoughtful and inclusive, and minimize their exposure to mean, derogatory and discriminatory social communication.

And while it is both impossible and undesirable to police all instances of social speech from above, once the mechanisms are understood, there is much that can be done to positively influence the nature of social speech. Thus, in the final two chapters of this project, I explore real world applications of the theory of social speech. In Chapter Six, I look at three examples of social speech—Internet speak, safe spaces and hate speech—to illustrate how the four mechanisms function in practice. Then, in Chapter Seven, I use that knowledge to develop a series of recommendations for influencing the nature of social speech in ways that are consistent with liberal democratic goals.

## CHAPTER 6

SOCIAL SPEECH IN PRACTICE: THREE UNTRADITIONAL SPHERES OF POLITICAL  
COMMUNICATION

In the preceding chapter, I identified four mechanisms that link social speech to democratic citizenship and political outcomes, both positive and negative. These mechanisms can be summed up as follows: 1) Informal communication is an instrument for creating the kind of character traits that make both better and worse democratic citizens; 2) Social communication builds social capital and trust (based on mutual interests, hopes and objectives), which facilitates collective action; 3) Private and social interactions train people for their political culture, teaching them the expectations of citizenship particular to their communities; and 4) Social speech ties citizens to one another emotionally, and helps them define the cognitive borders of their communities, including some and excluding others. Chapter Five explained, theoretically, that communication and discussion in civil society, even when it involves seemingly apolitical topics, holds the potential to affect distinct political ends both positively and negatively. Depending on the content and style of social speech, participants may eventually develop into engaged, invested, community-minded members of a common public *or* they might become disconnected, insecure and isolated creatures. The varying qualities (and quantity) of social speech may lead some individuals to associate their own best interest with that of the wider public; others may connect with a smaller subgroup; and some may withdraw from community life entirely.

One of the strengths of the theory of social speech is that it is grounded in empirical observation and, therefore, reflects liberal democratic life as citizens actually experience it. Instead of focusing on how people would deliberate in an ideal world under perfect conditions of

equality, rationality and respect, the theory of social speech is able to tell us something about the way people *actually do communicate*. As Nancy Fraser has explained, the tendency of many deliberative democratic (and, I would add, legal) theorists to assume ideal speech conditions has meant that their theories fail to fully incorporate the complexities of human interactions and power relationships.<sup>719</sup> The theory of social speech, however, is designed to take into account the varying ways in which formal institutions and social structures influence democratic citizenship and political outcomes. It does so by building from empirical analyses of how people really do interact with one another in everyday life.

Unfortunately for research purposes, real life communication between ordinary citizens often bears little resemblance to the ideals found in Bruce Ackerman and James Fishkin's "Deliberation Day" model<sup>720</sup> or Alexander Meiklejohn's standard of democratic self-governance.<sup>721</sup> That is not to say that quotidian speech never adheres to the ideal speech situations described by deliberative democratic or legal theorists; under rare circumstance (e.g. market research groups, small college seminars, etc.) near-perfect deliberation may actually exist. However, in the vast majority of instances, while everyday communication between citizens *may* include politeness, reason and research, it is more likely to incorporate elements of passion, humor, emotional bias, personal history, bargaining, anger, vitriol, sarcasm, etc. Instead of functioning like a formal, public, impartial debate, most everyday speech is rich with rhetoric, testimony and narratives. It is casual, unstudied and (on the face of it) apolitical.

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<sup>719</sup> Looking specifically at Jürgen Habermas' "bourgeois masculinist" conception of the public sphere, Fraser points to four assumptions that are both central to the theory and also limit its applicability to real life: 1) It is possible for interlocutors in a public sphere to bracket their social status and to deliberate 'as if' they were equals; 2) A single, inclusive public sphere is always better than a "nexus of multiple publics"; 3) Public spheres should only address the common good, and not private interests; and 4) There must be a sharp separation between civil society and the state for a public sphere to function properly. See Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Social Text*, No. 25/26 (1999), pp. 62-63.

<sup>720</sup> See Bruce Ackerman and James S. Fishkin, "Deliberation Day," in *Deliberating Deliberative Democracy*, James S. Fishkin and Peter Laslett (eds.) (Oxford: Blackwell Publishing Ltd., 2003).

<sup>721</sup> See Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (New York: Harper & Brothers Publishers, 1948).

These observations are nothing new. It has always been the case that social speech has dominated the everyday conversations of ordinary people. Even within the eighteenth century bourgeois public sphere that Jürgen Habermas idealizes, the majority of the population eschewed formal, political deliberation in favor of more intimate and social interactions.<sup>722</sup> Thus, one might wonder why it is currently so important to develop a theory of speech that explicitly incorporates the social, when the world has survived so long without one. I believe that there are two reasons why social speech merits a second look at this point in history: 1) the increase in informal, anonymous, private speech due to growing use of the Internet and social networking websites; and 2) growing concerns for political and social equality.

First, like the printing press, the post, radio and television before it, the Internet has revolutionized the way people communicate and receive information. Knowledge can now be transported around the world at the very instant it is demanded. But the digital revolution has not just been a development in speed and efficiency. For the first time, and in contrast to the top-down models that came before, the Internet has made it possible for the average citizen of the liberal, democratic West to simultaneously act as both a producer and a consumer of information.<sup>723</sup> This development has changed both the form and the content of speech, increasing the likelihood that when people are communicating, they will be discussing seemingly apolitical topics and doing so in an informal style. As policymakers and private citizens evaluate and regulate the new and increasingly dominant Internet speak, it is especially important that political theorists develop models that can incorporate this kind of communication.

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<sup>722</sup> See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: The MIT Press, 1991).

<sup>723</sup> See David Beers, "The Public Sphere and Online, Independent Journalism," in *Canadian Journal of Education / Revue canadienne de l'éducation*, Vol. 29, No. 1, The Popular Media, Education, and Resistance / Les mass-media populaires, l'éducation et la résistance (2006), pp. 109-130: "The culture of citizenry modeled online... is one where news is not passively received, but is challenged, corrected, embroidered and, through individual agency, rippled outwards into the society. At the same moment, the Internet is fast eroding assumptions about who may publish and report news... [A] burgeoning new breed of 'citizen journalists' populating blogs and open publishing sites are shifting assumptions about authority and influence in news media culture" (pp. 119).



Second, as concerns for equality between the sexes, races, classes, etc. have progressed, social speech has taken on a more visible role. Growing norms of inclusiveness and fairness would seem to dictate that all citizens of liberal democratic states have at least the same opportunities for equal participation and representation in the political sphere. However, as contemporary political and legal theories of free speech have tended to privilege public speech about purely political topics, they have also neglected both that informal speech which takes place outside of the public arena (e.g. in homes, coffee shops, schools) as well as those who are most commonly associated with those spaces. The neglect of social speech may mean that democratic states and their citizens have failed to attend to discourses that contribute to the marginalization of the least advantaged in society, even as they insist on equality in official and overtly political discourse. By idealizing the narrowly construed vision of formal, rational speech favored by those already in relative positions of relative power, contemporary speech theories imply to those who do not conform to (and thrive within) these deliberative ideals that they will be relegated to the background of politics.<sup>724</sup> Women and minorities, in particular, must either adopt this highly structured approach to discourse or risk being left out or ignored. While communication theory is hardly the only sphere in which women and minorities have been marginalized, the fact that the veneration of rational, informed, unbiased deliberation disproportionately silences groups that are already likely to be disempowered, makes the offense all the more severe.

What is needed is a theory of speech that illuminates and validates the social speech most associated with these groups. While social speech may not always appear political on the surface, it has significant political consequences. Not only does it represent a legitimate form of political action in its own right, but it also serves as a vital step towards more traditional political behaviors. For many individuals, social speech provides a necessary outlet – a way to

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<sup>724</sup> See Iris Marion Young, "Difference as a Resource for Democratic Communication," in *Deliberative Democracy: Essays on Reason and Politics*, James Bohman and William Rehg (eds.) (Cambridge, MA: The MIT Press, 1997); Fraser, "Rethinking the Public Sphere."

understand how they fit into society at large, and also a space to build the autonomy and self-worth necessary for full participation in their political community. And as wealth has become more unequally distributed in recent years, the proportion of society choosing to retreat away from political life and into the social sphere is likely to increase, making the need for a theory that represents these groups all the more obvious.<sup>725</sup>

Taken together, these two concerns—the rise of new forms of communication and growing egalitarian norms—justify the search for a theory of social speech that addresses the lived experiences of everyday citizens. In this chapter, I connect the theory of Chapter Five with empirical observation by examining three distinct spheres of social communication: Internet speak, safe spaces and hate speech. At first glance, these three types of speech may not seem to have much in common. From their typical practitioners to the public opinion about them to their historical context, Internet speak, safe spaces and hate speech are all very different. However, as venues for social speech, they all serve a similar function: depending on their style and content, they all have the capacity to significantly influence democratic citizenship and political outcomes in both positive and negative ways (although in the case of hate speech, I only address its clearly predominant negative potentialities). By focusing on three very dissimilar—but still widely practiced—kinds of social communication, I am able to show just how diverse and prevalent social speech really is, thus highlighting its political impact.

First, I address Internet speak and social networking in terms of both their positive and negative potential impacts on democratic citizenship and political participation. On the positive side, I demonstrate how participation in online social networking sites leads to greater political participation offline and stronger feelings of political efficacy and connectedness. On the negative side, I show how communication on the Internet has led to the new phenomenon of cyberbullying,

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<sup>725</sup> For more on the growing income disparity in the United States, see Chad Stone, Danilo Trisi and Arloc Sherman, “A Guide to Statistics on Historical Trends in Income Inequality,” Center on Budget and Policy Priorities (Sept. 11, 2013). Available at: <http://www.cbpp.org/files/11-28-11pov.pdf>.

which causes victims to lose agency and to feel like outsiders in their communities. Anonymity is often the key to this process, as the victim often does not know the identities of her attackers.

Second, I look at “safe spaces” in Black feminist literature to show how time spent in intimate or civil settings (e.g. homes, churches, Black community organizations) and with extended families and friends offers members of marginalized groups the opportunity to not only have their voices heard and their opinions respected, but also to challenge oppression and affirm one another’s humanity. The self-respect that these processes breed serves as a necessary condition for fair and equal participation in the political realm. On the other hand, these kinds of interaction may further cement differences, defining boundaries along lines of race, sex or class, and breed suspicion between the resulting “us” and “them.”

Third, I consider the unique case of hate speech. Deviating from the structure of both the Internet speak and safe spaces sections, in this section, I address only the negative potential effects of hate speech on democratic citizenship and political outcomes. While hate speech may serve some possibly cathartic functions in liberal democratic societies (discussed in Chapter Seven), unlike my previous examples of social speech, its content and its emotional impact on its targets are unquestionably so negative from the standpoint of democratic citizenship, that they must be my main concern. Hate speech differs from Internet speak and safe space speech in another way as well: Because hate speech necessarily addresses issues of public importance (e.g. racist, sexist, homophobic, etc. ideologies), it is one of the few examples of social speech that is already generally considered political. But while hate speech may be widely accepted as political in terms of its content, it is also political in terms of its implications. Hate speech is an intimate and personal form of aggression, cutting to the core of how a person defines herself. When it takes place in the social sphere, this messaging may be impossible to ignore. Thus, social hate speech, more than any other kind, can lead to psychological distress and feelings of alienation that significantly affect the democratic character traits of its targets. Victims of hate speech often internalize the negative messaging about them, becoming fearful, unsure and

insecure individuals who are unwilling and unable to engage in democratic politics. And as a mode of speech designed to draw hostile boundaries between in-groups and out-groups, social hate speech also decreases social capital and trust on the part of both its targets and majority society, making compromise and collective action more difficult.

In Chapter Seven, I will return to all three of these loci of social speech in order to suggest several legal and social approaches for harnessing the positive democratic potential of social speech while also limiting its negative outcomes.

### **I. Internet speak:**

The Internet, in general, and social networking sites, in particular, are at the frontier of social speech theory.<sup>726</sup> In a matter of only a couple decades, these communicative arenas have grown immensely in size and reach, becoming both nearly ubiquitous and also deeply integrated into the everyday lives of western, democratic citizens. As the technology to go online has become more affordable, accessible and portable, people from all demographic and socioeconomic backgrounds have begun to supplement face-to-face contact with communication through their computers and mobile devices.

To provide just a sense of the prevalence of virtual speech, according to recent consumer surveys, Facebook, the world's most popular social networking site, had an audience of nearly 153.9 million users in 2010 in the U.S. alone. This represents an increase of 38 percent from the previous year.<sup>727</sup> Of those, 69 percent were daily users, averaging 25 minutes per day on the

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<sup>726</sup> By social networking sites, I am referring to large websites like Facebook and MySpace, as well as the blogosphere, twitter, chatrooms, message boards and massively multiplayer online role-playing games (MMORPG's). To put it broadly, I am considering all those spaces in the virtual world where individuals can come together voluntarily to interact with one another, and not simply absorb content from above.

<sup>727</sup> See Sarah Radwanick, "U.S. Digital Year in Review: A Recap of the Year in Digital Media," comScore (February 2011). Available at:

site.<sup>728</sup> And that is just one website. If one were to add the next three most popular sites—MySpace (50 million users), LinkedIn (26.6 million users) and Twitter.com (23.6 million users)—she would have the image of a world that is tied together through virtual links. Many Internet observers speculate that these high growth rates will only continue as mobile devices become cheaper and fifth generation wireless (5G) capabilities improve.

While the rapid growth of Internet usage is an interesting field of study in its own right, it might not merit particular attention for the theory of social speech if Internet users followed the same speech patterns online as they do in person. For the average user, however, online speech looks significantly different from face-to-face conversation. Specifically, the Internet fosters a style of speech that is notably private and casual.<sup>729</sup> The sense of anonymity online often encourages users to contribute largely personal or intimate information (as evidenced in blogs, tweets, status updates), and to do so in a less formal style (e.g. abbreviations, emoticons, photographs).<sup>730</sup> Such a degree of openness and informality may be less common in offline spheres of interaction, where people are more cautious of offending others and being judged.

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[http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/2010\\_US\\_Digital\\_Year\\_in\\_Review](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/2010_US_Digital_Year_in_Review).

<sup>728</sup> Ibid.

<sup>729</sup> For more information, see James P. Zappen, Laura J. Gurak and Stephen Doheny-Farina's experiment comparing real life and Internet rhetoric. In this study, the authors designed a colloquium that took place at Diversity University Multi-User Dimension, Object-Oriented (MOO), an electronic space where graduate students could meet and chat in real time. The authors describe their findings as follows: "Our colloquium revealed to us a kind of rhetoric and a kind of community that seems quite unlike anything that we have seen before—seventeen 'voices' from different places all 'speaking' at once in the same 'place' and 'speaking' in fragments rather than complete discourses" (Ibid., pp. 400).

<sup>730</sup> The anonymous nature of the Internet, while often regarded as a hallmark of online communication, may be waning, however. See Brian Stelter, "Upending Anonymity, These Days the Web Unmasks Everyone," in *The New York Times* (June 20, 2011): "The collective intelligence of the Internet's two billion users, and the digital fingerprints that so many users leave on Web sites, combine to make it more and more likely that every embarrassing video, every intimate photo, and every indelicate e-mail is attributed to its source, whether that source wants it to be or not. This intelligence makes the public sphere more public than ever before and sometimes forces personal lives into public view." Stelter cites the Vancouver riots of 2011, after which locals combed through social media in order to identify some of the people involved, as well as more quotidian examples of public shaming and exposure.

In recent years, the tendency toward brevity and informality in Internet communication has been amplified as many users have opted to forgo text altogether. Written language has rapidly decreased in prominence online, as Internet users have moved from expressing themselves to others via blogs (mostly words) to social networking sites (large spaces for both words and visuals) to Twitter (140 character maximum) to the sites *du jour*, such as Instagram and Tumblr (entirely image-based).<sup>731</sup> The trend toward visual means expression online has been substantial. For example, users of Instagram, an industry leader, currently post about 45 million photos a day. Between 2013 and its founding in 2010, users have posted 16 billion total pictures to their Instagram sites.<sup>732</sup> Facebook users have joined in on the trend, posting about 300 million images per day, or 100 billion per year.<sup>733</sup> And in an ode to the ephemeral, Snapchat has emerged as a popular mobile application that allows users to take and send a picture or video, while controlling the length of its visibility to the recipient (but with a set maximum viewing time of 10 sec.). After the photo is viewed, it is supposed to disappear forever.<sup>734</sup> As Robin Kelsey, a professor of photography at Harvard University explains: “You have images now that

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<sup>731</sup> It is important to note that the rise in visual communication does not merely represent the rise in Internet users; the relationship is actually inversely proportional. As the use of images rises, textual speaks falls: In 2012, 2.19 trillion text messages were sent and received in 2012, about 5% less than one year earlier. During that same period, MMS (multimedia messages that include photos and videos) grew by 41 percent to 74.5 billion. See Stephen Lawson, “US mobile data growing while SMS falls, CTIA reports,” in *PC World* (May 2, 2013). Available at: <http://www.pcworld.com/article/2037138/us-mobile-data-growing-while-sms-falls-ctia-reports.html>. In other words, as Internet users move towards visual communications, they become less likely to utilize online text communications.

<sup>732</sup> Nick Bilton, “Disruptions: Social Media Images Form a New Language Online,” in *The New York Times: Bits* (June 30, 2013). Available at: [http://bits.blogs.nytimes.com/2013/06/30/disruptions-social-media-images-form-a-new-language-online/?\\_r=0](http://bits.blogs.nytimes.com/2013/06/30/disruptions-social-media-images-form-a-new-language-online/?_r=0)

<sup>733</sup> Ibid.

<sup>734</sup> Despite initial assurances from Snapchat’s founders that the images sent via the application are quickly deleted, it has been revealed that this data actually does remain available. See Richard Hickman, “Snapchat Unveiled: An Examination of Snapchat on Android Devices” (January 23, 2014). Available at: <http://www.decipherforensics.com/snapchat/>. Furthermore, it has always been possible for users to take a screenshot of Snapchats in order to save them to their mobile devices. However, since Snapchat is still generally utilized under the assumption that images are only temporary, these revelations do not affect my argument that communication is growing increasingly nonverbal and ephemeral.

have no possible afterlife... They are simply communicative.”<sup>735</sup> This model clearly appeals to Internet users. As Nick Bilton writes for *The New York Times*: “The cutting-edge crowd is learning that communicating with a simple image, be it a picture of what’s for dinner or a street sign that slyly indicates to a friend, ‘Hey, I’m waiting for you,’ is easier than bothering with words, even in a world of hyper-abbreviated Twitter posts and texts.” Thus, demand for social websites that feature entirely visual means of communication does appear to be growing. Although the site was only two years old in June 2013, Snapchat users sent 200 million images a day during that month. This number represents a 400% increase from only six months prior. Similarly, Vine, Twitter’s six-second video sharing app has signed up more than 13 million people between January and June of 2013.<sup>736</sup>

An evolution in the form of Internet speak towards the nonverbal has affected its content and its effects on “speakers.” This new dialogue has served to magnify the tendencies towards informality and succinctness that have characterized Internet communication from the start. The emphasis on visual means of communication has also meant that users are more able to connect across language barriers. Bilton goes on to write, “As the world grows smaller, thanks to technology, people from all over the globe can chat with images that translate into a universal tongue. Do you speak only Mandarin? No problem, you can now communicate with someone who speaks only English. Take a picture and reply.”<sup>737</sup> In fact, Instagram reports that more than 50 percent of people using their service reside outside of North America.

Unfortunately, none of this has meant that Internet communicators are likely to engage in traditional political conversations online. Studies of Internet usage have repeatedly shown that, when given a plethora of choice of sites to frequent and topics to discuss, Internet users consistently opt to talk about the latest gossip, rather than world events and philosophical

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<sup>735</sup> Bilton, Disruptions.”

<sup>736</sup> Ibid.

<sup>737</sup> Ibid.

treatises. While the Internet contains countless sources for political information and arenas for political discussion, the communication that occurs via the Web is only rarely in clear pursuit of political purposes. In *The Myth of Digital Democracy*, Matthew Hindman studies Web usage patterns and shows that the vast majority of Internet traffic concerns intimate and social topics: "Overall, about 10.5 percent of Web traffic goes to adult or pornographic Web sites. A slightly smaller portion (9.6 percent) goes to Web-mail services such as Yahoo! Mail or Hotmail, 7.2 percent of traffic goes to search engines, while only 2.9 percent of Web traffic goes to news and media sites. These facts alone tell us much about citizens' priorities in cyberspace... [only] 0.12 percent of traffic... goes to political Web sites."<sup>738</sup> Primarily political websites hardly even register on the average citizen's radar. Hindman finds that, among the top one hundred most visited sites on the Web, not a single political website is featured.<sup>739</sup>

The tendency for the average individual to shy away from traditionally political topics in a social setting is not unique to the Internet. But while people also may prefer to veer away from discussions of public policy, economics, etc. when they engage in offline social spheres, there is data to suggest that the Internet is constructed in a way that makes it especially conducive to discussions of the personal, the intimate and the social. Even researchers who are optimistic about the possibilities of citizens engaging in meaningful political discussions online admit that this is still a relatively rare phenomenon, and one that might be limited by the very structure of the Internet, which tends toward the superficial. For example, in "Citizens Deliberating Online: Theory and Some Evidence," Vincent Price writes: "While growing at a fairly rapid rate, however, political 'conversation' online remains a rare phenomenon."<sup>740</sup> Price continues to report that,

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<sup>738</sup> Matthew Hindman, *The Myth of Digital Democracy* (Princeton, NJ: Princeton University Press, 2009), pp. 60-61.

<sup>739</sup> "For April 2007, HuffingtonPost.com and FreeRepublic.com were the most popular political Web sites. The Huffington Post ranked 796<sup>th</sup> among all nonadult Web sites; Free Republic was ranked 871<sup>st</sup>" (Ibid., pp. 63).

<sup>740</sup> Vincent Price, "Citizens Deliberating Online: Theory and Some Evidence," in *Online Deliberation: Design, Research, and Practice*, Todd Davies and Seeta Pena Gangadharan (eds.) (Chicago: University of Chicago Press, 2009), pp. 41.



according to a 2005 Pew Research Center study, only about 10 percent of respondents could report having taken part in any online discussions regarding the United States presidential election from the previous year.<sup>741</sup>

Within the small subset of the population that actually does use the Internet for political purposes, we find that people are not demographically representative of Internet users in general. While women represent more than half of all Internet users in the United States, men are considerably more likely to visit political and news sites – the gender gap is 18 and 12 percentage points, respectively.<sup>742</sup> And although the Web over-represents younger citizens, they are less likely to engage in online politics than older Internet users. While eighteen to thirty-four year olds account for 43 percent of all Web traffic, they amount to only 32 percent of visits to news sites and 22 percent to political sites.<sup>743</sup>

Even in the best-case scenario (from the perspective of hopeful deliberative democrats), in which Internet users are actively engaging in political discourse, the resulting conversations tend not to contain rich, meaningful discussion. Overtly political users are not, for the most part, seeking out opposing opinions, diverse audiences and new perspectives. Instead, these communicators tend to use the Internet as a tool to reinforce their own preexisting beliefs. While it may be only natural for people to prefer to organize with and receive information from those who already share their viewpoints in real life (or “IRL,” as Internet speakers might say), the Internet poses a new set of challenges by making it so easy for likeminded people to find one another and to exclude conflicting opinions.<sup>744</sup>

Unfortunately, this means that many Internet speakers are likely to fall victim to radicalism and the phenomenon that Cass Sunstein describes as “echo chambers.” This means

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<sup>741</sup> Ibid.

<sup>742</sup> Hindman, *The Myth of Digital Democracy*, pp. 67-68.

<sup>743</sup> Ibid., pp. 68.

<sup>744</sup> See Diana C. Mutz and Jeffrey J. Mondak, “The Workplace as a Context for Cross Cutting Political Discourse,” in *Journal of Politics*, Vol. 68 (2006), pp. 140-155.

that Internet speakers may use discussion to not only reinforce their preexisting viewpoints without much reflection, but by seeking out only likeminded speech partners, members of communicative groups also tend to unwittingly polarize themselves. Sunstein shows that, due to social influences on behavior (i.e. people trying to maintain their sense of identity and reputation) and the limited argument pools that exists within any group, members of a deliberating body tend to move toward a more extreme point in the direction of the members' preexisting tendencies. This is true even in perfect conditions of fairness and equality.<sup>745</sup> And because the Internet makes it so much easier than ever before for individuals to find likeminded others, it also makes it all that much more probable that users will go to extremes. Sunstein writes: "With the Internet, it is exceedingly easy for each of us to find like-minded types. Views that would ordinarily dissolve, simply because of an absence of social support, can be found in large numbers on the Internet, even if they are understood to be exotic, indefensible, or bizarre in most communities."<sup>746</sup> Even Jürgen Habermas agrees that, when left to their own devices, the Internet actually fragments users "into a huge number of isolated issue publics."<sup>747</sup>

To the extent that the Internet provides users with the option to personalize their preferences, "polarization is all the more probable, as like-minded people sort themselves into virtual communities that seem comfortable and comforting. Instead of good information aggregation, bad polarization is the outcome."<sup>748</sup> Hindman shows empirically that this is the case, finding that "only 2.6 percent of the traffic from one top fifty political Web site to another crosses

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<sup>745</sup> "But group polarization is likely to occur even in the face of equality and of entirely conscientious efforts at reaching both truth and understanding. The existence of a limited argument pool, strengthening the existing tendency within the group, will operate in favor of group polarization even if no individual behaves strategically. By itself, this will produce group polarization, whether or not social influence is operating" (Sunstein, "Deliberative Trouble?" pp. 107).

<sup>746</sup> Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide*. New York: Oxford University Press, 2009, pp. 81.

<sup>747</sup> Jürgen Habermas, "Political Communication and Mass Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research," in *Communication Theory*, Vol. 16, No. 4 (2006), pp. 422.

<sup>748</sup> Sunstein, *Infotopia: How Many Minds Produce Knowledge* (New York: Oxford University Press, 2006), pp. 97.

ideological lines.”<sup>749</sup> Even more alarming, Sunstein points out that this ideological polarization might be coming about, not through the users themselves, but automatically, through their increasing dependence on search engines.<sup>750</sup> As websites like Google and Amazon develop increasingly sophisticated algorithms to filter information for their users, this sorting becomes practically invisible.<sup>751</sup> The resulting distance between polarized ideological groups makes it unlikely that participants will reach out across the aisle when it comes time for political decision-making, and when they do, they will be less able to communicate effectively.

All of these factors—the brevity and informality of Internet speech, the rarity of online political discussion and the tendency towards polarization through the Web—seem to present a discouraging prospect for the effects on Internet usage on political outcomes. Indeed, many critics now argue that online activity is, at best, completely separate from politics; at worst, it may actually be having a negative effect. One of the more salient concerns is that individuals are now replacing the time and energy they would have expended on traditional political activity with politically ineffectual online activity. As Zizi Papacharissi explains, “political expression online might leave people with a false sense of empowerment, which misrepresents the true impact of their opinions. Individuals may leave political newsgroups with the content feeling that they are part of a well-oiled democracy – does this feeling represent reality or substitute for genuine civic engagement?”<sup>752</sup> Posting online may be an easy, accessible way to express one’s political viewpoints, but it is unlikely to have an effect equivalent to traditional political activities, such as

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<sup>749</sup> Hindman, *The Myth of Digital Democracy*, pp. 66.

<sup>750</sup> “Indeed, personalized searches, which are now possible, ensure that Google can give you the kinds of things in which you, in particular, have previously shown an interest. It follows that with personalized searches, different people with different histories will automatically receive different answers to exactly the same searches. In terms of convenience and usefulness, this is a great benefit. But in terms of information aggregation, it has an unfortunate side” (Sunstein, *Infotopia*, pp. 97-98).

<sup>751</sup> For more information, see Eli Pariser, *The Filter Bubble: How the New Personalized Web is Changing What We Read and How We Think* (New York: The Penguin Press, 2011).

<sup>752</sup> Zizi Papacharissi, “The Virtual Sphere: The Internet as a Public Sphere,” in *New Media & Society*, Vol. 4, No. 1 (2002), pp. 16-17.

voting or writing one's congressman.<sup>753</sup> To the extent that people consider "liking" a Facebook page or posting on a message board to be forms of legitimate political action, they may be falling into the traps of "clicktivism" or "slacktivism."<sup>754</sup> While lawmakers may have grown increasingly attuned to public opinion as represented through benign online actions, as Karpf explains, a "Facebook group '100,000 in support of gay marriage' is not going to convince any senators to vote for the repeal of the Defense of Marriage Act. An auto-tuned remix poking fun at Democratic spending priorities will not affect entitlement spending."<sup>755</sup> The distance between these seemingly political actions and measurable political outcomes may lead Internet users to feel politically powerless, thus breeding resentment, apathy and increased levels of government distrust.<sup>756</sup>

While it may be true that the Internet poses certain threats to the political process, these sorts of critiques do not address the full relationship between Internet communication and democratic citizenship. Just because people are not talking about the *right* things in the *right* way when they log on, it does not follow that their actions are having *no* effects on politics. The key to recognizing the impact of Internet speech on political outcomes is to dispel oneself of the notion that the effects will necessarily be immediate and acute. Internet speech is not necessarily analogous to protesting or voting; there may not be a clear cause-and-effect relationship between engaging in online communication and creating traditional political outcomes. What is likely, however, is that Internet speak—regardless of its content and style—changes the way people think about their communities and their relationships to political life. And by influencing these relationships, Internet communication (like all examples of social speech) plays an essential role

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<sup>753</sup> As Malcolm Gladwell writes in a now infamous article for *The New York Times*, "the revolution will not be tweeted" ("Small Change," pp. 42).

<sup>754</sup> By lowering the cost of citizen input, the Internet promotes large waves of low-cost symbolic action, which has minimal political impact. See Evgeny Morozov, *The New Delusion: How Not to Liberate the World* (New York, Penguin Press, 2011).

<sup>755</sup> David Karpf, *The MoveOn Effect: The Unexpected Transformation of American Political Advocacy* (New York: Oxford University Press, 2012), pp. 166.

<sup>756</sup> "When all that clicking produces no change, they reason, citizens will turn bitter or tune out" (Ibid., pp. 8).

in shaping the development of democratic citizenship. Depending on the content and style of that speech, those effects may be positive or negative from the perspective of liberal democratic ideals. It is this argument that I will explore in the remainder of this section.

But before transitioning to a closer study of the potential positive and negative effects of Internet speech on democratic citizenship, it is important to note a key limitation to these findings. One of the most challenging aspects of any study that attempts to look at online communication is the fact that the landscape and norms are constantly evolving. While it is safe to say that Internet speech looks and functions differently than face-to-face communication, it is difficult to predict the form that those differences will take in the future. As Karpf highlights in his study of the transformative effects of the Internet on political advocacy organizations, “YouTube did not exist during the 2004 election, yet it was a fixture by 2008. The microblogging service Twitter was still in its infancy in 2008. It is a fixture of the media landscape today. Now that mobile web devices like the iPhone and Android phones are rapidly gaining market penetration, new social experiment with geolocational data are being devised.”<sup>757</sup> As these transformations continue to take root and new modes and styles of Internet communication emerge, more research will be needed to see how the Internet affects political communication and what can be done to encourage its positive democratic impact.

*A. Positive effects of social speech: social networking -> facilitating coordination and increasing the likelihood of political action*

Growing Internet usage, despite—and owing to—its informal style and traditionally apolitical content, has had a tremendous impact on the political world. Recent events such as the Arab Spring have proven the power inherent in these communicative mediums and their potential to function as conduits to political action. In Iran, for example, young people have been rapidly

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<sup>757</sup> Ibid., pp. 17.

expanding their use of the Internet and social networking sites as a means of political communication. Online communication has enabled Iranian young people to speak outside the cultural restrictions of their nation, and to connect with a wider audience. In his article, "Cyberdissent: The Internet in Revolutionary Iran," Babak Rahimi explains how the Internet has become an important tool in the destabilizing of the authoritarian rule of Iran, and in its potential journey towards democracy.<sup>758</sup> Pro-reformist groups in Iran have found ways to use the Internet as an alternative platform from which they can mobilize support and increase political conversations. This mobilization has also moved offline as well. Grassroots democracy advocates have embraced the Internet; sometimes, using chat rooms, discussion forums and other online communications when the state closes down physical meeting locations; at other times, organizing street protests.

The 2006 Kenyan election represents another example of the potential democratic power of social networking and informal Internet communication. Websites such as Facebook, YouTube and Twitter were instrumental in mobilizing citizens to vote, sharing information and raising money under time constraints. In nations like Kenya, where the population worries that mainstream media has been coopted by the government, the Internet offers an alternative method of getting involved in the political process.<sup>759</sup> And when information channels have been blocked or restricted by government, the Internet can sometimes be the only way of sharing informational materials.<sup>760</sup> For example, during the post-2006 election crisis, the Kenyan people mobilized a website called "Ushahidi" so that the citizenry could collaboratively report where violent clashes had occurred.<sup>761</sup> Online commentary and criticism, because they represented a safe method of reacting against an unfair and unjust system of governance, were much more

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<sup>758</sup> Babak Rahimi, "Cyberdissent: The Internet in Revolutionary Iran," in *Middle East Review of International Affairs*, Vol. 7, No. 3 (Sept. 2003).

<sup>759</sup> See Maarit Makinen and Mary Wangu Kuira, "Social Media and Postelection Crisis in Kenya," in *The International Journal of Press/Politics*, Vol. 13, No. 3 (July, 2008), pp. 328-335.

<sup>760</sup> Unfortunately, many states are now growing increasingly adept at restricting Internet communication and blocking certain websites.

<sup>761</sup> Makinsen and Kuira, "Social Media and Postelection Crisis in Kenya."

diverse (and in some cases, extreme) than what was found in the mainstream media.<sup>762</sup> Internet users were also able to respond more quickly to political events than the traditional media. As Maarit Mäkinen and Mary Wangu Kuira write in “Social Media and Postelection Crisis in Kenya,” “Social media offered swifter, more subjective, and more detailed coverage during a fast moving and changing situation”<sup>763</sup>

The United States has also been home to political action that was spurred on and made easier with the use of Internet communication. In his book *The MoveOn Effect*, Karpf describes the labor protests that erupted in Madison, Wisconsin, after newly elected Republican Governor Scott Walker unveiled a budget repair proposal that would curtail the collective bargaining rights of public employee unions on February 15<sup>th</sup>, 2011. Perhaps unsurprisingly, thousands of members of local unions and the national labor movement (i.e. AFL-CIO and SEIU) decamped within and around the capital building to protest the bill. What was more surprising, however, was the speed and efficiency with which bloggers and netroots groups, such as MoveOn.org, DailyKos, Democracy for America (DFA) and Progressive Change Campaign Committee (PCCC), joined the effort by launching fundraisers, organizing solidarity rallies across the U.S., generating national press coverage and sending organizers to the Wisconsin state capital, where they helped “coordinate logistics, organize pressure tactics, and cover the details of the struggle.”<sup>764</sup> These efforts by netroots organizations, spurring everyday citizens to action, were ultimately unable to stop the passage of governor’s bill, but they did have significant effects on public opinion and political outcomes. In the wake of these protests, the Wisconsin governor’s approval ratings fell significantly and a neighboring Republican governor chose to dismiss a similar bill out of fear of public disapproval.

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<sup>762</sup> Ibid.

<sup>763</sup> Ibid., pp. 330.

<sup>764</sup> Karpf, *The MoveOn Effect*, pp. 5.

These three examples (as well as others) show how social networking sites and other informal means of online communication have acted as effective transmitters of information and energy across populations, shaping the decisions and actions of everyday citizens and traditional political actors. As a low-cost medium that does not respect the borders of nation states, this is true for both more and less developed countries. And while a number of national governments (e.g. China) have sought to issue controls to monitor (or shut down) websites that they deem unacceptable and punish rebellious users, the World Wide Web has proven itself extremely durable and persistent – even under the most extreme circumstances of political unrest and state censorship, Internet users have found ways to circumvent official policies and make their voices heard.<sup>765</sup> Thus, through 140-character tweets, blog posts and Facebook links, people around the world are now able to coordinate, educate and gain the support they need to excite real political change.

While the Internet's ability to provide information and coordinate action in these instances is extremely important, it seems unlikely that coordination is the *only* thing going on here.<sup>766</sup> Indeed, the very act of engaging in social speech online can be seen as a political action. As I discuss below, the energy of these virtual movements tends to trickle down to even the most apolitical users.<sup>767</sup> Recent studies have shown that just being online makes an individual more

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<sup>765</sup> See Yu Hua, "The Censorship Pendulum," in *The New York Times* (February 5, 2014). "Although China's privately-run Internet companies are generally loathe to offend the government, they also "quietly allow critical voices" on many social media websites. Even as posts are deleted and accounts are cancelled," writes Hua, "new ones spring up" (Ibid.).

<sup>766</sup> While it is not the subject of this project, the organizational potential of online communications should not be underemphasized. As Karpf explains, online communications can spiral into political actions: "Online groups can form through Facebook. Offline meetings can be organized cheaply through Meetup.com. Political campaign commercials can be remixed and posted to YouTube, garnering millions of views. Media content is now spread through Twitter and the blogosphere, bypassing traditional gatekeepers. The costs of engaging in many individual acts of political speech have become infinitesimal, particularly in a stable democracy like the United States, where citizens do not face the looming threat of government reprisal" (Karpf, *The MoveOn Effect*, pp. 7).

<sup>767</sup> See Kevin Gillian and Jenny Pickerill, "Transnational anti-war activism: solidarity, diversity and the internet in Australia, Britain and the United States after 9/11," in *Australian Journal of Political Science*, Vol. 43, No. 1 (2008), pp. 59-157.



likely to engage in political action, regardless of whether or not she is communicating about traditional political topics.<sup>768</sup> In other words, an Internet user does not need to be engaging with organizations like MoveOn.org or chatting about elections in order for her online presence to increase the likelihood that she will engage in politics; even social communication online appears to be having these effects. Thus, the question becomes: What are the mechanisms underlying the positive relationship between Internet speak and political action?

There have been several recent empirical analyses that identify positive relationships between Internet usage and political involvement, covering a range of possible forms of political action. Until now, most of these studies have focused specifically on the relationship between online political information seeking and offline political action; however, because these same analyses also include general measures of Internet use, many of their findings can be extended to include Internet activities of all kinds.

In a 2001 study, Lori M. Weber and James Bergan show that engaging in online communicative activities—such as e-mail and chatrooms—is positively correlated with a variety of political activities, including attending political rallies, signing petitions and writing to political actors.<sup>769</sup> And in an especially thorough treatment of the subject, M. Kent Jennings and Vicki Zeitner examine the effects of Internet usage on fourteen measures of civic engagement (grouped into four clusters: media attentiveness, political involvement, volunteerism and trust orientations). Taking into account pre-Internet levels of civic engagement and key socio-economic characteristics, Jennings and Zeitner find that Internet access is “significantly related” to all forms of media attentiveness, all measures of political involvement, volunteerism and social

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<sup>768</sup> See below.

<sup>769</sup> Lori M. Weber and James Bergman, “Who Participates and How? A Comparison of Citizens ‘Online’ and the Mass Public,” presented at the Annual Meeting of the Western Political Science Association (March 15-17, 2001, Las Vegas NV).

trust.<sup>770</sup> And while the correlations may not always be strong, they are always positive and statistically significant. In other words, Internet users are more likely than non-Internet users to engage in a number of civic activities, including: following public affairs through the traditional media, making political donations, volunteering within the community and experiencing social trust.

Many other, more focused attempts at capturing the relationship between Internet communication and political action have been equally encouraging. For example, several researchers have noted a positive connection between Internet usage and voter turnout. In their essay, "Unraveling the Effects of the Internet on Political Participation," Caroline J. Tolbert and Ramona S. McNeal find that respondents with access to the Internet and online election news were significantly more likely to report voting in the 1996 and 2000 presidential elections, respectively, even after controlling for "socioeconomic conditions, partisanship, race, ethnicity, gender, age, traditional media use, political interest, political efficacy and state environmental factors."<sup>771</sup> Their simulations showed that, for the 2000 election, access to the Internet and online election news increased the probability of voting by an average of 12 percent and 7.5 percent, respectively. And although this study was designed to look specifically at the effects of political information garnered from Internet use, the authors do point out that mere access to the Internet made respondents significantly more likely to vote than those who did not have Internet access.<sup>772</sup>

Another traditional measure of political involvement, campaign contributions, also appears to be positively correlated with general Internet use. Although his early findings were

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<sup>770</sup> M. Kent Jennings and Vicki Zeitner, "Internet Use and Civic Engagement," in *The Public Opinion Quarterly*, Vol. 67, No. 3 (Autumn, 2003), pp. 319.

<sup>771</sup> Caroline J. Tolbert and Ramona S. McNeal, "Unraveling the Effects of the Internet on Political Participation," in *Political Research Quarterly*, Vol. 56, No. 2 (2003), pp. 179.

<sup>772</sup> "In the 2000 elections, the coefficients for both viewing Internet news and Internet access are positive and statistically significant, and almost twice that of 1996, likely underscoring the growing size of the population with Internet access" (Ibid.).

mixed, in a 2001 study, Bruce Bimber shows that access to the Internet, generally, and online political information, specifically, do statistically increase the probability of a respondent contributing money to political campaigns.<sup>773</sup> Bimber also finds a connection between Internet use and citizen-initiated contact with government. In a separate study, he uses the results of one online survey and two phone surveys to show that, in much the same way as more traditional means of communication, Internet interaction encourages citizen contact with elected officials.<sup>774</sup> In 2002, Dhavan Shah, Nojin Kwak and Lance Holbert were able to further parse out these results by accounting for generational differences in Internet use. In their article, “‘Connecting’ and ‘Disconnecting’ with Civic Life,” the authors explain that older individuals, who came of age before the advent of the Internet, may already have developed more traditional patterns of civic engagement. Therefore, in terms of their political involvement, the Internet tends to function in the same ways as any other media usage would. Those who have grown up with the Internet, however, are still discovering its potentialities and may find it to be a stronger predictor of political action than more traditional media usage.<sup>775</sup>

While there is still room for more empirical research that looks specifically at the effects of online social speech on political behavior, it does seem like people who even just casually chat online are becoming more political at the same time.<sup>776</sup> This may simply be an extension of the

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<sup>773</sup> Bruce Bimber, “Information and Political Engagement in America: The Search for Effects of Internet Technology at the Individual Level,” in *Political Research Quarterly* Vol. 54 (2001), pp. 53-67.

<sup>774</sup> Bruce Bimber. 1999, “The Internet and Citizen Communication and Governments: Does the Medium Matter?” in *Political Communication* Vol. 16, No. 4 (1999), pp. 409-428.

<sup>775</sup> While younger Internet users are less likely to use the Internet to serve overtly political ends than are older Internet users, the vast majority (70%) of 18 to 25 year-olds view the Internet as a “useful” source of political and issue information. See Dhavan Shah, Nojin Kwak, and R. Lance Holbert, “‘Connecting’ and ‘Disconnecting’ with Civic Life: Patterns of Internet Use and the Production of Social Capital, in *Political Communication*, Vol. 18 (2002), pp. 141-162. See also Michael X. Delli Carpini and Scott Keeter, “The Internet and an Informed Citizenry,” in *The Civic Web: Online Politics and Democratic Values*, David M. Anderson and Michael Cornfield (eds.) (New York: Rowan & Littlefield Publishers, Inc., 2003), pp. 129-130.

<sup>776</sup> While even casual Internet usage is positively correlated with political involvement, all communication is not equal in this regard. Those who use the Internet for political purposes might

general phenomenon that talking to others promotes civic involvement.<sup>777</sup> However, it seems likely that there is also something unique about Internet social communication that makes it particularly likely to positively affect one's relationship to the political sphere. In their book, *Digital Citizenship: The Internet, Society, and Participation*, Karen Mossberger, Tolbert and McNeal suggest that there are certain intrinsic characteristics of the Internet that make it more likely that users will participate in politics offline. They write:

The Internet's interactivity, diversity, flexibility, speed, convenience, low cost, and information capacity potentially allow the public to become more knowledgeable about politics and government—a first step towards greater participation. Interpersonal and small group communities are also possible online, in contrast to the passive consumption of news offered by other media. There may also be unique advantages to online political discussion that are important for civic engagement. Research has shown that online discussions are more frank and egalitarian than face-to-face meetings. Women, for example, are less likely to be interrupted in cyberspace discussions.<sup>778</sup>

When this statement is unpacked, Mossberger, Tolbert and McNeal seem to be arguing that there are three processes at work when people communicate online that increase the likelihood that they will engage in offline political action: gaining information, building social trust and defining communities. While Mossberger, Tolbert and McNeal limit their discussion to Internet

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still be more likely to engage in politics than those who use it for social communication. See Jennings and Zeitner, "Internet Use and Civic Engagement."

<sup>777</sup> Casey A. Klofstad illustrates this phenomenon in a study that looks at the relationship between civic discussion and civic involvement. Klofstad finds that "civically relevant discussions with peers promote civic activity by subsidizing the costs and increasing the benefits associated with participating. Peers go about this in three ways: by providing individuals with information on how to become active in civic activities, by increasing individuals' engagement with politics and current events, and by explicitly asking individuals to participate in civic activities" ("Talk Leads to Recruitment," pp. 180).

<sup>778</sup> Karen Mossberger, Caroline J. Tolbert and Ramona S. McNeal, *Digital Citizenship: The Internet, Society, and Participation* (Cambridge, MA: The MIT Press, 2008), pp. 52.

communications, all three of the processes they point out can be related back to the mechanisms I identify in Chapter Five, connecting social speech, generally, to political outcomes.

First, the authors argue that Internet communication has proven itself to be a quick, easy and efficient method for obtaining and disseminating information. Information does not necessarily refer only to facts and figures, however (although the Internet has plenty of that). Much of what is going on when people engage in conversation online is that they are learning the norms and expectations of the political communities to which they belong. They are also practicing at the kind of civic engagement that trains an individual for participation in democratic politics. As a medium that encourages users to interact and provide user-generated content, the Internet enforces the value of community involvement. It also teaches Internet speakers the logistical information that makes such action possible. Over time, participation in Internet communication makes users more skilled and confident in their ability to make judgments. For example, Karpf suggests that sites like Yelp (which relies on user reviews) have become instrumental for more traditional political organizations because they familiarize everyday citizens with the steps needed to engage in political action: “As Americans-as-consumers become accustomed to using the Mobile Web to rate offline organizations and events, the learning curve required for Americans-as-citizens to take equivalent actions in the public sphere is sharply reduced.”<sup>779</sup> This kind of socially learned understanding—just as much as knowing how to vote and who to vote for—affects political choices and increases the likeliness of political action.

It is also important to note that the easier the process of obtaining this information becomes, the more Internet use would seem to have a positive effect on political participation. In their article, “Surfing the Net: A Pathway for Participation for the Politically Uninterested?” Rosa Borge and Ana Cardenal suggest that, by facilitating the process of connecting with others,

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<sup>779</sup> Karpf, *The MoveOn Effect*, pp. 94.

Internet use reduces the costs of political participation.<sup>780</sup> This ultimately leads more frequent and skilled Internet users to participate in politics without the need for much (if any) political motivation.<sup>781</sup>

Second, Mossberger, Tolbert and McNeal suggest that, because the Internet both makes small group discussion more available and encourages participants to be active and engaged, it is likely to promote social trust or social capital. As I explain in Chapter Five, trust is an essential element of any well-functioning democratic community. It is only when people recognize mutual hopes, interests and objectives that they become willing to make sacrifices for one another. And despite initial concerns about the Internet's capacity to forge emotional connections (see below), recent research suggests that the Internet may actually be an especially effective venue for building social skills, generally, and bridging social capital between different demographic groups in particular.<sup>782</sup>

Finally, Mossberger, Tolbert and McNeal argue that the typical style of Internet communication may make it appealing to members of marginalized groups who might be too intimidated to engage in other forms of discussion. Recent research suggests that it is likely that the Internet has mobilized groups that have traditionally participated in politics less frequently, or

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<sup>780</sup> "The ease of contact and communication through the Internet enables traditional participation activities which were previously relatively costly, such as contact politicians, working with organizations, joining a party, working on campaigns, and/or participating in forums and discussion groups, to be carried out at an extremely low cost. In fact, to receive information or subscribe to a bulletin, contact a politician, make a donation, complain or protest against the government via email, contact and association, work on a campaign, participate in a discussion forum, etc., all you need to do is be online and, without having to move from your armchair, tap on the keyboard of the computer" (Borge and Cardenal, "Surfing the Net," pp. 9).

<sup>781</sup> Borge and Cardenal found that the Internet was breeding a possible new generation of political actor – one that did not care about politics, but engaged in online political action out of a desire to participation in Internet activities: "Our data shows evidence of a possible new type of participant—skilled Internet users with no political motivation—who is starting to take part in online activities" (Ibid., pp. 1).

<sup>782</sup> See Nicole B. Ellison, Charles Steinfield and Cliff Lampe, "The Benefits of Facebook 'Friends': Social Capital and College Students' Use on Online Social Networking Sites," in *Journal of Computer-Mediated Communication*, Vol. 12 (2007), pp. 1143-1168.

not at all.<sup>783</sup> While this is the result of many factors, key among them is the Internet's capacity for equalizing communication and increasing feelings of empowerment.<sup>784</sup> Either because Internet users are more likely to speak up when they feel a sense of anonymity and privacy, or because discrimination is harder to translate online, those with socioeconomic disadvantages have a greater potential to engage in free and equal discussion when they log on than when they are offline.<sup>785</sup> While this does not mean that these new participants are communicating as much or as effectively as others, once they actually are online, members of marginalized groups are able to compete *more* fairly in discussions.

As I explained in Chapters Two and Five, when deliberation norms require formal, polite, rational dialogue, those who were not schooled or socialized into that kind of speech are at a distinct disadvantage. Internet speech, however, more strongly resembles the kind of natural, informal communication that occurs between friends, acquaintances and families in civil society (i.e. social speech) than the reasoned, informed, political deliberation of ideal theory. In this way,

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<sup>783</sup> See Michael X. Delli Carpini, "Gen.com: Youth, Civic Engagement, and the New Information Environment," in *Political Communication*, Vol. 17, No. 4 (2000), pp. 341-349; Stephen Ward, Rachel K. Gibson and Wainer Lusoli, "Participation and Mobilization Online: Hype, Hope and Reality," in *Parliamentary Affairs*, Vol. 56 (2003), pp. 652-668; Ellen Quintelier and Sarah Vissers, "The Effect of Internet Use on Political Participation. An Analysis of Survey Results for 16-Year-Olds in Belgium," in *Social Science Computer Review*, Vol. 26 (2008) pp. 411-427; Corinna di Gennaro and William Dutton, "The Internet and the Public: Online and Offline Political Participation in the UK," in *Parliamentary Affairs*, Vol. 59 (2006), pp. 299-313; and Mossberger, Tolbert and McNeal, *Digital Citizenship*. Alternatively, there have been several studies that suggest that the Internet may only be reinforcing the involvement of people who were already likely to participate in politics. For more information, see Bimber, "Information and Political Engagement in America"; Pippa Norris, *Digital Divide: Civic Engagement, Information Poverty and the Internet Worldwide* (Cambridge: Cambridge University Press, 2001).

<sup>784</sup> For example, see Lars Fuglsang's Danish experiments on IT and "active citizenship," based on empowerment properties, for senior citizens: Lars Fuglsang, "IT and Senior Citizens: Using the Internet for Empowering Active Citizenship," in *Science, Technology, & Human Values*, Vol. 30, No. 4 (Autumn, 2005), pp. 468-495.

<sup>785</sup> See Michael Cornfield, "Adding in the Net: Making citizenship count in the digital age," in *The Civic Web: Online Politics and Democratic Values*, David M. Anderson and Michael Cornfield (eds.) (Lanham, MD: Rowman & Littlefield, 2003). Cornfield suggests that the anonymous nature of the Internet may make it easier to ask questions and participate for those who are afraid of being embarrassed by their lack of political knowledge: "The Internet can nourish a personal sense of efficacy indirectly, in that the anonymity it offers may assuage the fear of public embarrassment. Many people recoil at the prospect of entering the public square, afraid of reprisals and doubtful of the adequacy of their skills" (Ibid., pp. 106).

it levels the playing field. The Internet's tendency towards social speech means that members of traditionally marginalized groups can express themselves in a form that feels more comfortable. By speaking to one another in a colloquial style, it is also easier for Internet communicators to connect with one another and form the borders of their imaginary communities. To the extent that broader participation in Internet discussion is able to widen these boundaries to include people who are female, low income and racial minorities, the liberal democratic value of inclusiveness is strengthened.

This is true, not only intra-nationally, but internationally as well. By facilitating communication across local and national boundaries, the Internet enables people to connect with an array of disparate others, finding similarities and building new communities. Modern social media have the potential to greatly expand the opportunities for interactions with people outside one's immediate physical neighborhood. When this happens and individuals discover commonalities and shared interests with distant strangers, they are able to build a sense of global community. While, in many cases, this may only result in geographically far-flung but still small cyber-circles of the likeminded, the very act of associating a voice and a personality with others who look, act and live differently from oneself is still likely to have a positive effect on establishing cosmopolitan values and an expansive view of human rights. The ability of speech to expand empathy is perhaps its most important function.<sup>786</sup>

As I mentioned above, critics of the Internet as a tool for political participation have often contended that online communications are less able to foster social capital and build genuine

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<sup>786</sup> As John Stuart Mill writes in *Considerations on Representative Government*, "It is by political discussion that the manual labourer, whose employment is a routine, and whose way of life brings him in contact with no variety of impressions, circumstances, or ideas, is taught that remote causes, and even events which take place far off, have a most sensible effect on his personal interests; and it is from political discussion, and collective political action, that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens, and becomes consciously a member of a great community" (Ibid., pp. 328). What is important here is that Mill notes the power that sharing different perspectives has in terms of making people better members of the community.



communities to as high a degree as face-to-face contact.<sup>787</sup> (Note that the ability of the Internet to disseminate all kinds of information has not been called into question.) Robert Putnam, for example, proposes four challenges to the assertion that Internet usage builds communities. First, he points to the persistent digital divide, which reflects the power inequalities already in existence in society.<sup>788</sup> Second, Putnam worries that Internet speech is too focused on entertainment to address the larger issues that bond members of a community together. Third, Putnam worries about the lack of non-verbal cues in Internet communication, suggesting that people are less able to connect psychologically and create good will when they cannot rely on body language and facial expression.<sup>789</sup> Finally, Putnam argues that Internet speech, by enabling people to choose their communities based on their preexisting values and opinions, will lead to more polarization and specialization. In real life, on the other hand, people are often forced to interact with people who hold different viewpoints.<sup>790</sup>

Each of these concerns can be easily addressed. Although Putnam is correct in stating that the digital divide presents a problem for building fair and equal democratic communities, he is also right in pointing out that the digital divide is merely a reflection of preexisting power

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<sup>787</sup> See, for example, Barney Warf and John Grimes, "Counterhegemonic Discourses and the Internet," in *Geographical Review*, Vol. 87, No. 2, Cyberspace and Geographical Space (Apr. 1997), pp. 259-274: "Communicating across distance with individuals is no replacement for interacting with others in our daily, nonvirtual lives" (pp. 267).

<sup>788</sup> "This specter of a kind of cyberapartheid, in which bridging social capital is diminished as elite networks become less accessible to the have-nots, is indeed frightening. For that very reason, however, it is widely recognized as a key challenge that must be addressed" (Putnam, *Bowling Alone*, pp. 175).

<sup>789</sup> "Computer-mediated communication, now and for the foreseeable future, masks the enormous amount of nonverbal communication that takes place during even the most casual face-to-face encounter. (Emoticons in e-mail, like ☺, implicitly acknowledge this fact, but provide only the faintest trace of the information in actual facial expression.) Eye contact, gestures (both intentional and unintentional), nods, a faint furrow of the brow, body language, seating arrangements, even hesitation measured in milliseconds—none of this mass of information that we ordinarily process without thinking in face-to-face encounters is captured in text" (Ibid., pp. 175).

<sup>790</sup> "Real-world interactions often force us to deal with diversity, whereas the virtual world may be more homogenous, not in demographic terms, but in terms of interest and outlook" (Ibid., pp. 178).

structures that favor some and disadvantage others.<sup>791</sup> To the extent that people are able to develop social networks via face-to-face contact, despite these imbalances, they should also be able to do so online. The same argument holds true for his concerns about the Internet being used primarily for entertainment. Most voluntary communication, whether that be online or in person, is based on a desire for personal pleasure and amusement. If that does not hinder traditional forms of speech from forging personal connections—and a theory of social speech suggests that it does not—it should not negatively affect online speech either.

As for Putnam's third concern that there is something lost when people cannot rely on nonverbal cues to inform discussion, I believe that this problem has been largely overblown. As Internet speak has become an increasingly pronounced feature of modern life, the lines between what happens online and what happens offline are beginning to blur. It is no longer valid to say that online personal ties are weak and shallow; in fact, Internet users are increasingly likely to use online spaces to sustain and strengthen preexisting relationships with friends and family.<sup>792</sup> Internet communication is both resilient and innovative. People have responded to a lack of physical cues by developing a new code of communication that approximates tone. This is especially true, as newer forms of online messaging have favored the visual over the purely textual. Through emoticons, picture texts, capitalizations and strategic punctuation, people are increasingly capable of capturing the intangible elements of physical communication. And as the political landscape is increasingly populated by a younger generation that grew up learning to read the tone of texts and emoticons, these concerns should become even less pressing.

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<sup>791</sup> Despite optimistic hopes that new technologies would limit the gap between the "have's" and the have-not's," the Internet has created its own sphere of elites. While most people in the United States now have access to the Internet, a digital divide has developed. Disadvantaged groups still have more limited access than traditionally empowered groups. And they are also less effective at using these new technologies. See Hindman, *The Myth of Digital Democracy*, pp. 9.

<sup>792</sup> Keith Hampton, "Networked Sociability Online, Off-line. The Networked Society: A Cross-Cultural Perspective," in *The Network Society: A Cross-Cultural Perspective*, M. Castells (ed.) (Cheltenham: Edward Elgar, 2004), pp. 217-232.

Finally, as I explain above, Putnam is right to worry about the polarizing nature of Internet communication. Like speakers in traditional forums, Internet communicators tend to seek out others who share their own opinions. What makes the Internet especially worrisome in this regard is that it not only makes this sorting process extremely easy for the average user, but it also often takes place automatically and invisibly through sorting algorithms. The effect of these “echo chambers” is to polarize the population, discouraging personal reflection and intergroup compromise.

This phenomenon may have obvious negative implications for democratic politics in a heterogeneous society. And yet, this threat may also be overestimated. The same underlying mechanism that makes polarization possible in the short term (the ease of assembling likeminded individuals), also makes it possible that Internet users will be able to build connections to diverse others in the long term. Even Sunstein admits that, for many curious and motivated people, the Internet provides opportunities to confront new and varied viewpoints that the physical world cannot offer. He explains that many people “may live in an information cocoon—their workplace, their school, their neighborhood—and the Internet can greatly broaden their horizons. Cocoons and echo chambers, emerging from simple geography, are easy to escape with just a few seconds on a few Web sites... Many citizens, in isolated areas or isolated nations, escape their confines, and learn an extraordinary amount, simply by virtue of the Internet.”<sup>793</sup> Even for those uncurious users who choose only to associate with those who share their opinions online, it is hard to imagine that they can avoid some degree of heterogeneity. While Internet speakers may come together based on specific interests and ideas, they are unlikely to find people who are exactly like them in all respects. Any prolonged communication with individuals who are different in terms of their race, ethnicity, sex, income level or physical location is likely to ultimately increase empathy and build a sense of global humanity. That long-term benefit may very well overwhelm any negativity associated with polarization in the short term.

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<sup>793</sup> Sunstein, *Infotopia*, pp. 97.

*B. Negative effects of social speech: cyberbullying -> alienation, eroding social trust and weak community ties*

Along with the positive political outcomes associated with online communication, it is important to remember that Internet speak can also potentially result in negative effects on democratic citizenship. Like all forms of social speech, Internet speak is not neutral. The form and content of Internet speech colors the effects that it will have on individual participants. The previous discussion focused primarily on online social speech that aims to discover commonalities and provide valuable information about what it means to act as a good democratic citizen. The result of this “good” social speech online is to encourage political activity by providing cultural and political training, building social trust and defining communities. But not all Internet speech contains such positive values. Much of the communication that takes place online seeks to identify differences and devalue individuals. Just as the anonymity of the Internet makes it more likely that users will share personal information and opinions, it also makes it easier for them to harass others. And just as the interactive nature of the Internet teaches users that their opinions matter and ought to be shared, it also serves to empower potential bullies. This “bad” social speech online tends to have negative effects on both its victims and its perpetrators from the standpoint of liberal democratic values, contributing to feelings of alienation and hopelessness for both. The results are a citizenry lacking in the character traits necessary for democratic citizenship (such as courage and initiative), low levels of social trust and weak community ties. In this section, I will focus specifically on one form of negative online social speech: cyberbullying.

There is no one commonly accepted legal definition of cyberbullying in the United States, but several government agencies have put forth helpful guidelines. The Centers for Disease

Control and Prevention refer to it as “electronic aggression.”<sup>794</sup> More specifically, the Centers’ website defines cyberbullying as any one of five activities: 1) disclosing someone else’s personal information in a public area (e.g., website) in order to cause embarrassment; 2) posting rumors or lies about someone in a public area (e.g., discussion board); 3) distributing embarrassing pictures of someone by posting them in a public area (e.g., website) or sending them via email; 4) assuming another person’s electronic identity to post or send messages about others with the intent of causing the other person harm; and 5) sending mean, embarrassing, or threatening text messages, instant messages, or e-mails.<sup>795</sup> The U.S. Department of Health & Human Services, on the other hand, promotes a more inclusive understanding of cyberbullying:

Cyberbullying is bullying that takes place using electronic technology. Electronic technology includes devices and equipment such as cell phones, computers, and tablets as well as communication tools including social media sites, text messages, chat, and websites. Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.<sup>796</sup>

In other words, in the case of cyberbullying, individuals exploit the ease and publicity of communication online to engage in aggressive, long-lasting bullying. Victims and perpetrators can be male or female, young or old; however, much of the current research on cyberbullying focuses on school-age children.

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<sup>794</sup> Centers for Disease Control and Prevention, “Technology and Youth: Protecting your Child from Electronic Aggression.” Available at: <http://www.cdc.gov/violenceprevention/pdf/EA-TipSheet-a.pdf>.

<sup>795</sup> Ibid.

<sup>796</sup> stopbullying.gov, “What is Cyberbullying,” U.S. Department of Health & Human Services. Available at: <http://www.stopbullying.gov/cyberbullying/what-is-it/index.html>.

While bullying has always existed, several aspects of the Internet make it both more likely to occur and also (potentially) more damaging: anonymity, pervasiveness and permanence.<sup>797</sup> In her book on cyberbullying, *Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy*, Emily Bazelon identifies and discusses these three characteristics of cyberbullying. First, she points to the effects of anonymity on the experience of cyberbullying for both the bully and the bullied. As discussed above, the nature of the Internet enables users to connect with one another without revealing who they are in real life. While this anonymity may lead to freer, more open, more diverse conversation in some contexts, it may also embolden potential bullies.<sup>798</sup> Because the cyberbully can choose to act anonymously, she may also feel more able to pursue a more hostile, nastier stance than she might in person.<sup>799</sup> As Bazelon explains, this is largely because it is harder to feel empathy when one is attacking another from behind the shield of a computer screen: "Sitting at the keyboard alone instead of talking face-to-face, often shrouded in anonymity, teenagers (and adults) sometimes strike a pose and write in a kind of text-speak that's harsher than what they would dare say out loud."<sup>800</sup> Not only is the content of cyberbullying perhaps meaner than its real life counterpart, but it is also experienced more painfully by the bullied. Bazelon continues: "Stripped of tone of voice or eye contact, the meanness often hits harder than intended. Here again, the

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<sup>797</sup> See Michele L. Ybarra and Kimberly J. Mitchell, "Youth Engaging in Online Harassment: Associations with Caregiver-Child Relationships, Internet Use, and Personal Characteristics," in *Journal of Adolescence*, Vol. 27, No. 3 (2004), pp. 319-336.

<sup>798</sup> As Tom Postes and Russell Spears write in their 1998 article, anonymity is likely to lead to heightened aggression and inappropriate behavior. See Tom Postes and Russell Spears, "Deindividuation and anti-normative behavior: A meta-analysis," in *Psychological Bulletin*, Vol. 123, pp. 238-259.

<sup>799</sup> It is important to note that not all cyberbullies choose to act anonymously. As the experience of the now-defunct website Formspring proved, many cyberbullies wear their real names as a badge of pride when harassing others online.

<sup>800</sup> Emily Bazelon, *Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy* (New York: Random House, 2013), pp. 9.

electronic trail only increases the blow's impact. Read again and again by the target, a tossed-off insult can become exponentially more painful."<sup>801</sup>

A second essential feature of cyberbullying is that it is nearly impossible to escape. Because the Internet is everywhere, cyberbullying, too, is omnipresent. Cyberbullying can take place 24 hours a day, seven days a week; it can reach its victims whether they are alone or with others, in public or in private. So even though traditional face-to-face bullying is still a more common occurrence than cyberbullying, it may not feel that way to the person being bullied. As Bazelon writes, with the advent of cyberbullying, "Coming home from school was no longer a refuge from torment: you could always check Facebook or Twitter to see what other kids were saying about you, and a bully could find you on IM if he missed you that day in the hall."<sup>802</sup> The potential for incessant, inescapable negative messaging makes cyberbullying an especially powerful tool for breaking down the psyche.

Finally, cyberbullying creates a permanent digital footprint. Once inappropriate or harassing messages and pictures are posted, they become impossible to completely destroy. In practice, this means that nasty comments and pictures can follow an individual around for the rest of her life. Even when individuals try to erase the evidence of bullying, Bazelon explains, it often lives on through digital printouts and screen shots: "This makes bullying more lasting, more visible, more viral. The consequences have infinitely expanded. It's not just the kids on the playground who see it—it's any of hundreds of thousands of Facebook friends."<sup>803</sup> So not only is this harassment permanent, but it has a wider audience than bullies of yesteryear could ever have imagined.

Bazelon softens these findings by repeatedly assuring readers that cyberbullying is not actually more prevalent than traditional bullying. Traditional bullying exists without cyberbullying,

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<sup>801</sup> Ibid.

<sup>802</sup> Ibid.

<sup>803</sup> Ibid.

but cyberbullying hardly ever exists without traditional bullying. Nevertheless, cyberbullying has become a common and persistent phenomenon. In a 2000 study by the Crimes Against Children Research Center, six percent of youths who used the Internet over the previous year reported having been harassed online. Of that group, 31 percent described feeling “very” or “extremely” upset as a result of cyberbullying.<sup>804</sup> And according to a separate 2008-2012 study, those numbers have remained fairly constant. In 2009 (the most recent year for which data was available), six percent of students in grades 6-12 had experienced cyberbullying.<sup>805</sup> The situation seems to worsen as children get older, however. According to a 2011 Youth Risk Behavior Surveillance Survey, by high school (grades 9-12), the number of children reporting experiences of cyberbullying spikes to 16 percent.<sup>806</sup> And these numbers might reflect underreporting. The study warns that because technology changes so rapidly, it is hard to design surveys that accurately capture these trends. Nevertheless, it is clear that cyberbullying is on the rise in the United States.

Regardless of the exact size of the problem, may critics will argue that bullying—whether it takes place online or offline—is an essential part of growing up. In order to become high functioning adults in a heterogeneous society, children must learn early on how to cope with others who disagree or behave hurtfully towards them. Adults, too, will often find that they must learn to cope and cooperate with people who harass them. Criticism and provocation are inescapable aspects of one’s personal life, as well as one’s political life. While this argument is

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<sup>804</sup> David Finkelhor, Kimberly J. Mitchell and Janis Wolak, “Online Victimization: A Report on the Nation’s Youth,” National Center for Missing & Exploited Children (2000). Available at: [http://www.unh.edu/ccrc/pdf/Victimization\\_Online\\_Survey.pdf](http://www.unh.edu/ccrc/pdf/Victimization_Online_Survey.pdf).

<sup>805</sup> See Jill Fleury DeVoe, Lynn Bauer and Monica Hill, “Student Victimization in U.S. Schools: Results From the 2009 School Crime Supplement to the National Crime Victimization Survey,” National Center for Education Statistics, Institute of Education Sciences (ies), U.S. Department of Education (November 2011). Available at: <http://nces.ed.gov/pubs2012/2012314.pdf>.

<sup>806</sup> Centers for Disease Control and Prevention, “Youth Risk Behavior Surveillance – United States, 2011,” in *Morbidity and Mortality Weekly Report*, Vol. 61, No. SS 4 (June 8, 2012), pp. 1-162. Available at: <http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf>.



certainly true, it fails to consider the long-term harms of cyberbullying and its effects on the wider democratic community. Indeed, these effects can be severe, both for the individual and society.

The U.S. Department of Health & Human Services points to several possible harms. It finds that children who are cyberbullied are more likely to use alcohol and drugs, skip school, experience in-person bullying, be unwilling to attend school, receive poor grades, have lower self-esteem and have more health problems.<sup>807</sup> Congress has also addressed the real, measurable harms that result from cyberbullying. In 2009, Congress introduced a bill (H.R. 1966) that set a federal definition for the term “cyberbullying.” Although the proposal was criticized for being overbroad and did not advance, the bill did provide some valuable claims about the potential damage caused by cyberbullying, and thus, the national interest in preventing it. The bill describes the harms as such: “Cyberbullying can cause psychological harm, including depression; negatively impact academic performance, safety, and the well-being of children in school; force children to change schools; and in some cases lead to extreme violent behavior, including murder and suicide.”<sup>808</sup>

The correlation between cyberbullying and negative psychological symptoms are not limited to those being bullied. Using data from the largest, most-detailed U.S.-based survey of young regular Internet users, the Youth Internet Safety Survey (YISS), Michele L. Ybarra and Kimberly J. Mitchell examine the effects of cyberbullying on the bullies, themselves. Interestingly, they find that bullies also report experiencing elevated health problems.<sup>809</sup> Thirty-two percent of online harassers reported frequent substance abuse (versus ten percent of non-harassers). Youth-reported delinquency, depressive symptomology, poor parent-child relationships and a history of receiving at least one failing grade in school were also more common among those who

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<sup>807</sup> stopbullying.gov, “What is Cyberbullying.”

<sup>808</sup> H.R. 1966. Available at: <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966>.

<sup>809</sup> Ybarra and Mitchell, “Youth Engaging in Online Harassment,” pp. 330.

reported having harassed other students than those who did not report engaging in such behavior.<sup>810</sup>

Because it is a relatively new phenomenon, there is still a need for a great deal more empirical and theoretical research into the effects of cyberbullying. In particular, the findings of cyberbullying researchers and agencies will need to be parsed out to determine the actual causal links between cyberbullying and negative psychological symptoms. While there is a clear positive correlation between the two variables, it will not be until the current victims and perpetrators of cyberbullying grow up (and researchers are able to chart how these experiences affected their relationships to their political communities over time) that I can draw any definitive conclusions regarding causation. For now, any examination of the long-term effects of cyberbullying will have to remain speculative.

Still, there is reason to suspect that this kind of widespread harassment will result in significant political consequences. As I explain in Chapter Five, informal social interactions are instrumental in forming the character traits that determine the kinds of citizens that individuals will become. When people are rewarded and encouraged for speaking up, they are likely to become brave, active democratic citizens. On the other hand, when, as in the case of cyberbullying, individuals are mocked and taught to think of themselves as unworthy, they will tend to grow into depressed, timid citizens, unwilling to reach out and question authority. The disinclination to engage in the democratic process harms not only the individual (in her capacity as an autonomous being), but also the greater political community, which is unable to fully reflect all of its citizens.

Cyberbullying also diminishes the capacity of an individual to form the bonds of social capital and trust (based on mutual hopes, interests and objectives) that make politics run smoothly. As the above studies suggest, cyberbullying often leads both victims and perpetrators

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<sup>810</sup> Ibid.

into other anti-social behaviors, such as drug use, delinquency and poor familial relations. These kinds of activities isolate the individual from the community, leading her to become distrustful and hopeless, all of which reduces feelings of political efficacy.

Finally, at its root, cyberbullying is a process of identifying difference and distancing the other. In other words, cyberbullying is a way of forming in-groups and out-groups. Those who find themselves in the out-groups are unlikely to feel connected to the greater society that has excluded them. The boundaries of their communities are decidedly small. This reduces the likelihood that they will care to participate in any political activities, from civic organizations to voting. There is also evidence to suggest that people involved in cyberbullying are less capable of empathizing with the wider community. Ybarra and Mitchell find that cyberbullies are four times more likely to report having previously been victims of cyberbullying than respondents who did not admit to engaging in the practice.<sup>811</sup> And over 50 percent of online harassers reported being the subject of traditional bullying, as opposed to only 30 percent of non-harassers.<sup>812</sup> These numbers imply that the experience of having been cyberbullied may negatively affect an individual's ability to understand and relate to others. Over time, victims of cyberbullying may grow to feel marginalized and alone, making it difficult for them to identify their own wellbeing with that of the greater community. They may also lack the self-esteem necessary to feel like they can or should have an impact on democratic self-governance. At the extreme, cyberbullying has even been linked to several high-profile suicides.<sup>813</sup>

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<sup>811</sup> Ibid., pp. 334.

<sup>812</sup> Ibid., pp. 330.

<sup>813</sup> The Annenberg Public Policy Center reports that the rate of suicidal ideation among teenage and young adult victims of cyberbullying is about four times higher than those who have not experienced cyberbullying (27.4% v. 7.5%). See The Annenberg Public Policy Center of the University of Pennsylvania, "Adolescent and young adult victims of cyberbullying at increased risk of suicide: Female youth especially at risk" (December 22, 2010). Available at: <http://www.annenbergpublicpolicycenter.org/downloads/releases/aci/cyberbullying%20release.pdf>. See also Sameer Hinduja and Justin W. Patchin, "Bullying, cyberbullying, and suicide," in *Arch Suicide Res.*, Vol. 14, No. 3 (2010), pp. 206-221.

One famous criminal trial in Middlesex County, New Jersey, *The State of New Jersey v. Dharun Ravi* (2012) received national and international attention as an example of the kind of extreme psychological and community harm that can result from cyberbullying (or what Dharun Ravi's supporters referred to as a "youthful prank"). On September 19<sup>th</sup>, 2010, Ravi and his friend, Molly Wei, used a webcam to spy on a private romantic encounter between Ravi's then-roommate, Tyler Clementi, and another man, identified only as "M.B." Two days later, Ravi urged several of his friends and Twitter followers to view a second tryst between Clementi and "M.B." via a secret webcam. (This second viewing did not actually take place.) The next day, after learning of Ravi's plan, Clementi committed suicide.

Ravi was tried and convicted on fifteen counts of crimes involving invasion of privacy, attempted invasion of privacy, bias intimidation, tampering with evidence, witness tampering and hindering apprehension or prosecution. He was sentenced to 30 days in jail, three years probation, 300 hours of community service, a \$10,000 fine and counseling on cyberbullying and alternative lifestyles. While it is impossible to know for certain to what extent Ravi's actions contributed towards Clementi's suicide (Clementi's family suggests that he was tormented by shame and embarrassment in his final days; Ravi's supporters point to underlying psychological conditions), the trial provided the country with an opportunity to discuss the new and troubling issue of cyberbullying.<sup>814</sup>

## II. Safe spaces:

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<sup>814</sup> In an interview for *Rock Center*, Clementi's mother, Jane Clementi, explicitly linked her son's suicide to the cyberbullying that he experienced: It was the humiliation that his roommates and his dorm-mates were watching him in a very intimate act. And that they were laughing behind his back... The last thing that Tyler looked at before he left the dorm room for the bridge (he jumped from) was the Twitter page, where (his roommate) was announcing Tyler's activities." His older brother, James Clementi, while granting that mental illness may have played a part in Clementi's death, referred to the cyberbullying as the "straw that broke the camel's back and... the thing that pushed him to the breaking point" ("Parents of Rutgers student who committed suicide change view of homosexuality").

While it is difficult to speculate regarding the particularities of the Ravi case, it may be fair to say that Clementi—like countless victims of harassment based on ascriptive characteristics—would have benefitted from having had access to a safe space in which he could speak openly with his peers who have experienced similar intolerance and repression. Within such a discursive group, he might have grown to feel less isolated, different and hopeless. He might have learned that there are many others whose personal experiences mirror his own, and through their stories and support, discover the tools to combat oppression and powerlessness. Over time, he might have come to think of himself as a useful, efficacious member of a community whose input would benefit the entire political body.

Throughout history, members of oppressed and marginalized groups have often found solace in forming small counter-publics where they can “speak among friends,” discussing everything from politics to their home lives. In fact, safe spaces have always existed; wherever and whenever mainstream political dialogue has systematically excluded or devalued members of particular demographic groups, space spaces have arisen to cater to those politically, economically and socially marginalized persons.<sup>815</sup> They are places in which disenfranchised people can meet, as equals, to discuss anything from the very mundane to the overtly political. What ties these spaces together is that they are outside of and apart from the traditional political establishment. Instead, safe space speech may take place, not only around the traditional kitchen table, but also in the myriad other spaces that populate civil society, such as the church, community organizations, sporting events, etc. As Lisa Dodson writes in “At the Kitchen Table: Poor Women Making Public Policy,” “table thinking has spread beyond the private kitchens of

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<sup>815</sup> Safe spaces are also likely to arise spontaneously where there isn't a clear state in which to participate. As Julie Mertus explains, “State structures are not the single, defining space when it comes to promoting transformative social change. Social-change movements like the ‘kitchen tablers’ often care little about participating in state structures, especially when, as in the case of Serbia, participation would entail acquiescence in the methods of a morally bankrupt regime. Instead, social-change movements work with others in the space known as transitional civil-society, that complex network of associational life that exists below the state and across national borders” (“Kitchen Table Lessons,” pp. 307-308).

poor America and has crept into public places wherever parents congregate. Tales, critiques, and strategies are exchanged where mothers rock babies, where parents line up at food pantries, at health clinics, and in schoolyards.”<sup>816</sup> The safe spaces literature has often been associated with the Black—and especially the Black female—community, but it can apply to any number of subjugated minorities as well. Most recently, the LGBT community has adopted the vocabulary to describe communicative groups that help people to understand their sexuality and to carve out a place for themselves in a heteronormative world.

The kind of speech that occurs within safe spaces differs substantially from ideal deliberation. In terms of its content and its style, typical safe space speech represents an excellent example of what I have called “social speech.” Much like the informal, abbreviated, colloquial style of speech that is so often criticized online, safe space speech incorporates passion, humor and shared narratives. It is a way of expressing feelings and experiences, not just facts and figures. Communication in safe spaces can be defined by three essential tenets:<sup>817</sup> 1) back-and-forth conversation,<sup>818</sup> 2) an ethics of caring<sup>819</sup> and 3) personal responsibility.<sup>820</sup> It is partly these qualities that relegate social speech to safe spaces. It is not just the participants

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<sup>816</sup> Lisa Dodson, “At the Kitchen Table: Poor Women Making Public Policy,” in *Women and Welfare: Theory and Practice in the United State and Europe*, Nancy Hirschmann and Ulrike Liebert (eds.) (New Brunswick, NJ: Rutgers University Press, 2001), pp. 186-187.

<sup>817</sup> See Patricia Hill Collins, *Black Feminist Thought* (New York: Routledge Classics, 2009).

<sup>818</sup> “Not to be confused with adversarial debate, the use of dialogue has deep roots in African-based oral traditions and in African-American culture... The widespread use of the call-and-response discourse mode among African-Americans illustrates the importance placed on dialogue. Composed of spontaneous and nonverbal interaction between speaker and listener in which all of the speaker’s statements, or ‘calls,’ are punctuated by expression, ‘or responses,’ from the listener, this Black discourse mode pervades African-American culture. The fundamental requirement of this interactive network is active participation of all individuals...” (Ibid., pp. 279-280).

<sup>819</sup> This may consist of three components: value placed on individual expressiveness, the appropriateness of emotions and the capacity for empathy (Ibid., pp. 281-285).

<sup>820</sup> “Assessments of an individual’s knowledge claims simultaneously evaluate an individual’s character, values, and ethics. Within this logic, many African-American reject prevailing beliefs that probing into an individual’s personal viewpoint is outside the boundaries of discussion” (Ibid., pp. 284).

themselves, but also their way of examining the world and relating it to others that is unwelcome in the dominant political culture.

As with all other examples of social speech, safe space speech carries the potential to significantly affect democratic citizenship and political outcomes. Through the process of building and maintaining communities of social speech, safe space participants learn to find their own voices, both as private individuals and public citizens.<sup>821</sup> However, it is important to keep in mind that, depending in the style and content of safe space speech, its political effects can manifest in either positive or negative ways. Through many of the same processes as Internet speak—information dissemination, mutual empowerment and community building—safe space discussions can either unite a democratic community or it can divide it.

On the one hand, safe spaces appear to have had a positive influence on liberal democratic politics in two ways. First, through secure, open, nonjudgmental discourses between peers, members of groups, which have traditionally been either ignored or viewed as inferior by the wider community, are able to develop the kind of character traits that are a prerequisite for democratic participation, such as confidence and eagerness to participate in community affairs. By engaging with one another, speakers validate their peers even as they, themselves, are being validated. And by gaining practice refining their opinions and discussing the issues that matter most to them—all within an insulated environment within which they are not intimidated into silence—safe space speakers gain confidence in themselves as individuals and in their abilities as members of a community. The dual sense of self worth and efficacy that can develop through these processes makes participants more likely to actively engage in the political arena that has

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<sup>821</sup> As Fraser explains in regard to the bourgeois conception, “public spheres are not only arenas for the formation of discursive opinion; in addition, they are arenas for the formation and enactment of social identities. This means that participation is not simply a matter of being able to state propositional contents that are neutral with respect to form of expression. Rather... participation means being able to speak ‘in one’s own voice,’ thereby simultaneously constructing and expressing one’s cultural identity through idiom and style” (“Rethinking the Public Sphere,” pp. 68-69).

traditionally excluded them. Second, through participation in safe space communities, members of subjugated groups are able to engage in cultural and political training that helps them learn what it means to be a good citizen in the context of their communities. In other words, safe space speakers are, collectively, through informal discussion, developing a language of right and wrong. The ideologies and policies that develop and tested as a result of this process are often exported (and sometimes adopted by) the larger political community. In this way, safe spaces function similarly to any other issue group, with its members going on to share what they've learned with the wider community.

On the other hand, this process of building a community of participation, self-actualization and ideological development is not always positive from the perspective of liberal democratic values. While safe space speech establishes and enforces community ties among participants, to the extent that those speakers identify with their safe space peers *to the exclusion of* society at large, they are actually undermining the wider democratic political community and its goals of inclusion and equality. If members of safe spaces only feel connected to others who are demographically similar to them, they are unlikely to engage with the larger political sphere, regardless of the skills, information and understanding they may have acquired through their social speech activities. If they are not willing to engage in democratic politics, safe space participants are also unable to share their perspectives, experiences, and ideologies with the rest of the political community. Thus, when the community boundaries that are forged through social speech divide the political community, this negatively affects the latter's capacity to accurately reflect all of its members' wants and needs.

The creation of in-groups and out-groups within the wider political community can also make democratic compromise especially difficult—even when members of safe spaces are involved in political action—because safe spaces tend to exacerbate polarization between minority groups and the majority. As Cass Sunstein explains, “[g]roups go to extremes. More precisely, members of a deliberating group usually end up at a more extreme position in the same



general direction as their inclinations before deliberation began.”<sup>822</sup> By contributing to the development of a sub-community that does not identify with the wider political community and also finds itself ideologically polarized from the democratic majority, safe spaces can worsen democratic political outcomes, not only for the minority groups that remain underrepresented, but also for the majority that is robbed of the benefits of engaging with those minority groups.

*A. Positive effects of social speech: safe spaces -> character development and ideological advancements*

Throughout American political history, safe spaces have played an essential (if often invisible) role in furthering the liberal democratic goals of equality and inclusion. In the case of women’s rights, for example, formal political institutions such as the National Women’s Rights Conventions (1850-1856; 1858-1860), the National American Woman Suffrage Association (NAWSA) and the National Organization for Women (NOW) have received much of the credit for extending equal rights to women. However, none of these organizations would have been possible without the preexisting and concurrent informal, social networks that enabled average citizens to meet, discuss their shared experiences, build a collective consciousness and train for political action. As women’s social positioning has evolved, these unofficial discursive groups continue to provide spaces within which individuals can push for progress by continuously reevaluating and reimagining their political and social positions. And even now, safe space social speech has prompted deep changes that legislation alone could not achieve. Where would the Feminist Movement be today, for example, if it weren’t for the “variegated array of journals, bookstores, publishing companies, film and video distribution, networks, lecture series, research

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<sup>822</sup> Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (New York: Oxford University Press, 2009), pp. 3. This happens because individuals who communicate as part of a like-minded community are prone to influence from several group dynamics—introduction of new information, corroboration and reputational concerns—all of which push opinions to a more extreme iteration.

centers, academic programs, conferences, conventions, festival, and local meetings places” that Nancy Fraser describes as the late-twentieth century “subaltern counterpublic”?<sup>823</sup> These zones of free and open communication eventually led to the creation of a new vocabulary to talk about female experiences (i.e. “sexism,” “sexual harassment,” and “marital, date, and acquaintance rape”), thus making it possible for women to represent their needs and identities—not only to themselves, but to society at large—in a way that has permanently altered the position of women in western society.<sup>824</sup>

While safe spaces offer a refuge and platform to the disadvantaged in society, their democratic appeal has also received some mainstream political recognition. For example, on June 17<sup>th</sup>, 2012, the mayor of Newark, NJ, Cory Booker, gave the Stanford University Commencement Address, in which he encouraged students to expand their ideas of what it means to make a difference in one’s political community:

I worked with this woman, this tenant leader, and I would sit at her kitchen table and watch these other African-American women sit around that table in these projects being run by a slumlord and they would sit there and strategize about how to take care of the kids in the community, how to keep a family in their housing when they missed a rental payment. I stood there and I watched them thinking about how to support that community and I found it, I found conspirators.<sup>825</sup>

Politics, Booker explained, is more than what happens in a mayor’s office or on Capitol Hill; it isn’t just a matter of wealthy white men deliberating with one another in a government setting. For the average citizen, political activity actually takes place in social arenas; it consists of friends and neighbors coming together casually to talk, and it concerns ideas that may feel personal or close-

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<sup>823</sup> Fraser, “Rethinking the Public Sphere,” pp. 67.

<sup>824</sup> Ibid.

<sup>825</sup> Cory Booker, “Transcript of Newark, N.J., Mayor Cory Booker’s remarks for Stanford’s Commencement 2012,” *Stanford Report* (June 19, 2012). Available at: <http://news.stanford.edu/news/2012/june/transcript-cory-booker-061912.html>.

to-home. This is especially true for those who have been systematically excluded from the formal political machine. For members of these groups, much of the political action they will engage in over their lifetimes takes place within a particular social speech location: safe spaces. In their democratic ideal, these counter-communities provides two benefits for democratic political communities: 1) educating and encouraging contributors to engage with the wider political community; and 2) enabling them to develop the ideologies that will go on to influence political outcomes.

First, it is important to remember that social communication is essential, not just for personal enjoyment, but for personal and political growth as well. As social animals, people are only capable of fully realizing their potential as individuals when they can do so in conjunction with others. In other words, we are only able to identify a complete sense of our selves through our relationships with our communities. And as verbal creatures, much of the human experience of engaging with a community takes place through conversation. This is true regardless of whether or not the content of that conversation would fall under the category of traditionally political. All speech—but especially social speech—helps people develop a sense of themselves as individuals and as valuable parts of a larger whole.

While the process of self-realization through social speech is essential for all members of democratic societies, in the United States, it is especially important for those whose personal narratives may not correspond to the orthodoxy of the “American Dream.” Members of these groups are often provided fewer opportunities to engage in traditional political action. As a result of both internal and external factors, they are also less likely to think of traditional avenues of political expression as worthwhile uses of time of and resources. When the distance between the ideal and the speaker’s lived experience is great, the result can be alienation. Worse, it can also include such negative connotations that the individual feels not only *different*, but *less than*. After generations of being neglected by the political process and being told (implicitly or explicitly) that

they are unwelcome, minority citizens can begin to internalize the message of inferiority.<sup>826</sup> This causes many people to retreat away from politics and into the private and social sphere.<sup>827</sup>

Fortunately, participation in safe spaces can work to counteract this messaging (to an extent) and socialize members of subjugated minorities into the character traits that facilitate political action.

The ideal character traits for liberal democratic citizenship do not arise in a vacuum; rather, they must be learned through regular participation and positive reinforcement. Through the process of communicating freely with others, individuals learn skills, such as cooperation, openness and empathy. They are also more likely to develop corresponding character traits, such as confidence and republican virtue.

Safe spaces contribute to these goals by offering venues where participants not only can speak, but also places where they are likely to speak. As discussed above, what makes safe spaces unique from other loci of social speech is that they offer members of marginalized groups places where they can socialize and relax among peers, who share their experiences of alienation and belittlement, in a relatively non-judgmental atmosphere. At the very least, these spaces are separate and somewhat insulated from the messaging of mainstream society that may denigrate and devalue their participants. (Those dominant ideologies still exist, but safe spaces allow members room to openly question the status quo as it relates to them.) As a result of the insulation, equality and protection that safe spaces provide, individuals may feel free to speak up in ways and to a degree that is not necessarily possible in the wider society.<sup>828</sup> Rather

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<sup>826</sup> Linda R. Tropp finds that exposure to prejudice from the majority tends to provoke more negative intergroup attitudes among members of minority groups. See Linda R. Tropp, "The Psychological Impact of Prejudice: Implications for Intergroup Contact," in *Group Processes and Intergroup Relations*, Vol. 6 (2003), pp. 131-149.

<sup>827</sup> See Beverly Daniel Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race* (New York: Basic Books, 1997): "When feelings, rational or irrational, are invalidated, most people disengage. They not only choose to discontinue the conversation, but are more likely to turn to someone who will understand their perspective" (pp. 59-60).

<sup>828</sup> Traditional communicative arenas do not necessarily provide an encouraging atmosphere for minorities to assert themselves. For example, Christopher F. Karpowitz, Tali Mendelberg and

than quietly observing from the sidelines, members of subjugated groups often become more likely to share their stories, feelings and opinions when they are within the walls of a safe space.

This practice is of the upmost importance for democratic citizenship. Within these relatively closed, homogenous communicative spaces, individuals communicate socially with others who share their experiences of alienation and belittlement. Through this process, participants learn that they are not alone. By sharing their experiences with a willing, receptive, understanding audience, safe space speakers also learn that their opinions and arguments are worthy of expression. The exchange of personal narratives allows safe space participants to reaffirm one another's value as individuals and members of a group. This is, perhaps, the most important political role that safe spaces play in the lives of minority citizens. As Patricia Hill Collins writes in her analysis of black female safe spaces, "In the comfort of daily conversations, through serious conversation and humor, African-American women as sisters and friends affirm one another's humanity, specialness, and right to exist."<sup>829</sup> The affirmation that takes place in safe spaces helps to counteract the negative effects of a societal message that one is inferior by challenging conventional imagery and fashioning an alternative group image that can then be applied to individuals. In other words, safe space speech helps participants develop the confidence in themselves and their opinions that is necessary for them to participate in a world outside of their safe space.

Safe spaces offer members of subjugated minority groups the opportunity to communicate in ways that allow them to not only share and validate their experiences among peers, but also to reflect communally upon the dominant culture that excludes them. This further increases their personal pride and assurance of their value as a community member. Collins

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Lee Shaker find that women are 75 percent less likely to voice their opinions in a group setting when men substantially outnumber them. See Christopher F. Karpowitz, Tali Mendelberg and Less Shaker, "Gender Inequality in Deliberative Participation," in *The American Political Science Review*, Vol. 106, No. 3 (August 2012), pp. 533-547.

<sup>829</sup> Collins, *Black Feminist Thought*, pp. 113.

explains how African-American women utilize the protection and insulation of family and community networks to present an alternative to “the controlling images of Black womanhood,” which are propagated by the media, legal institutions, schools, etc. Instead of simply accepting the established image of a black American woman, these informal and formal safe spaces enable black women to resist and reconstruct the ideal that better fits their lived experiences.

The process of self-definition represents a vital step toward political action. As Collins explains, “[i]dentity is not the goal, but rather the point of departure in the process of self-definition.”<sup>830</sup> Recent research suggests that when minority individuals grow to strongly identify as members of a group (based on their minority status), they are more likely to engage in political action. Identification with the female community, in particular, makes a person more likely to engage in political action than almost any other group. In “Identity and Injustice: Exploring Women’s Participation in Collective Action,” Caroline Kelly and Sara Breinlinger find that the more an individual identifies as a woman, the more likely she is to engage in politics. The only group identifier that showed a stronger correlation was “activist.”<sup>831</sup> To the extent that participation in a safe space makes an individual more likely to identify with her peers, it also seems to make it likelier that she will engage with the wider community.

One theory to explain this correlation is that perhaps membership in one group prepares and trains individuals for membership in ever-larger communities. Fraser points to this possibility when she discusses the dual nature of “subaltern counterpublics,” or safe spaces; not only do they serve as a space for retreat, she argues, but also they also act as places where members can be armed for political battle: “On the one hand, they function as spaces of withdrawal and

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<sup>830</sup> Ibid., pp. 125. Collins cites Mary Helen Washington, who argues for the political significance of self-definition. See Mary Helen Washington, *Black-Eyed Susans and Midnight Birds: Stories by and about Black Women* (Garden City, NY: Anchor, 1980). Washington writes that Black women who work to “forge an identity larger than the one society would force upon them... are aware and conscious, and that very consciousness is potent.”

<sup>831</sup> Caroline Kelly and Sara Breinlinger, “Identity and Injustice: Exploring Women’s Participation in Collective Action,” in *Journal of Community & Applied Social Psychology*, Vol. 5 (1995), pp. 41-57.

regroupment; on the other hand, they also function as bases and training groups for agitational activities directed toward wider publics.”<sup>832</sup> Members of Fraser’s subaltern counterpublics are always aware that they also simultaneously belong to a wider “public-at-large.” So when they are communicating in the smaller groups, they are preparing themselves with the perspectives and the vigor that they will need to confront the larger community.

Another promising hypothesis for the cause underlying the relationship between group identification and political action is that participation in small discursive groups—such as safe spaces—increases feelings of empowerment. When an individual feels validated and efficacious in one sphere of her life, those feelings are likely to cross over into other areas of her life as well. Marc A. Zimmerman and Julian Rappaport’s study, “Citizen Participation, Perceived Control, and Psychological Empowerment” shows this to be the case, finding that the feeling of empowerment in any area of one’s life makes civic and political participation, specifically, more probable.<sup>833</sup> The authors propose a potential link between safe space speech and political action, specifically, when they suggest that becoming involved in decisions that affect one’s local community life is an especially promising option for developing a sense of psychological empowerment.<sup>834</sup> Any experience in organizing people and developing strategies for achieving one’s goals can contribute towards stronger feelings of empowerment; and for those whose formal options are limited in this regard, safe spaces provide an excellent opportunity to engage with a community. And as the messages they receive within safe spaces develop a more positive tone of empowerment, participants are more likely to view themselves as strong political actors with voices that ought to be heard. This attitudinal shift makes it more likely that participants in safe spaces will (and will want to) engage in the wider political community.

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<sup>832</sup> Fraser, “Rethinking the Public Sphere,” pp. 68.

<sup>833</sup> Zimmerman and Rappaport describe empowerment thusly: “Empowerment is a construct that links individual strengths and competencies, natural helping systems, and proactive behaviors to matters of social policy and social change. It is thought to be a process by which individuals gain mastery or control over their own lives and democratic participation in the life of their community” (“Citizen Participation, Perceived Control, and Psychological Empowerment,” pp. 726).

<sup>834</sup> *Ibid.*

The second way that safe space speech influences political action is tonally, acting as the locus for the creation of group-specific moral codes. As speakers begin to understand themselves in a social context, they are also determining where they fit into the larger political community. Through interactions with others who share histories, perspectives, etc., marginalized citizens struggle to reconcile the discrepancy between their lives and the American ideal. To the extent that black women, for example, see themselves as poorly represented in the “American Dream,” they are also likely to use safe spaces to question prevailing norms and ethical standards. As Dodson explains, it is through social speech, around the kitchen table, that members of oppressed groups feel free to develop their own moral codes. Conversations that may look like the simple sharing of “stories of terrible hardship, despair, and loss,” are also likely to include “ethical guidance, the obligations of kin, community, and of decent behavior.”<sup>835</sup> As an example, Dodson looks at the case of Adrienne, a white woman in her thirties who was previously on welfare. As a child, Adrienne’s mother used the kitchen table as podium from which to stress the liberal value of “individual responsibility for survival,” as well as to teach the republican “idea of responsibility for others as well as one’s own.”<sup>836</sup> It was through these informal lessons that Adrienne learned the ideologies that would follow her throughout her personal and political life.

Dodson finds that these philosophies tend not to be so black-and white, however. Because they are founded more on lived experience than formal theoretical learning, kitchen table philosophies tend to be more realistic and, thus, greyer: “Kitchen-table policy assumes choices are not clear cut, no black and white, gray is all that is real. Raising families on poverty wages; transcending stigma; managing complex households that have a high rate of health problems, disruptions, and stresses—none of this labor can be crammed into crisp and polished work schedules.”<sup>837</sup> The kitchen table philosophies and moral codes that develop out of hardship and oppression contain answers to questions of justice, fairness, liberty, etc. But when

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<sup>835</sup> Dodson, “At the Kitchen Table,” pp. 189.

<sup>836</sup> *Ibid.*, pp. 186.

<sup>837</sup> *Ibid.*, pp. 188-189.



individuals grow up hearing tales of how the state isn't always fair or just, and when all they've ever seen is the difference between their reality and the ideal society, they eventually learn to be distrustful (and maybe even resentful) of government. This was certainly the case for Dodson's Adrienne, who "grew into a person who believes that government is morally bankrupt—that the only justice a poor person will ever find is of her own creation."<sup>838</sup>

The beliefs about right and wrong, good and bad, which are realized and honed through social speech in safe spaces, can contribute towards the development and reconstruction (over time) of political ideologies that may look very different from what prevails in mainstream society. These unique ideologies often find their way into mainstream politics through the safe space participants who adopt them, by serving as the lens through which they see the political. Melissa Victoria Harris-Lacewell explains:

For both the individual and the group, ideology interprets truth, reduces complexity, links individual experiences to group narratives, identifies friends and foes, defines what is desirable, and provides a range of possible strategies for achieving desired outcomes... Ideology is the sort of story we tell ourselves and others about how the world works. The narrative encompasses historical events, personal experiences and collective realities. This narrative then directs interpretation of the political world and structures expressions of political attitudes.<sup>839</sup>

Safe space speech, by coloring the ideologies of its participants, affects the way they view the political world and their place within it. These revised interpretations and languages go on to influence others, as safe space speakers move outside of their communities and engage with the wider population.

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<sup>838</sup> Ibid., pp. 186. Still, despite the negativity, Dodson points to an overarching theme of kitchen table philosophies: survival. As she writes, "one clarion imperative emerges: If you are a healthy and self-respecting woman, your family *will* survive" (Ibid., pp. 189).

<sup>839</sup> Melissa Victoria Harris-Lacewell, *Barbershops, Bibles, and BET: Everyday Talk and Black Political Thought* (Princeton, NJ: Princeton University Press, 2004), pp. 19.

Despite the potential democratic advantages of safe space social speech—development of democratic character traits and the refinement of ideologies—critics may argue that safe spaces are no longer necessary in a society with formal, legal equality. If all individuals are technically free to compete in the marketplace of ideas, then why should some be granted additional, exclusionary arenas of discussion? Doesn't it belittle a group to argue that they need additional spaces of training, education and involvement in order to compete politically with the rest of the community? To these critiques, I offer two rebuttals. First, the very existence of safe spaces proves their necessity. Safe spaces are rarely formal institutions, granted to a specific group; instead, they tend to arise organically wherever people who have traditionally been left out of formal politics find one another. This may not always be the case (as I will discuss in Chapter Seven), but for now, I want to stress the legitimate point that where safe spaces do exist, it is often because there are still groups that do not have other social outlets.

Second, formal equality of speech does not necessarily equate to equality in practice. Many liberal theories of free speech begin with the assumption of a level playing field. If everyone would just participate and accept the same standards, the truth will eventually win out. This is meant to be a neutral, objective process, with the social standing of the participants playing no role in determining which ideas are accepted and which are rejected. But just because the general public sphere is technically open to everyone, it does not follow that all will equally join the public debate.<sup>840</sup> As this section has shown, consistent negative messaging (both implicit and explicit) is likely to affect an individual's interest in and willingness to engage with a political community that has seemingly rejected her. Even when she does choose to take part in traditional political debate, she may find herself less well prepared than those who have not had

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<sup>840</sup> Catherine A. MacKinnon explains: "The most basic assumption underlying First Amendment adjudication is that, socially, speech is free. The First Amendment says, 'Congress shall not abridge *the freedom of speech*.' Free speech exists. The problem for government is to avoid constraining that which, if unconstrained by government, is free. This tends to presuppose that whole segments of the population are not systematically silenced *socially*, prior to government action" ("Not a Moral Issue," pp. 157-158).

to struggle with exclusion and prejudice. When she is communicating with the wider public, she may feel too intimidated to speak her mind or feel too insecure in her beliefs—which likely do not perfectly align with the ideal—to fight for them. This lack of preparedness makes it more difficult for her opinions and perspectives to gain footing in the wider political community.

Safe spaces present a potential solution to this imbalance. Not only do they provide an alternative form of political action, but they also offer individuals the opportunity to enhance their positions in traditional politics. Through safe space social speech, participants are able to practice communicating their wants and needs while also building confidence and a sense of self worth. And, working as a unit, safe space speakers can define a self-image that better reflects their lived experiences and their relationship to the larger world. In these ways, safe spaces actually do help to level out the democratic playing field, making it both more likely that participants will transfer their skills and knowledge to the political world, and also that they will have a meaningful influence when they get there.

*B. Negative effects of social speech: safe spaces -> isolation and polarization*

Safe space social communication provides speakers with many of the skills and capabilities necessary for political action in the larger community. The processes of self-affirmation, self-definition and empowerment that occur during these “kitchen table discussions” (regardless of where they actually take place) enable participants to not only question the world around them, but also to develop the confidence and republican virtue that they can then carry into increasingly wider social and political circles. And by serving as a discursive space in which people can identify and discuss group-specific moral codes, safe space social speech also influences the form that that political participation will take. Unfortunately, despite the positive political potential of safe space speech, depending on its style and content, it can also result in significant negative consequences for the liberal democratic goals of equality and inclusiveness.

While this highly insider communication helps to build trust, cohesiveness and a sense of belonging among members, through that process, it may also serve to further solidify the lines between in-groups and out-groups, villainizing the latter and leading to increased feelings of estrangement and polarization.

Experiences in safe spaces teach individuals what it means to be and act as a valuable, contributing member of a community. It is through building ideas with others and sharing personal opinions that safe space participants learn to understand the boundaries of their communities as well as their places within them. It is also how they learn to identify who is not a part of those communities. In her essay, "In Praise of Gossip," Patricia Meyer Spacks suggests that a primary function of one form of social speech, gossip, is to equalize the social position of participants. "People discourse *to* one another;" she writes, "they gossip *with*... One discourses from a height, gossips around the kitchen table."<sup>841</sup> Gossip, much like the myriad other forms of social speech, ensures that participants feel like they are among peers – friends, even. To gossip—or even just chat—with another implies a degree of trust, mutual understanding and camaraderie. Through its practice, casual conversation truly does lead to closer affective bonds:

For the two or three discussers, it [gossip] supports comradeship, connection; it enables them to distance, even to deny, their own competitive impulses. They declare their closeness by sharing their secrets, and by investing those secrets with meaning. The sharing involves more than exchange of information. It implies self-revelation as well as exposure of other people's affairs because responses to news matter more than news itself in intimate gossip. By gossiping people know one another."<sup>842</sup>

In other words, the two-way process of self-exposure and receptivity towards others that takes place through social speech helps individuals to establish ties of community and social trust.

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<sup>841</sup> Patricia Meyer Spacks, "In Praise of Gossip," in *The Hudson Review*, Vol. 35, No. 1 (Spring, 1982), pp. 24.

<sup>842</sup> *Ibid.*, pp. 28.

They are not only drawing the boundaries around their communities – they are also learning to care about the people within those imaginary lines and to identify their good with the good of that group. Thus, social speech and the connections it forges are instrumental for democratic bodies that require sacrifices from some citizens in order to benefit others.

The unfortunate side effect of this community building is that, although it brings some people together, it also “directs competitive feelings outward, toward the absent other, the subject of discussion.”<sup>843</sup> In-groups, after all, can only exist by virtue of there being an out-group. In establishing connections to some people, social speakers are also discovering who they do not need to care about. In the case of safe spaces, in which participation is based on membership in a marginalized ascriptive group, the resulting lines between in-groups and out-groups can be particularly stark and impenetrable.

Safe space speech establishes a distance between the “us” who are welcome in the safe space, and the “them” that can never truly understand the dynamics of those relationships. Several black feminist theorists have argued that, in order to be effective, safe spaces must be highly exclusionary. As Beverly Daniel Tatum explains in her book, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race*, it is much easier to understand our own experiences when we are in conversation with others who can personally relate to us.<sup>844</sup> Drawing from her life as a black woman, Tatum argues that even well-meaning white Americans are unable to fill that need for underrepresented minorities: “Even when White friends are willing and able to listen and bear witness to one’s struggles, they cannot really share the experience.”<sup>845</sup> This is especially true, Tatum argues, in the identity-forming phase of

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<sup>843</sup> Ibid.

<sup>844</sup> “As one’s awareness of the daily challenges of living in a racist society increase, it is immensely helpful to be able to share one’s experiences with others who have lived it” (Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria?* pp. 70).

<sup>845</sup> Ibid.

adolescence. But it is also true throughout life; in order to fully know ourselves, we must be able to identify with others who are like us.

Not only do outsiders fail to truly understand and relate to the experiences of safe space participants, but their mere presence compromises the goals of those spaces. As Collins argues, the very idea of a safe space requires homogeneity: “Historically, safe spaces were ‘safe’ because they represented places where Black women could freely examine issues that concerned us. By definition, such spaces became less ‘safe’ if shared with those who were not Black and female.”<sup>846</sup> If the purpose of a safe space is to provide opportunities for members of a marginalized group to communicate freely and apart from (or with limited exposure to) external power imbalances, the presence of an outsider negates that function. Black women, Collins writes, because they do not find themselves or their struggles accurately represented in popular or political culture, need opportunities to fully and openly express themselves if they are to develop understandings of their own realities. And they need to be able to do that with as few stifling outside influences as possible.

Finally, in her book, *Ain't I a Woman: Black Women and Feminism*, bell hooks uses the example of the black feminist movement to show just how important it is for counter-hegemonic movements to be carefully defined and to maintain internal homogeneity. As hooks explains, when feminist groups included both white and black female members, the latter became less willing and able to participate. Not only were they influenced by preexisting racial power imbalances that limited their opportunities for full engagement, but they were also, in a sense, oppressed by white feminists who insisted on particular agendas that did not adequately reflect the lives of black women. Hooks writes: “We were unable to usurp leadership positions within the movement... We could not even get a hearing at women’s groups because they were organized and controlled by white women... We dropped out of groups, weary of hearing talk

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<sup>846</sup> Collins, *Black Feminist Thought*, pp. 121.

about women as a force that could change the world when we had not changed ourselves.”<sup>847</sup> By 318  
insisting that black women take part in a feminist struggle that did not express their perspectives,  
white women were effectually silencing them.

Thus, many black women were compelled to further segregate themselves away from  
feminist groups and into *black* feminist groups. According to hooks, this was ultimately a positive  
development for black female empowerment: “Many black women found an affirmation and  
support of their concern with feminism in all-black groups that they had not experienced in  
women’s groups dominated by white women; this has been one of the positive features of black  
women’s groups.”<sup>848</sup> The more narrowly counter-publics—or safe spaces—are defined, the more  
they are able to reduce unequal power relationships, and thus, decrease the chances for  
silencing and lack of representation. In other words, in order to achieve maximum effectiveness,  
safe spaces must be fairly homogenous and closed.

It is important to note that the segregation imposed by safe spaces is only meant to be  
temporary. Ideally, these spaces exist to prepare, encourage and coach participants for life in a  
wider, heterogeneous society. As Collins explains for the case of black women, “safe spaces  
were never meant to be a way of life. Instead, they constitute one mechanism among many  
designed to foster Black women’s empowerment and enhance our ability to participate in social  
justice projects. As strategies, safe spaces rely on exclusionary practices, but their overall  
purpose most certainly aims for a more inclusionary, just society.”<sup>849</sup> It is not the purpose of most  
safe spaces to form a fortress that closes participants off from the world; rather it is to find a  
group of people who share common experiences and can provide the advice, comfort and  
reassurance that makes political action possible.

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<sup>847</sup> bell hooks, *Ain’t I a Woman? Black Women and Feminism* (Boston, MA: South End Press, 1981), pp. 189.

<sup>848</sup> *Ibid.*, pp. 151-152.

<sup>849</sup> Collins, *Black Feminist Thought*, pp. 121.

Problems begin to arise, however, when members of safe spaces become enmeshed in their specific groups and their particular discourses, and begin to distance themselves from the rest of the public, turning the in-group into the priority and the out-group into the enemy. For members of groups that have traditionally been marginalized by the “them,” such distancing and isolation might initially seem appealing. When one feels like she has been rejected by mainstream society, it may be a natural instinct to reject them right back, especially when she has the benefit of support within her safe space community. The resulting “us vs. them” mentality may inadvertently lead to radicalized attitudes and a demonization of the majority. This, in turn, may decrease the likelihood that minority members will participate actively (if at all) in mainstream politics.

From the outset, it seems likely that the ideas and opinions that characterize safe spaces tend to differ from majority public opinion. As Harris-Lacewell writes, “Once we allow that the African American counterpublic is operating beyond the reach of powerful whites, we must allow for the possibility that the ideological work being done in that counterpublic is distinct from the hegemonic work of elite discourse.”<sup>850</sup> And although there may be some Black men and women whose political attitudes reflect aspects of American ideology—“such as meritocracy, individualism, and uncritical patriotism”—the vast majority of black discourse is critical of these ideas. This is not, in and of itself, a problem. Diversity of opinions and perspectives is one of the democratic benefits of a society that encourages safe space speech. Unfortunately, when that critical attitude focuses less on democratic, inclusive solutions and more on isolationism, if safe space participants are not vigilant, those attitudes may radicalize in ways that further separate minority and majority groups, making political compromise extremely difficult.

As Sunstein explains, ideological differences, when insulated within like-minded, discursive groups, have a tendency to go to extremes. As discussed in the previous section on

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<sup>850</sup> Harris-Lacewell, *Barbershops, Bibles, and BET*, pp. 13.



Internet speak, this occurs in three ways. First, Sunstein suggests that new information inevitably leans in the direction of the predominant group norms and ideologies. This appears almost commonsense: the greater the number of members of a group that hold a particular belief, the more information will be provided supporting that belief.<sup>851</sup> Second, like-minded deliberative groups, simply by bringing together people with similar opinions, are apt to provide psychological reinforcement to their participants, thus diminishing uncertainty and strengthening/radicalizing viewpoints.<sup>852</sup> It is important to note that this process may be taking place for many group members at once – the more people in my group seem to agree with me, the more confident and firm I will be in my opinion, and the more I will be offering that same reinforcement to others in my group. Finally, reputation plays an important role in radicalizing group opinions. As Sunstein explains, whether an individual consciously desires approval or not, it is difficult to avoid adjusting her positions (at least slightly), when she learns what other members of her group believe.<sup>853</sup>

All three of these processes that lead towards radicalization are enhanced when the like-minded discursive group is tied together through social and affective bonds, as in the case of safe spaces. The greater the sense of shared identity and solidarity among group members, Sunstein claims, the higher the likelihood of polarization. This may be because people who feel united by some personal connection—“family, politics, or religious convictions”—are highly influenced in their decision-making by social dynamics and are likely to dampen dissent. The more “individual

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<sup>851</sup> “Happily, people tend to respond to the arguments made by other people—and the pool of arguments, in a group with a predisposition in a particular direction, will inevitably be skewed in the direction of the original predisposition” (Sunstein, *Going to Extremes*, pp. 22).

<sup>852</sup> “Those who lack confidence and who are unsure what they should think tend to moderate their views. Suppose that you are asked what you think about some question on which you lack information. You are likely to avoid extremes. It is for this reason that cautious people, not knowing what to do, tend to choose some midpoint between the extremes. But if other people seem to share their views, people become more confident that they are correct. As a result, they will probably move in a more extreme direction” (Ibid., pp. 23).

<sup>853</sup> “Sometimes our views are, to a greater or lesser extent, a function of how we want to present ourselves. Of course, some people are more concerned than others with their self-presentation. But once we hear what others believe, some of us will adjust our positions at least slightly in the direction of the dominant position, to hold onto our preserved self-presentation. We might constrain our opposition; we might voice somewhat more enthusiasm for the majority view than we really feel” (Ibid., pp. 27).

members tend to perceive others as friendly, likable, and similar to them,” the more that the diversity of arguments will be reduced.”<sup>854</sup> So when the initial messages in safe spaces tend towards segregation, it is very possible that, over time, they will become increasingly radicalized and more separatist.

But such separatism is not an effective long-term political strategy in democratic, heterogeneous states. When prolonged participation in radicalized safe spaces makes individuals less able to identify with the wider community, it compromises their willingness to engage in mainstream politics. To the extent that these extremist safe space participants are willing to engage in traditional politics, the very ideologies they developed within those communicative arenas distance them from the majority, making compromise especially difficult. And yet, in order to influence political outcomes, marginalized citizens must be willing to move beyond their safe spaces and into the wider community. That is why, from the perspective of liberal democratic values, it is so important that safe space discourse focus, not on creating distance and differences, but on discovering commonalities. In order to avoid negative democratic outcomes, safe space participants must always keep in mind that these discursive groups represent just one example of political involvement; if they are to act as full and equal democratic citizens, safe space participants must always keep an eye towards the larger community.

### **III. Hate speech:**

Unlike both Internet speak and safe space speech, it is difficult to find instances in which hate speech contributes positively to democratic citizenship and political outcomes according to the model I have presented. Arguments in favor of protecting hate speech tend to fall into two categories. First, there is the school of thought that, since we cannot know what is true and what

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<sup>854</sup> Ibid., pp. 42.

is not (or at least, the state is not in a position to judge), no speech should be prohibited on the basis of content. Since hate speech regulations hinge on *what* is being said, they ought to be abandoned.<sup>855</sup> Hate speech, according to this view, as an example of political speech, merits the same legal protections as any other form of political speech. The fact that the political opinions that underlie hate speech may be unpopular is just further proof that they need to be constitutionally protected. The second school of thought posits that hate speech serves an important social function, acting as a safety valve by allowing individuals to vent their feelings before they boil over into harmful actions. By suppressing hate speech, negative feelings may not only intensify, but they may even find new grounds of resentment.<sup>856</sup> Perpetrators of hate speech may also appear more legitimate in a regime that silences them, as they can charge their censors with tyrannical oppression.

Thus, many legal and political scholars argue that there is value in the free expression of hate speech – if not in its message, at least in its ability to expose important political ideas about racism, sexism, etc. This openness is the first step to finding a solution, they argue.<sup>857</sup> When individuals are allowed to share their hateful beliefs and thoughts, the recipients of that hate at the same time receive “valuable information” regarding their social status. They are afforded the opportunity to publically respond to the charges against them and establish an open dialogue (in which, ideally, the truth will win out).

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<sup>855</sup> See Supreme Court Justice Antonin Scalia’s opinion for *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), discussed below: “St. Paul’s brief asserts that a general ‘fighting words’ law would not meet the city’s needs, because only a content-specific measure can communicate to minority groups that the ‘group hatred’ aspect of such speech ‘is not condoned by the majority.’... The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”

<sup>856</sup> See Thomas I Emerson, *The System of Freedom of Expression* (New York: Random House Books, 1970). Also see Supreme Court Justice Louis Brandeis’s concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927), in which he argues that “it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.”

<sup>857</sup> As Nadine Strossen writes, “hate speech highlights “issues that can be addressed in other ways, for example through education” (“Interview with Nadine Strossen,” pp. 384).

While it is not the goal of this project to test the validity of the individual arguments in favor of the legality of hate speech—proponents from both schools of thought make strong points, but they do so *not* in terms of the relationship of hate speech (as social speech) to democratic citizenship—I will challenge the claim that hate speech typically brings communities together through free and open dialogue.<sup>858</sup> Hate speech is a tool for dividing communities, not uniting them. It is used to make certain segments of society feel unwelcome and unworthy, rather than to teach all citizens what it means to be a full and equal member of a community. In the following sections, I will focus entirely on these potential negative effects of hate speech from the perspective of the liberal democratic values of human dignity, equality and inclusiveness.

Any study of hate speech is subject to certain challenges, as the concept, itself, has not been clearly or universally defined. Still, there are some useful guidelines for understanding the topic. In his 2012 essay, “Is There a Case for Banning Hate Speech?,” for example, Bhikhu Parekh proposes three essential features of hate speech, which distinguish it from legal offensive speech. First, hate speech must be “directed against a specified or easily identifiable individual or, more commonly, a group of individuals based on an arbitrary and normatively irrelevant feature.”<sup>859</sup> Second, the tone and content of hate speech must be decidedly negative. In other words, it must stigmatize “by implicitly or explicitly ascribing to [the target group] qualities widely regarded as undesirable.”<sup>860</sup> Finally, Parekh defines hate speech by its consequences; in order for speech to be considered hate speech, it must diminish the victim’s standing within the wider community. Targets of hate speech eventually come to be seen as undeserving and untrustworthy members of society. This denigration leads the wider community to feel like they

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<sup>858</sup> As Charles R. Lawrence, III, explains, hate speech often serves the opposite purpose, shutting down communication. “Assaultive speech functions as a preemptive strike,” Lawrence writes. “The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow” (Lawrence, “If He Hollers Let Him Go,” pp. 67-68).

<sup>859</sup> Bhikhu Parekh, “Is There a Case for Banning Hate Speech?” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses* Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 40.

<sup>860</sup> *Ibid.*, pp. 41.

can “legitimately exterminate or expel the target group. And if that should prove impossible, it may rightly discriminate against and tolerate it as an unavoidable evil confined to a shadowy existence on the margins of society.”<sup>861</sup>

In *The Harm of Hate Speech*, Jeremy Waldron identifies several international examples of hate speech definitions.<sup>862</sup> In Denmark, for instance, hate speech includes “statements ‘by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background.’”<sup>863</sup> In Germany, it involves any “attacks on ‘the human dignity of others by insulting, maliciously maligning or defaming segments of the population.’”<sup>864</sup> And in New Zealand, hate speech is “threatening, abusive, or insulting... words likely to excite hostility against or bring into contempt any group of persons... on the ground of the colour, race, or ethnic or national or ethnic [sic.] origins of that group of persons.”<sup>865</sup> As Waldron suggests, these several international understandings of hate speech prove that it is widely regarded as a real harm (both individual and public), one that merits legal action and prohibition.

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<sup>861</sup> Ibid.

<sup>862</sup> Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012), pp. 8.

<sup>863</sup> Section 266b of the Danish Penal Code: “(1) Any person who publicly or with the intention of dissemination to a wide circle of people makes a statement or imparts other information threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin, belief or sexual orientation, shall be liable to a fine, simple detention or imprisonment for a term not exceeding two years. (2) When handing down the punishment, it is to be considered as an aggravating circumstance that the statement is in the nature of propaganda.”

<sup>864</sup> German Penal Code, section 130(1): “Whoever, in a manner that is capable of disturbing the public peace: 1) incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2) assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years.”

<sup>865</sup> New Zealand Human Rights Act 1993, section 61(1): “It shall be unlawful for any person—(a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.”

For the purposes of this project, I define hate speech as harassment on the basis of ascriptive characteristics, which compromises the victim's ability and/or willingness to participate in society as a free and equal member.<sup>866</sup> Hate speech is more than mere nastiness or disrespect; it implies actual *hatred* with a wish to destroy or harm.<sup>867</sup> It aggressively attempts to take particular forms of "otherness" and solidify them into justifications for unequal social and political standing. Examples of hate speech can be found in all spheres of human interaction, from the highly public to the deeply intimate.

But regardless of whether hate speech takes place in the political, social or private realm, it is *necessarily* a public act. As Waldron warns, "[w]e must not be misled into regarding hate speech and group defamation as essentially private acts with which governments are perversely trying to interfere in the spirit of mind control. Hate speech and group defamation are actions performed in public, with a public orientation, aimed at undermining public goods."<sup>868</sup> Even when these ideas are informally addressed at private individuals, they are, in essence, political statements. As the United States Supreme Court ruled in *Snyder v. Phelps*, the opinions reflected in hate speech—in this case, ranging from "Fags Doom Nations" and "Thank God for IEDs," to "You're Going to Hell," and "God Hates You"—while they may be directed at an individuals and fail to rise to the standards of refined, formal political commentary, "the issues

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<sup>866</sup> I choose to focus on ascriptive characteristics—such as sex, race and sexuality—because it seems that hate speech based on those traits is particularly psychologically harmful for the victims. See Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw (eds.) (Boulder, CO: Westview Press, Inc., 1993), pp. 89-110: "The psychological harms caused by racial stigmatization are often much more severe than those created by other stereotyping actions. Unlike many characteristics upon which stigmatization may be based, membership in a racial minority can be considered neither self-induced nor alterable" (pp. 90).

<sup>867</sup> The Canadian Supreme Court described "hatred" well for these purposes. In *Keegstra*, the Court wrote: "Hatred is predicated on destruction, and hatred against identifiable groups and therefore thrives on insensitivity, bigotry and destruction of both the target groups and the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation" *Keegstra*, *supra* note 24, Part VII(D)(iii)(a) (Dickson, C.J.).

<sup>868</sup> Waldron, *The Harm in Hate Speech*, pp. 100.

they highlight... are matters of public import.”<sup>869</sup> Not only is the content of hate speech necessarily political, but the act of expressing hatred, not towards an individual, but towards the ascriptive characteristics of the group to which that individual belongs, can lead to significant negative consequences for liberal democratic society, in general. These undesirable outcomes include: 1) diminishing positive democratic character traits for target groups (e.g. initiative, resolution and courage), and replacing them insecurity and self-doubt; and 2) dividing communities and breeding distrust on both sides.

All of this is especially true for hate speech practiced by private individuals in the social sphere. As discussed in both the Internet speak and safe space speech sections, social speech does not just refer to the sphere in which communication occurs, but also to its “socializing” effects. As Orville Lee explains, “[s]ocially manifest forms of symbolic power comprise the most explicit or manifest instances of social risk in speech, and are most easily recognized as such. They are historically connected to systems of political, legal, economic, and cultural domination in which words construct particular individuals as biologically or mental inferior, as immoral, and as objects of social derision.”<sup>870</sup> The social sphere is where negative messaging based on systematic power imbalances often enters the private lives of ordinary citizens. Thus, this kind of speech has a particularly deleterious effect on an individual’s development as a democratic citizen. When people are forced to exist in a community in which they are subject to denigration and hatred on the basis of their ascriptive characteristics, they can absorb the message and may become socialized to think of themselves as *less than*. As Gordon W. Allport writes, “[o]ne’s reputation, whether false or true, cannot be hammered, hammered, hammered, into one’s head without it doing something to one’s character.”<sup>871</sup>

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<sup>869</sup> *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>870</sup> Orville Lee, “Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society,” in *Law & Social Inquiry*, Vol. 26, No. 4 (Autumn, 2001), pp. 871.

<sup>871</sup> Gordon W. Allport, *The Nature of Prejudice* (Cambridge, MA: Perseus Books, 1979), pp. 142.

Negative socializing effects are particularly pronounced in the case of groups that already traditionally carry a social stigma. “In the case of members of these racial, ethnic, religious, etc. groups, defamatory attacks all too frequently ‘stick as truth.’ Members of such groups are easily stereotyped, which enables a degrading description or depiction of the group to lead to diminished respect for all its members.”<sup>872</sup> In these cases, even a strong will may not be enough to assert a positive opinion of oneself and one’s capacities amidst all the negative voices. Certainly, it is even harder to prove to the rest of the population that you are not what others say you are. And where this kind of hate speech is not punishable by law—thus receiving the state’s implicit sanction—these hurdles are even harder to overcome.

Thus, whatever preexisting tensions existed between ascriptive minority groups and the majority community are likely to be enhanced through social hate speech. Clearly, targets will tend to grow distrustful and resentful of not only the individuals who express hate speech, but also of the mainstream community that accepts it. They may retreat into isolated, homogenous counter-publics, resisting any opportunities to try to work with the larger public. And whether or not members of the majority community personally condone the viewpoints expressed through hate speech, the self-fulfilling prophecy of hate speech—which encourages victims to become what they are accused of being—may serve to lower their expectations and evaluations of others over time. This dual process of increasing distrust may lead to significant societal fracturing and diminished public morale.

As noted above, much of the western world has acknowledged the potential public harms of social hate speech, and has deemed them adequately substantial to merit legal action. In the following section, I present several international approaches towards social hate speech in order to elucidate and emphasize the seriousness of the threat it poses to liberal democratic values. I

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<sup>872</sup> See Susan J. Brison, “Relational Autonomy and Freedom of Expression,” in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, Catriona Mackenzie and Natalie Stoljar (eds.) (New York: Oxford University Press, 2000), pp. 291.



then contrast these understandings with the American example, in which hate speech has been more narrowly defined and (generally) constitutionally protected. While the potential of hate speech to cause both personal and widespread public harm is conceded in the United States, these risks are not considered significant enough to curb the freedom of political hate speech. (I return to the American philosophical and legal understandings of hate speech in Chapter Seven, in order to evaluate this approach and suggest several initiatives to limit the negative effects of social hate speech on democratic citizenship and political outcomes.)

Having examined several international frameworks for understanding hate speech, I then move on to more closely examine the harms themselves. In particular, I address two sets of democratic harms. First, I look at the tendency of social hate speech to affect character development in ways that compromise the target's ability and willingness to engage in participatory politics. Specifically, I argue that hate speech increases feelings of worthlessness and powerlessness in its victims, as opposed to the determined, assertive, enterprising nature required of democratic citizens. Second, I show how hateful messaging from within the social sphere is likely to solidify community divisions and breed distrust on both sides. This not only undermines the liberal democratic goals of inclusiveness and equality, but it also compromises the functionings of the state.

A. *Assessing the power of hate speech: International and American historical perspectives*

Because hate speech legislation is so contingent on historical particularities and legal traditions, particular hate speech codes represent considerable variation. In Canada, for example, the courts have come out against protecting hate speech, legally defined as any statements that incite "hatred against any identifiable group where such incitement is likely to lead

to a breach of the peace.”<sup>873</sup> In *Regina v. Keegstra* (1990), Chief Justice of the Canadian Supreme Court Brian Dickson refers to three concerns as providing support for freedom of expression under the Canadian Charter: “(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.”<sup>874</sup> In other words, Dickson claims that freedom of speech in the Canadian context is justified on the basis of democracy, the pursuit of truth and autonomy. Hate speech, which does not meet any of these goals and actually has a negative effect on autonomy, is, therefore, not considered protected speech. Dickson continues:

The derision, hostility and abuse encouraged by hate propaganda... have a severely negative impact on the individual’s sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them in contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious, and cultural groups in our society.<sup>875</sup>

Similarly, English common law has repeatedly distinguished hate speech from legal protected expression based on the challenges it presents for equality and human dignity. Although Great Britain has no written constitution recognizing a right to freedom of expression

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<sup>873</sup> Canadian Criminal Code (R.S.C., 1985, c. C-46), Section 319(1): “Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.”

<sup>874</sup> *Regina v. Keegstra*, (1990) 3 S.C.R. 697.

<sup>875</sup> *Ibid.*

and its caveats, the nation does have an explicit legal tradition of criminalizing hate speech, which dates back to the 17<sup>th</sup> Century laws on seditious libel. Seditious libel is defined as the utterance or publication of statements with “an intention to bring into hatred or contempt, or excite disaffection against the person of Her Majesty... or to promote feelings of ill-will and hostility between different classes... [of her] subjects.”<sup>876</sup> And while “seditious libel was primarily used to punish those perceived to pose a threat to the monarchy,” as Michael Rosenfeld explains, “occasionally, it was used in the context of what today is called ‘hate speech.’”<sup>877</sup> In the 1905 case of *Regina v. Osborne*, the Court extended the crime of seditious libel to apply to the publishers of a pamphlet who had asserted that certain Jews had murdered a woman and her child because the child had a Christian father. As a result of this propaganda, several English Jews were beaten and killed. In this case, the speech (and not just the actions of the murders) was deemed illegal because the Court found its hateful content to be a clear incitement to violence.

However, over time, seditious libel laws in Great Britain grew insufficient for the purposes of hate speech prosecution, in that convictions required proof of *direct* incitement to violence. Thus, in 1936, Parliament instituted *The Public Order Act* in order to more closely address the content of hateful speech. This act relaxed the standards for seditious libel in two respects. First, it enabled the state to punish speech that was “likely” to lead to violence, even if no violence had actually occurred. Second, it allowed for the punishment of a mere intent to provoke violence. Thus, the British courts moved further away from punishing speech based on its direct negative outcomes, and closer toward a modern day European conception of hate speech legislation.

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<sup>876</sup> As Michel Rosenfeld explains, seditious libel, by allowing for the punishment of political criticism of the government, “contravenes a core function of modern freedom-of-expression rights” (“Hate Speech in Constitutional Jurisprudence,” pp. 263).

<sup>877</sup> *Ibid.* See also Anthony Lester and Geoffrey Bindman, *Race and Law in Great Britain* (Cambridge, MA: Harvard University Press, 1972).

These standards for what constituted illegal hate speech in England only became more expansive after World War II. In 1965, Parliament enacted the Race Relations Act. Section 6 of that Act made it a crime to utter in public or publish words “which are threatening, abusive, or insulting,” and are meant to incite hatred on the basis of race, color or national origin.<sup>878</sup> In 1986, Parliament amended *The Public Order Act* to include Section 5, which made hate speech punishable if it amounted to harassment of a target group or individual. And in 1997, Parliament enacted the *Protection from Harassment Act*. Finally, in 2006, the United Kingdom adopted the Racial and Religious Hatred Act, which prohibits threats that incite to religious hatred, but explicitly exempts religious criticism even if it involves “antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherent.”<sup>879</sup>

In each instance that the English legislature and judiciary have addressed the legality of hate (and hateful) speech, they have moved in a less tolerant direction. Great Britain has also expressed a commitment to anti-hate speech legislation through its adherence to international covenants, such as the European Convention on Human Rights (discussed below). Many other European nations have signed onto this and similar international covenants as well. Germany and France, for example, have led the continent in developing restrictions on hate speech. In both nations, although they boast long traditions valuing freedom of speech, that liberty is balanced against their historical record of hate propaganda and discrimination, which culminated in the widespread harms of the Holocaust and WWII. Under the contemporary German and French legal approaches, freedom of speech remains esteemed, but it must also be interpreted in its relationship to other fundamental values, such as equality and human dignity.

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<sup>878</sup> While these statutes were enacted to protect minority groups from the kind of harassment and propaganda that culminated in World War II, problems with enforcement meant that many people who were meant to be protected were actually prosecuted under Section 6. In particular, many of the convictions were obtained against leaders of the Black Liberation Movement of the 1960's. See: *Regina v. Malik*, (2008) All ER (D) 201 (Jun).

<sup>879</sup> “Racial and Religious Hatred Act 2006,” amendment to the “Public Order Act of 1986,” Part 3A, Section 29J.

This approach can be seen in the German decision for the *Holocaust Denial Case* of 1994.<sup>880</sup> As Parekh observes, banning Holocaust denial is “part of reparative justice, a public statement of the country’s acknowledgement of and apology for its past, a way of fighting neo-Nazi trends in German society.”<sup>881</sup> This particular case involved David Irving, a revisionist British historian who argued that the mass extermination of the Jews under the Third Reich never took place. Irving was invited to speak at a public meeting of a far-right political party in Germany, and although the government approved the meeting, it did so on the condition that it would include no Holocaust denial. Any instance of Holocaust denial, the government concluded, would amount to “denigration of the memory of the dead, criminal agitation, and, most important, criminal insult, all of which are prohibited by the Criminal Code.”<sup>882</sup> The political party brought complaint against the government, alleging that these restrictions amounted to an infringement of its right to freedom of expression. The Constitutional Court upheld a lower court’s rejection of this complaint, citing the state’s legitimate interest in protecting human dignity, a central aspect of the German understanding of hate speech.

Similarly, the French legal system has taken an intolerant stance towards Holocaust denial and racist speech, categorizing the former as a criminal act (*un délit*) rather than a civil liability. The post-WWII French governments have made explicit efforts to distance themselves from the atrocities of Nazism and official French anti-Semitic propaganda. In 1946, when the regime converted from Nazi-dominated Vichy France to the free French Republic, for example, that transition included the reestablishment of a 1939 French law banning racist and anti-Semitic speech, known as the Marchandreau law. This decree amended the 1881 Freedom of the Press law to ban “defamation and insults against a group of persons belonging by their origin to a particular race or religion, which have for their purpose to incite hatred against citizens or

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<sup>880</sup> *Holocaust Denial Case*, 90 BVerfGE 241 (1994).

<sup>881</sup> Parekh, “Is There a Case for Banning Hate Speech?” pp. 37-56.

<sup>882</sup> Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 1997), pp. 363.

residents.”<sup>883</sup> As Julie C. Suk explains in “Denying Experience: Holocaust Denial and the Free-Speech Theory of the State,” the reintroduction of this decree in the post-WWII era came out of a public recognition that “hateful speech had the effect of dividing citizens and weakening the morale of the nation.”<sup>884</sup> Since then, the French legal discourse on racism and discrimination has revolved around the Marchandreau law, with legislators evoking it in both 1979 and 1990, when new, more restrictive hate speech laws were introduced.

French and German laws were designed after WWII to face their responsibility for the Holocaust. Similar histories of discrimination and genocide appear to be behind anti-hate speech regulations in other parts of the world as well. For example, in his study of Indian hate speech laws, Floyd Abrams draws a link between the more than 600,000 deaths due to the communal violence that occurred during the period after the subcontinent was divided into India and Pakistan, and Section 153A of the Indian penal code, which criminalizes speech that promotes “enmity between different groups on grounds of religion, race, place of birth, language, etc.” as well as “acts prejudicial to the maintenance of harmony.”<sup>885</sup>

While there is clearly variation in what constitutes illegal hate speech and how it should be handled, international laws regarding hate speech do share some commonalities. First, in all of the cases discussed above, speech (both verbal and nonverbal) ceases to be legal “offensive speech” and becomes illegal “hate speech” when it is powerful enough to incite hatred, violence or prejudicial action against a protected individual or group. As Waldron writes, all of these national laws “are concerned with the use of words which are deliberately abusive and/or insulting

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<sup>883</sup> Décret modifiant les articles 32, 33, et 60 de la loi du 29 juillet 1881 sur la liberté de la presse, 21 avril 1939, [decree modifying articles 32, 33 and 60 of the law of July 29, 1881 on the Freedom of the Press, April 21, 1939], J.O.R.F., April 25, 1939, at 5295.

<sup>884</sup> Julie C. Suk, “Denying Experience: Holocaust Denial and the Free-Speech Theory of the State,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 155.

<sup>885</sup> Floyd Abrams, “On American Hate Speech Law,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 116-126.

and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them.”<sup>886</sup> Second, each of these national regulations regarding hate speech was founded on the belief that hate speech represents a public—not merely individual—harm. The environment of offense and denigration created by hate speech not only diminishes the autonomy and human dignity of its targets, but in doing so, it also decreases inclusiveness, divides political communities and weakens public morale. Thus, there is not just a personal interest in protecting citizens from hate speech, but a public interest as well.

It is for these reasons that so many nation states not only write their own hate speech legislation, but have also taken it a step further and signed on to international pledges and treaties restricting hate speech within their borders. Consider, for example, the International Covenant on Civil and Political Rights (ICCPR), which set out to provide a reasonable set of uniform standards for prohibitions on hate speech. As of April 2010, ICCPR had been ratified by 165 states around the world, representing 75 percent of the world’s nations. Article 19 of this covenant guarantees the right to freedom of expression, but adds that it is not an absolute right. Restrictions may be permitted, but only if they are proscribed by law and are deemed necessary to protect the public and private interests listed within the Article (e.g. public order and the rights of others).<sup>887</sup> The corresponding Article 20(2) “requires” States Parties to prohibit “the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>888</sup>

*The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)* is another widely supported international treatise limiting hate speech. Article 4 of CERD reads:

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<sup>886</sup> Ibid., pp. 8-9.

<sup>887</sup> United Nations Human Rights Committee, *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>888</sup> Ibid.

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.<sup>889</sup>

CERD was signed by eighty-one nations states, and became effective on January 4<sup>th</sup>, 1969.

Such strong positions against hate speech represent more than just lofty political rhetoric. The Committee on the Elimination of Racial Discrimination considers Art. 4 to be an essential obligation of all parties to the Convention and has repeatedly cited those states that have not

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<sup>889</sup> United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Vol. 660, p. 195. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3940.html>.



done enough to criminalize hate speech.<sup>890</sup> The Committee understands Art. 4 as “the prohibition of the dissemination of all ideas based upon racial superiority or hatred,” and is thus, “compatible with the right to freedom of opinion and expression.”<sup>891</sup> While Article 19 of the Universal Declaration of Human Rights does grant freedom of expression, the Committee admits that the “the citizen’s exercise of this right carries special duties and responsibilities... among which the obligation not to disseminate racist ideas is of particular importance.”<sup>892</sup> While the effects of ICCPR have been limited until now—the international courts have not yet provided a clear interpretation of hate speech rules—the fact that so many nations have signed on to these two treaties proves just how seriously the international community views the public harms inherent to hate speech.

Despite these norms and guidelines, hate speech remains a uniquely contested topic in the United States. While recent historical events have caused many government officials in Europe and Asia to resort to legislation and jurisprudence in order to acknowledge and protect against the potential societal harms created by hate speech, many in the United States believe that these rationales do not apply to them.<sup>893</sup> Thus, the United States was one of the last parties

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<sup>890</sup> Office of the High Commissioner for Human Rights, *General Recommendation No. 1: States’ parties’ obligations (Art. 4):* 2/25/1972. Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/09bca82e6dab7b8fc12563ee0039c575?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/09bca82e6dab7b8fc12563ee0039c575?Opendocument); Office of the High Commissioner for Human Rights, *General Recommendation No. 07: Legislation to eradicate racial discrimination (Art. 4):* 08/23/1985. Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c5a2e04b85557870c12563ee003e883f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c5a2e04b85557870c12563ee003e883f?Opendocument).

<sup>891</sup> Office of the High Commissioner for Human Rights, *General Recommendation No. 15: Organized violence based on ethnic origin (Art. 4):* 03/23/1993. Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument).

<sup>892</sup> Ibid. Referring to Art. 29, Para. 2.

<sup>893</sup> “It is a truism of comparative constitutional law that the United States takes an absolutist position against the criminalization of hate speech, and that it is alone among the constitutional democracies in taking this position” (Jacobson and Schlink, “Hate Speech and Self-Restraint,” pp. 217). However, there are some that argue that America is not, in fact, as exceptional as it may first appear. See, for example, C. Edwin Baker, “Hate Speech,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 57-80. Baker points out that “many, if not most,

to the Convention to sign CERD (in 1994), and American lawmakers have consistently flouted Art. 4. The United States maintains that Art. 4 is irrelevant to itself because any efforts to forbid such a broad concept of hate speech would unconstitutionally infringe upon the First Amendment freedom of speech.<sup>894</sup>

Within their own nation, American legislators have typically refused to even provide a single, precise, legally consistent definition of hate speech. Instead, the United States has relied on a patchwork of legal decisions to develop an understanding of what constitutes hate speech and to determine how it should be treated. In general, speech counts as illegal hate speech in the United States only when it is used to directly incite violence or display intent to incite violence against a specific person or group (although, in practice, the courts have moved closer to requiring proof of the former).<sup>895</sup> Thus, relative to international criteria (which tend to incorporate the “potential” to cause harm, hatred, etc.), the standards for what should be considered hate speech are decidedly narrow in the United States.

This narrowness stems from a rights tradition that values freedom of speech and expression, and is skeptical of any censorship or restrictions on that liberty. The First Amendment right to freedom of speech, the argument goes, is fundamental. Or as some have

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American First Amendment scholars and jurists favor a ‘balancing’ that is quite like what is portrayed as the European approach” (Ibid., pp. 59).

<sup>894</sup> The United States is not alone in this regard. Several other nations are also choosing not to fully implement Art. 4. Austria, Belgium, France, Ireland, Italy, Japan, Malta, Monaco, Switzerland and Tonga all claim that the treaty doesn’t require measures that threaten freedoms of speech, thought or association. Antigua and Barbuda, the Bahamas, Barbados, Fiji, Nepal, Papua New Guinea, Thailand and United Kingdom, on the other hand, assert that the treaty creates an obligation to enact measures against hate speech only when a need arises.

<sup>895</sup> However, as Arthur Jacobson and Bernhard Schlink point out, in these cases, the words and ideas are instrumental to an “incipient assault,” and it is the assault, not the speech, that is criminalized. See Arthur Jacobson and Bernhard Schlink. “Hate Speech and Self-Restraint,” In *The Context and Content of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 218. For illustration of this point, also see Seventh Circuit Appeals Court Judge Richard Posner’s lead opinion in *Nelson v. Streeter*, in which he argues that the harm from speech comes not from the speaker, but from the audience who took that speech as a call to action: “The rioters are the culpable parties, not the [speaker] whose work unintentionally provoked them to violence” Nos. 92-2991, 92-3177 (1994).

said, the First Amendment is first.<sup>896</sup> As one of the most cherished and vital constitutionally protected civil liberties, freedom of speech has therefore often been read quite broadly. It may be balanced against other interests (e.g. human dignity and autonomy), but only when those interests are so powerful and obvious as to overwhelm the bias in favor of protecting speech.<sup>897</sup> And yet, the First Amendment does not protect all speech. As C. Edwin Baker argues in his essay, "Hate Speech," if one were to examine the whole of the American legal tradition of free speech, one would find a great deal more European-style restrictions than she might expect.<sup>898</sup> As Chapter Three explained, the Supreme Court has actually allowed for the restriction and punishment of many kinds of speech, including: speech favoring socialism, communism, and anarchism;<sup>899</sup> sexually explicit speech;<sup>900</sup> obscenity or child pornography;<sup>901</sup> the publication and sale of great novels;<sup>902</sup> labor picketing;<sup>903</sup> and speech that poses an imminent breach of peace.<sup>904</sup> Hateful speech, however, unless it can be shown to directly incite violence, has generally been spared legal sanction. Any harms created by hate speech, either to the individual or society, are

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<sup>896</sup> This phrasing was first coined by Edmond Cahn during the McCarthy Era. See Edmond Cahn, *The Firstness of the First Amendment*, in *Yale Law Journal*, Vol. 65, No. 464 (1956).

<sup>897</sup> Note that in the 2010 case, *United States v. Stevens*, Supreme Court Chief Justice John Roberts disagrees with the notion of "balancing." Writing for the majority, he argues that it is history and tradition, rather than Congressional "ad hoc" balancing of interests that determines whether a category of speech is unprotected. Thus, the Court rejected an explicit test to determine whether "a given category of speech enjoys First Amendment protection [depending] upon a categorical balancing of the value of the speech against its societal costs": "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it" 559 U.S. 460, 130 S.Ct. 1577 (2010).

<sup>898</sup> Baker, "Hate Speech," pp. 59-60.

<sup>899</sup> See Zachariah Chaffee, Jr., *Free Speech in the United States* (Cambridge, MA: Harvard University Press, 1964), pp. 36-107.

<sup>900</sup> *Roth v. United States*, 354 U.S. 476 (1957)

<sup>901</sup> *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>902</sup> See Emerson, *The System of Freedom of Expression*, pp. 468-470.

<sup>903</sup> *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *International Brotherhood of Teamsters v. Vogt*, 354 U.S. 284 (1957).

<sup>904</sup> *Cantwell v. Connecticut*, 310 U.S. 310 (1940); *Schenck v. United States*, 249 U.S. 47 (1919); *Brandenburg v. Ohio*, U.S. 444 (1969).

overshadowed by the potential harm in allowing the state to censor political opinions on the basis of its content.

This was not always the case. In 1952, the Supreme Court initially appeared amenable to arguments in favor of restricting hate speech. In *Beauharnais v. Illinois*, a majority upheld a conviction for hate speech, labeling it “group libel” and equating it to individual defamation, which has traditionally been excluded from free speech protections.<sup>905</sup> In the decades since that ruling, however, the majority opinion has been mostly overturned. Already in the dissenting opinions of the case, the other justices attacked the majority’s use of the term “group libel.”<sup>906</sup> Both the libel and the “fighting words” exceptions to the First Amendment, the multiple dissenters concluded, concerned statements addressed to particular individuals. Because such statements were localized, their prohibition would not have a significant impact on the public good of free and open debate. Group libel, on the other hand, is not localized. It is a political statement. To exclude such statements would inhibit public debate, thus infringing on the very values that the First Amendment was designed to uphold.

The claim that any harms created by hate speech, either to the individual or society, are overshadowed by the potential harm of stifling political debate has been taken up and expounded upon by subsequent Courts. And the standards for what counts as illegal hate speech have been narrowed – not only must speech advocate violence in order to be considered hate speech, but it must actually be shown to have incited such violence. In *Brandenburg v. Ohio*, for example, the Court overturned a hate speech conviction, arguing that, although the Klu Klux Klan may have

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<sup>905</sup> See Supreme Court Justice Felix Frankfurter’s majority opinion: “But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group unless we can say that this a willful and purposeless restriction unrelated to the peace and wellbeing of the State” *Beauharnais v. Illinois*, 343 US 250 (1952).

<sup>906</sup> In his dissenting opinion, Supreme Court Justice Hugo Black questions the majority’s decision to condone “this expansive state censorship by painstakingly analogizing it to the law of criminal libel. As a result of this refined analysis, the Illinois statute emerges labeled a ‘group libel law.’ This label may make the Court’s holding more palatable for those who sustain it, but the sugar-coating for not make the censorship less deadly” (ibid.).

encouraged violence, they did not rouse it.<sup>907</sup> If there was no proof that the Klan's speech actually caused violence—even if violence could have been anticipated—then there was no basis for censorship. In 1977, the Illinois Supreme Court followed the same logic in deciding *Nationalist Socialist Party v. Village of Skokie*. Although the Court recognized the intensity and likelihood of the hurt felt by Holocaust survivors in response to the Klan's march on Skokie, they concluded that such a demonstration did not merit hate speech because it did not meet the “incitement to violence requirement.”<sup>908</sup> In other words, the use of swastikas and anti-Semitic propaganda did not constitute “fighting words.” Again, the hurt and degradation of the victims were not enough to justify the censorship of Klan members' freedom of speech.

Finally, in *R.A.V. v. City of St. Paul*, the Court responded to a local Minnesota criminal ordinance that stated: “Whoever places on public or private property a symbol, object... but not limited to, a burning cross or Nazi swastika, which one knows... arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct...”<sup>909</sup> In a unanimous decision (with multiple concurring opinions), the Court found this ordinance unconstitutional. In his majority opinion, Antonin Scalia cites two rationales for the court's ruling. First, the speech in question did not meet the Court's own “incitement to violence” standard. Second, even if a burning cross did qualify as unprotected “fighting words,” by singling out some expressions for criminalization and omitting others, the writers of the ordinance had

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<sup>907</sup> The majority decision, written *per curiam*, explains that the Ohio Criminal Syndicalism Act under discussion could not be sustained because it “punishes persons who ‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform’; or who publish or circulate or display any book or paper containing such advocacy; or who ‘justify’ the commission of violent acts ‘with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism’; or who ‘voluntarily assemble’ with a group formed ‘to teach or advocate the doctrines of criminal syndicalism.’ Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action” *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>908</sup> *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

<sup>909</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 77 (1992).

engaged in illegal “viewpoint discrimination.”<sup>910</sup> Because the text was written to explicitly prohibit speech that hurt and upset members of protected groups, but seemed to exclude “displays containing ‘fighting words’ that do not invoke the disfavored groups,” Scalia argues that it amounted to an unconstitutional use of censorship.<sup>911</sup>

In addition to the powerful role the judiciary has played in determining the scope and consequences of illegal hate speech, legislators and diplomats have also made considerable contributions to the American hate speech discourse. For example, American legal attitudes regarding hate speech have been reflected in the international treaties that the United States actually *has* accepted and helped craft. Earlier in this section, I examined the relatively socially progressive, European-style ICCPR and CERD, which the American government has mostly deemed irrelevant. For the sake of comparison, it is also useful to look at the American Convention on Human Rights (ACHR), in which the United States has played an active role.

ACHR serves two functions. First, it enumerates 23 rights and freedoms to be protected by States Parties. Second, it defines the functions and procedures of two organs with respect to these international obligations: The Inter-American Commission on Human Rights (est. 1959 and located in Washington, D.C.) and the Inter-American Court of Human Rights (est. 1979 and located in San Jose, Costa Rica). When individual citizens of the States Parties have exhausted their options in their home states, they can appeal to the Inter-American Commission. And where a friendly settlement cannot be reached, individual citizens may submit a case to the Inter-American Court, comprised of seven justices who are elected by the General Assembly of the Organization of American States (OAS).

Like the international treaties previously discussed, ACHR, although it begins by securing fairly broad protection for freedom of speech, also introduces several caveats. Section 2 protects freedom of speech from prior restraint, but allows that speech “shall be subject to

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<sup>910</sup> Ibid.

<sup>911</sup> Ibid.

subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; (b) the protection of national security, public order, or public health or morals.”<sup>912</sup> Section 5 seems to pull back on those provisions, echoing the American perspective that hateful speech should only be punished when it “constitute[s] incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”<sup>913</sup>

So far, neither the Inter-American Commission on Human Rights nor the Inter-American Court of Human Rights has reviewed any restrictions on hate speech; however, the Commission’s Office of the Special Rapporteur for Freedom of Expression did perform a study of the topic for its 2004 Annual Report. This report highlights ACHR’s more limited restrictions on hate speech as compared to ICCPR and CERD.<sup>914</sup> As quoted above, Article 13(5), for example, requires prohibition of speech only with proof of its actual incitement of “lawless violence” or “any other similar action.” ICCPR, on the other hand, demands that states outlaw speech inciting “discrimination, hostility *or* violence,” which implies that it covers a wider range of speech prohibitions.<sup>915</sup> Similarly, CERD requires States Parties to criminalize “all dissemination of ideas based on racial superiority or hatred,” regardless of whether or not that speech amounts to an incitement to racial discrimination or violence.<sup>916</sup>

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<sup>912</sup> Organization of American States, *American Convention on Human Rights “Pact of San José, Costa Rica” (B-32)*. Available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf).

<sup>913</sup> Ibid.

<sup>914</sup> Inter-American Convention on Human Rights, “Annual Report 2004,” OEA/Ser.L/V/II.222. Doc. 5 rev. 23 February 2005, chapters II, V and VII. Available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=459&IID=1>.

<sup>915</sup> Organization of American States, *American Convention on Human Rights*; United Nations Human Rights Committee, *International Covenant on Civil and Political Rights*.

<sup>916</sup> United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*.

ACHR clearly provides a stricter, more limited understanding of hate speech than the treatises previously considered in this section. As Eduardo Bertoni and Julio Rivera, Jr. explain in their essay, “The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression,” the relatively narrow scope of Article 13(5), in comparison to ICCPR and CERD, can be directly attributed to the influence of the United States delegation in the negotiations. According to the authors, the Americans fought to avoid any inconsistency between the Convention and the United States Supreme Court’s interpretation of the First Amendment in *Brandenburg v. Ohio*.<sup>917</sup> This view is supported by the obvious similarities between the texts of Article 13(5) and *Brandenburg*. As discussed above, in *Brandenburg*, the Court decided that the First Amendment disallows “a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.”<sup>918</sup> Article 13(5) of ACHR reproduces the *Brandenburg* test, forbidding any war propaganda and “any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or any other similar action...” (emphasis added).<sup>919</sup>

Not only does Article 13(5) strongly resemble the American jurisprudential view towards hate speech, but the entirety of the document also seems to reflect the more limited hate speech provisions favored by the United States. Despite providing for some restrictions on freedom of speech, ACHR’s hate speech provisions may be even more limited than they first appear. Bertoni and Rivera suggest that, first, following the UN Human Rights Committee’s standards, it could be concluded that Article 13(5)’s narrow definition of proscribed hate speech only applies to speech occurring in the *public discourse*.<sup>920</sup> For speech taking place in the workplace, schools or any other area of civil society, it is not clear that ACHR even applies. Second, the authors

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<sup>917</sup> Eduardo Bertoni and Julio Rivera Jr., “The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 504.

<sup>918</sup> *Brandenburg v. Ohio*, 395 U.S. 444.

<sup>919</sup> Organization of American States, *American Convention on Human Rights*.

<sup>920</sup> Bertoni and Rivera, “The American Convention on Human Rights,” pp. 505.



explain that Article 13(5) only applies to broad political statements, and not “insulting, degrading, or threatening speech directed against a *specific individual*.”<sup>921</sup>

Taken together—the American influence on ACHR, as well as *Brandenburg*, *Skokie* and *R.A.V.*—two common themes emerge in the American hate speech tradition: 1) Hate speech must be directed at groups, and not individuals; and 2) Hate speech must be shown to actually incite violence, and not just have the potential to incite violence or hatred. This limited reading of hate speech does not imply that the United States views social hate speech as insignificant or apolitical, however. Rather, hate speech is thought to be of the utmost political importance. Regardless of its location—public, social or private—hate speech is understood as concerning issues of public interest. As the dissenters in *Beauharnais* argue, it is largely because hate speech is necessarily political (contributing to the public debate) that any kind of content-based censorship is so problematic.

In the American context, whether or not certain speech is constitutionally protected often hinges on its value as public or private, with speech of purely private significance more easily and frequently being subject to regulation. As described in Chapter Three, this is because, when entirely private speech is limited, “there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas.”<sup>922</sup> Speech of public value, on the other hand, as Supreme Court Justice Lewis F. Powell writes in his decision for *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, “is at the heart of the First Amendment’s protection.”<sup>923</sup> Similarly, in *New York Times Co. v. Sullivan*, the Court explained that the First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>924</sup> That is because “speech concerning

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<sup>921</sup> *Ibid.*, pp. 506.

<sup>922</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>923</sup> *Ibid.* (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

<sup>924</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

public affairs is more than self-expression; rather, it is the essence of self-government."<sup>925</sup>

Therefore, it should come as no surprise that, in general, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>926</sup>

While the Court conceded in *San Diego v. Roe* that "the boundaries of the public concern test are not well defined," it has established some guiding principles for determining what constitutes public speech through its case law.<sup>927</sup> First, when speech can "be fairly considered as relating to any matter of political, social, or other concern to the community," it is public speech, falling under the protection of the First Amendment.<sup>928</sup> Second, speech contains matters of public concern when it is of "legitimate news interest; that is, a subject of general interest and of value and concern to the public."<sup>929</sup> The possibly "inappropriate or controversial character of a statement"; however, "is irrelevant to the question whether it deals with a matter of public concern."<sup>930</sup>

Using this framework, hate speech constitutes political speech from an American legal point of view, regardless of whether it takes place in the public, social or intimate sphere.<sup>931</sup> The ideas and values expressed through hate speech are of public interest, and that is why they merit First Amendment protection. The American insistence on the political nature of hate speech actually fits in nicely with the theory of social speech, which explains a connection between informal, everyday communications and democratic outcomes: Even when average citizens are sharing hate speech through social interactions, it constitutes political action. This attitude is also

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<sup>925</sup> *Garrison v. Louisiana*, 379 U.S. 64 (1964).

<sup>926</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>927</sup> *San Diego v. Roe*, 543 U.S. 77 (2004). Note that, as I explained in Chapter Three, the Supreme Court has not provided similar guidelines for what it considers private speech.

<sup>928</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>929</sup> *San Diego v. Roe*, 543 U.S. 77 (2004). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>930</sup> *Rankin v. McPherson*, 483 U.S. 378 (1987).

<sup>931</sup> This says very little, however, about other kinds of social speech that I argue have political value.

consistent with the international community, which emphasizes the political nature of all hateful speech.

While the American consensus that social hate speech should be constitutionally protected on the basis of its political status may be correct, it is also important to examine all of the ways in which social hate speech affects political life, including its negative effects on democratic citizenship. To the extent that United States imagines the negative effects of hate speech primarily in terms of their immediate threat to public safety and order, they lose sight of the wider harms—such as, decreased participation, limited inclusiveness and weak social ties—that are emphasized in the European context.

*B. Negative effects of hate speech: hate speech -> weak participatory democratic character, fractured communities and decreased social trust*

Hate speech in the social sphere contributes negatively to democratic citizenship and political outcomes in two ways.<sup>932</sup> First, much like cyberbullying and the kind of long-term denigration that drives minority individuals into safe spaces, hate speech in the social sphere contributes to the development of character traits that make participation in democratic politics especially difficult. Individuals become who they are through their social interactions. When one's social milieu is littered with hate speech, rather than developing into a powerful, confident and engaged democratic citizen, targets tend to become dejected and doubtful about their ability to control the direction of their own lives, much less the life of their community. If they are not deemed worthy of being treated with equal respect and dignity by their fellow citizens, how can

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<sup>932</sup> While this section focuses on the damage social hate speech inflicts on its targets, it is important to note that social hate speech can harm the speaker as well. See Anthony Cortese, *Opposing Hate Speech* (Westport, CT: Praeger Publishers, 2006): "Bigotry harms the people who harbor it by reinforcing rigid thinking, thereby dulling their moral and social senses" (pp. 50).

they believe themselves to have the right (much less the power) to try to determine political outcomes? Thus, victims of hate speech find themselves disengaged from the political process.

Second, by diminishing the victim's standing (both in their own eyes and within the wider community), social hate speech solidifies boundaries between in-groups and out-groups. Not only does each instance of hate speech add new fuel to the fires of discriminatory ideologies (potentially breeding new adherents), but as targets come to absorb the negative messaging about them, they may also begin to distance themselves from the wider society. Individuals and groups who feel socially isolated are likely to become politically isolated as well. Why trust those who think so little of me, much less the community that condones the expression of those beliefs? And to the extent that victims internalize and reproduce the negative messaging about them, even those majority members who do not personally endorse the messages of hate speech may begin to separate themselves as well. Thus, even when victims of social hate speech do participate in the larger political sphere, the lack of trust on both sides makes cooperation difficult.

To begin, hate speech affects the personal and political development of its victims more than most other kinds of harassment or nastiness. Attacks on one's race, ethnicity, religion or gender, regardless of the location of those assaults, are necessarily intimate in nature. They strike to the core of how an individual defines herself. As Mari Matsuda explains in, "Public Response to Racist Speech: Considering the Victim's Story," "[r]acist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group."<sup>933</sup> That is what makes hate speech so potentially painful and powerful, often resulting in extreme psychological and emotional distress for its victims (e.g. humiliation, self-hatred and isolation). While victims of hate speech may experience its harms to differing degrees, it is often felt as an assault on one's

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<sup>933</sup> Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw (eds.) (Boulder, CO: Westview Press, Inc., 1993), pp. 23.

very being.<sup>934</sup> Charles R. Lawrence, III, for example, equates the personal harm of hate speech to the sting of “being struck in the face,” suggesting that “it is often more severe.”<sup>935</sup> He elaborates: “Racial epithets and harassment often cause deep emotional scarring and feelings of anxiety and fear that pervade every aspect of a victim’s life.”<sup>936</sup>

These feelings of distress and anxiety are often so severe that they are accompanied by physiological symptoms as well. Matsuda explains how, for “victims of vicious hate propaganda,” psychic discomfort can manifest itself in any number of short- and long-term physical symptoms, “ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.”<sup>937</sup> Richard Delgado makes a similar claim, arguing that such long-term emotional distress can transform into the kind of mental illnesses that lead sufferers to resort to drugs, alcohol and other anti-social behaviors.<sup>938</sup> Delgado also points to evidence that the “inhibited, constrained or restricted anger” brought on as a common response to hate speech has been linked to high blood pressure. Given the higher incidence of hypertension, hypertensive disease and stroke in the black community, Delgado

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<sup>934</sup> Throughout this section, it is important to keep in mind that the negative psychological effects of hate speech do not affect all equally. As Strossen writes, “to suggest that there is inevitably a direct negative impact on the person who is insulted, I think, is insulting. It suggests that the person doesn’t have enough critical capacity. We are not somehow automatically diminished just because some bigot says something negative about us” (“Interview with Nadine Strossen, pp. 378). In her discussion of the effects of pornography, Catherine A. MacKinnon claims, instead, that while the level of personal hurt experienced by each woman may be somewhat unpredictable, what matters is that this kind of hateful speech affects women, as a group: “Pornography does hurt individuals, not as individuals in a one-at-a-time sense, but as members of the group ‘women.’ Harm is caused to one individual woman rather than another essentially by the way one number rather than another is caused in roulette. But on a group basis, as women, the selection process is absolutely selective and systematic. Its causality is essentially collective and totalistic and contextual” (“Not a Moral Issue, pp. 156-157).

<sup>935</sup> Lawrence, “If He Hollers Let Him Go,” pp. 74.

<sup>936</sup> Ibid.

<sup>937</sup> Matsuda, “Public Response to Racist Speech,” pp. 24.

<sup>938</sup> Delgado points out that the rates of narcotic use and admission to public psychiatric hospitals are both much higher within the minority community than in the rest of the United States. See “Words that Wound,” pp. 91.

suggests that there might be something other than genetics at work – hate speech and other forms of discrimination may actually be contributing to lower life spans among minority groups.<sup>939</sup>

Not only are the negative personal harms of hate speech—both physical and psychological—potentially severe in the short-term, but their potential to “deeply scar” victims means that they can be extremely difficult to shake in the long-term. The negative effects of hate speech may follow an individual throughout life, forever affecting her sense of self-worth and her ability to connect with her communities. In fact, the permanence of the damage caused by messages of racial hatred played a key role in *Brown v. Board of Education* decision to abolish segregation in schools. The Court explained that it was not just segregation, *per se*, that causes harm. Rather, the symbolic message of segregation affects “the hearts and minds,” of black children “in a way unlikely ever to be undone.”<sup>940</sup> As Lawrence explains in his examination of the *Brown* decision, the Court actually conceded the fact that “[r]acial epithets and harassment often cause deep emotional scarring, and feelings of anxiety and fear that pervade every aspect of a victim’s life.”<sup>941</sup>

All of this is to say that hate speech, for the individual victims, is more than mere harassment – it is not just a matter of hurt feelings. (That is, in fact, an essential part of what makes speech hate speech, and not harassment.) While Delgado may be going a little too far with his claim that hate speech leads to premature death by literally destroying the hearts of its victims (and thus limiting their opportunities for community engagement), it is clear that hate speech harms its victims at a fundamental, personal level. This is particularly true of hate speech within the social sphere. While there are obvious dangers to public or state-sponsored messages of hate (e.g. Nazi Germany, the pre-Civil Rights Era South), it is especially difficult for individuals

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<sup>939</sup> *Ibid.*, pp. 92. See also Ernest Harburg, John C. Erfurt, Louise S. Hauenstein, Catherine Chape, William J. Schull and M.A. Schork, “Socio-Economical Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit,” in *Psychosomatic Medicine*, Vol. 35, No. 276 (July 1 1973), pp. 276-296.

<sup>940</sup> *Brown v. Board of Education*, 347 U.S. 483.

<sup>941</sup> Lawrence, “If He Hollers Let Him Go,” pp. 334.

to avoid or ignore messages of worthlessness when they come from within one's own neighborhood, school or community. When it takes place in the social sphere, hate speech becomes more than abstract political rhetoric – it is an expression of personalized hatred and disgust directed at real individuals.

Thus, hate speech in the social sphere attacks the very human dignity of its targets. As Waldron explains, dignity is established and protected through our everyday interactions. “The primary habitat of human dignity,” he writes, “is the mundane.”<sup>942</sup> While the Kantian conception of dignity (*Würde*) may be noumenal, legally, dignity is a question of “one’s status as an ordinary member of society in good standing, entitled to the same liberties, protections, and powers that everyone else has... [It] is what enables a person to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah.”<sup>943</sup> Some degree of social equality is a necessary condition of human dignity. When, as in the case of social hate speech, individuals are not afforded a level of decency and respect equal to that of other members of their community, that abuse is likely to eat away at their own assessment of self-worth. As Delgado explains, no matter how hard a person may “try to resist a piece of hate propaganda, the effect on [her] self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human being.”<sup>944</sup>

Social speech not only damages its victims’ individual senses of self-worth, but it also compromises their personal autonomy. As Brison explains, individual autonomy does not develop in a vacuum; rather, it is dependent on one’s relationships with other people.<sup>945</sup> She

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<sup>942</sup> Waldron, *The Harm in Hate Speech*, pp. 219.

<sup>943</sup> *Ibid.*, pp. 219-220.

<sup>944</sup> Delgado, “Words that Wound,” pp. 25.

<sup>945</sup> “We develop the capacity for autonomy only after considerable interaction with others (parents, teachers, etc.) and socialization into the language, norms, and other aspects of a culture. As second persons, we also require for autonomous personhood the right sorts of ongoing relations with others. Since some form of conditioning, socialization, and ongoing

argues that this is true in three respects. First, individuals develop and sustain the “competencies” needed for autonomy through social interactions. Second, in order to make autonomous choices, individuals must possess a range of “significant” options from which to choose. Finally, in order to understand those options and consider them personally relevant, an individual must exist in a society that also recognizes their applicability to her, specifically.<sup>946</sup> It is through the socializations of everyday life, including (and especially) speech interactions that people can grow into these independent, self-governing beings. However, when those social interactions are compromised, as in the example of hate speech, so too is the victim’s capacity for autonomy diminished. As Brison explains, if “one has been socialized, in large part as a result of others’ speech, to expect very little of herself or to defer to others, she is hardly in a position to make autonomous choices.”<sup>947</sup> Specifically, the hostile environment created by social hate speech damages its victims’ self-worth, their thoughts about which options are available (and feasible) for them, their confidence in their abilities and the very formation of their preferences – all of which negatively affects the ability to think and act as an autonomous agent.<sup>948</sup>

Each of these factors—the psychological (e.g. depression, anxiety) and physiological (e.g. drug addiction, hypertension) responses to social hate speech, as well as the effects of its symbolic attacks on human dignity and autonomy—negatively influences the sort of democratic citizens that victims of social hate speech will become. Again, this is largely due to the socializing influences of social speech. The victims of social hate speech, far from being isolated from society, have no choice but to develop their individual identities within the very communities that condemn them. Victims internalize the same norms and standards as everyone else, only with the awareness that they are not expected to live up to them. This is true whether they react

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interactions with others are autonomy undermining, whereas others are autonomy enhancing, the degree to which one is able to be autonomous depends upon one’s past and present relations to others” (Brison, “Relational Autonomy and Freedom of Expression,” pp. 285).

<sup>946</sup> Ibid., pp. 283-284.

<sup>947</sup> Ibid., pp. 284.

<sup>948</sup> Ibid., pp. 286.



against these social norms or conform to them. It is therefore not unusual for victims of social hate speech to become ambivalent about their own value and identity. Over time, this negative messaging in the social sphere can lead to persistent feelings of inferiority and depression, or what Patricia J. Williams has called “spirit murder.”<sup>949</sup> Thus, social hate speech becomes a self-fulfilling prophecy. As Martin Deutsch, Irwin Katz and Arthur Robert Jensen write, racist speech “tends to create in the victim those very traits of ‘inferiority’ that it ascribes to him.”<sup>950</sup>

These socially constructed “traits of ‘inferiority’” are not just problematic for the individuals who adopt them; more importantly, they harm the whole of societies that purport to value participation, inclusiveness and equality. When groups of citizens feel inferior and isolated, they are less likely to engage in democratic politics than if they feel that they are valued members of their communities. The psychological, physical and symbolic damage resulting from social hate speech is also likely to translate into democratic character traits of fear, weakness and insecurity. Victims of social hate speech are more likely to grow into either self-doubting/timid or angry/hostile adults, rather than the confident, robust, engaged citizens that a well-functioning democracy requires.

As discussed above (in both the cyberbullying and safe space sections), these kinds of character traits would seem to make it less likely that victims of hate speech will engage in the political process during their lifetimes, whether that be through voting, contributing to campaigns, contacting government officials, etc. One precondition of both the desire and the aptitude for political participation is maintaining a sense of oneself as an efficacious, powerful, worthy member of society. Individuals must feel like they have some value and agency in their own lives

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<sup>949</sup> See Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991). Williams explains that racism is only one form of spirit murder—“cultural obliteration, prostitution, abandonment of the elderly and the homeless, and genocide are some of its other guises” (Ibid., pp. 73).

<sup>950</sup> Martin Deutsch, Irwin Katz and Arthur Robert Jensen, *Social Class, Race, and Psychological Development* (New York: Holt, Rinehart, and Winston, 1968), pp. 175.

before they take on community affairs. Thus, to the extent that social hate speech diminishes these qualities in its victims, it also keeps them out of the political process.

Theoretical research into the political effects of hate speech tends to support the connection between fearful, insecure characters and diminished community involvement. For example, as Parekhu explains, in its extreme, the kind of character traits that are bred from social hate speech can lead victims into hiding and complete isolation. In fact, the fear of how they will be received may preclude them from interacting with others at all:

Targets of hate speech understandably feel nervous in public spaces lest they should be humiliated. They are afraid to speak their minds and behave normally, and they worry constantly about how the negative stereotypes that others hold of them will lead them to interpret their words and actions. As a result, they are likely to feel alienated from the wider society, to lead shadowy lives, and to feel trapped in a cramped mode of being.<sup>951</sup>

Victims may feel—perhaps rightly so—that their voices will not be heard or respected even if they do speak up; so instead, they silence themselves.<sup>952</sup>

This tendency towards inaction and isolation is unsurprising, as victims cannot help but observe the negative opinions about them that are advocated through social hate speech. They may find solace in their peer groups (as discussed above, in the safe spaces section), but they are also likely to emotionally disconnect from the majority society that has rejected them. This isolation is not limited to those individuals who actually espouse hateful views, however. The fact that one's community might legally protect hate speech makes the entire majority group complicit in its harms. By condoning the expression of hate speech (if not necessarily its content), the

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<sup>951</sup> Parekh, "Is There a Case for Banning Hate Speech?" pp. 44.

<sup>952</sup> See Owen Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard University Press, 1998). Fiss explains how, even if these beaten-down persons do try to voice their opinions, those arguments lack the force necessary to make themselves heard: "It is asserted that hate speech tends to diminish the victims' sense of worth, thus impeding their full participation in many of the activities of civil society, including public debate. Even when these victims speak, their words lack authority; it is as though they said nothing" (*Ibid.*, pp. 16).

state and general social structures send a message that its victims are not as welcome in the wider community as others.<sup>953</sup> This is especially true where victims witness active governmental efforts to protect hate speech. Matsuda explains: “When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are often dismissed as pranks, the victim becomes a stateless person. Target-group members must either identify with a community that promotes racist speech or admit that the community does not include them.”<sup>954</sup>

Many (although not all) victims of social hate speech choose the latter option, accepting that they are not truly members of their political communities and removing themselves as much as possible. As a result, the lines between out-groups (those targeted by hate speech) and in-groups (members of majority society) become bolder and less penetrable. Such distancing presents challenges for the entire political community. After all, social hate speech does not target all demographics equally; it is disproportionately directed at those who have traditionally been excluded and looked down upon by the majority community. To the extent that social hate speech diminishes participation in public dialogue and/or political action only for those groups that have already been marginalized and disenfranchised, it reproduces preexisting power imbalances and increases systematic inequality. It also decreases social trust between in-groups and out-groups, handicapping democratic decision-making.

When members of particular groups are made to feel like outsiders in the political community based on uncontrollable, ascriptive factors, even if they do participate in politics, there is likely be enough antagonism and distrust on both sides to make cooperation difficult, if not impossible. As Allport, Thomas F. Pettigrew and Linda R. Tropp have famously shown, higher

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<sup>953</sup> As Parekh writes, this reinforces and strengthens the message of inferiority for victims of hate speech: “When hate speech is allowed uninhibited expression, its targets rightly conclude that the state either shares the implied sentiments or does not consider their dignity, self-respect, and well-being important enough to warrant action” (*Is There a Case for Banning Hate Speech?* pp. 44).

<sup>954</sup> *Ibid.*, pp. 25.

levels of intergroup contact tend to result in lower levels of intergroup prejudice, especially under conditions of relative equality.<sup>955</sup> The reverse tends to hold true as well: limited intergroup contact is generally associated with higher levels of intergroup prejudice. The more separated and isolated that out-groups become, the more that individuals on both sides of the divide will come to think negatively of one another.<sup>956</sup>

First, as discussed in the section on safe space, members of victimized groups are likely to isolate themselves, and adopt radicalized opinions and ideologies that further distance them from majority society. As the Canadian Supreme Court explains in *Regina v. Keegstra*, the impact of hate speech “may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them in contact with non-group members or adopting attitudes and postures directed towards blending in with the majority.”<sup>957</sup> This becomes a vicious cycle. As members of the out-groups distance themselves from the in-group, they tend to take on more radical positions, thus distancing themselves even further and making cooperation and compromise more difficult.

Not only do victims of social hate speech find themselves alone and apart from the larger community, but they also have good reason not to trust it. Racism is a violation of the principle of social equality that all liberal, western democracies supposedly embrace. The decision of state actors and institutions not to intercede in these harms sends the message that social equality

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<sup>955</sup> See Allport, *The Nature of Prejudice*; Thomas F. Pettigrew and Linda R. Tropp, “A Meta-Analytic Test of Intergroup Contact Theory,” in *Journal of Personality and Social Psychology*, Vol. 90, No. 5 (2006), pp. 751-783. Pettigrew and Tropp amends Allport by suggesting that the positive relationship between intergroup contact and lower levels of intergroup prejudice can be attributed to four activities: learning about the group, changing behavior, generating affective ties and intergroup reappraisal. See Pettigrew, “Intergroup Contact Theory,” in *Annual Review of Psychology*, Vol. 49 (1998), pp. 65-85.

<sup>956</sup> While it is true that intergroup contact affects prejudice levels for both the majority and minorities groups, in a 2005 study, Pettigrew and Linda R. Tropp found that these relationships were generally weaker for minority group members. See Tropp and Pettigrew, “Relationships between Intergroup Contact and Prejudice among Minority and Majority Status Groups,” in *Psychological Science*, Vol. 16, No. 12 (December, 2005), pp. 951-957.

<sup>957</sup> *Regina v. Keegstra*, (1990) 3 S.C.R. 697

might not be a priority after all. Open violations of the democratic ideal are likely to dishearten and discourage those who could most benefit from a more equal society. They also likely to reduce the legitimacy of the state in the eyes of those who are victimized by hate speech and yet still called upon for their loyalty.

Second, social hate speech is designed to build distrust and distaste on the part of majority society as well. Members of the majority community may respond to hate speech in varying ways. These can range anywhere from acceptance of the hate speech propaganda to discomfort to pity. As Matsuda explains, in-group reactions to hate speech are similar to their responses toward any other human tragedy. (He cites natural disease and a plane crash as examples.) Even those who feel sympathy for the victims tend to do so from a distance, making note of the differences between the “us” and the “them,” and therefore “making it harder to achieve a sense of common humanity.”<sup>958</sup> One experiences pity from a position of privilege, not of equal footing.

And as Parekh's definition of hate speech (cited above) makes clear, hate speech is more malignant than a national tragedy – in fact, it is the very essence of hate speech to highlight differences and paint targets of hate speech as “undeserving and untrustworthy members of society.”<sup>959</sup> Whether or not individual members of the majority community actually endorse the derogatory ideologies underlying hate speech, the messages are difficult to completely ignore. Just as targets of hate speech must develop personally and politically amidst the influence of hate speech, so too do members of majority society become who they are as individuals in this hateful

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<sup>958</sup> “Just as when we confront human tragedy—a natural disease, a plane crash—we feel the blessing of the fortunate that distances us from the victims, the presence of racist hate propaganda distance right-thinking dominant-group members from the victims, making it harder to achieve a sense of common humanity. Similarly, racist propaganda forces victim-group members to view all dominant-group members with suspicion. It forces well-meaning dominant-group members to use kid-glove care in dealing with outsiders. This is one reason why social relations across racial lines are so rare in the United States” (Matsuda, “Public Response to Hate Speech,” pp. 25).

<sup>959</sup> Parekh, “Is There a Case for Banning Hate Speech?” pp. 41.

context. And the tendency of social hate speech to function as a self-fulfilling prophecy, encouraging its targets to develop as meek, fearful and unsure of their own self-worth and autonomy, may ultimately lower in-group expectations and evaluations. Over time, social hate speech may come to corrupt all intergroup interactions, handicapping efforts to build egalitarian, trusting relationships between its victims and the majority citizens.

The increasing distrust on the parts of both in-groups and out-groups as a result of social hate speech leads to less egalitarian and representative political institutions as well as poorer economic results for all. As discussed in Chapter Five, social capital and trust are necessary elements for all well functioning representative democracies. In *The Civic Culture: Political Attitudes and Democracy in Five Nations*, Gabriel A. Almond and Sydney Verba explain how interpersonal trust at the social level gets translated into “politically relevant trust,” which ultimately has a favorable effect on the flourishing of democratic institutions.<sup>960</sup> There is a strong connection, the authors argue, between having faith in one’s fellow man and engaging in political activity.<sup>961</sup> In cases such as hate speech, however, where such intergroup faith and trust does not exist, both the willingness and the ability of all citizens to identify and work towards common goals is compromised. Where different demographic groups are incapable of cooperating, coordinating and compromising together, the result is significant societal fracturing and diminished public morale.<sup>962</sup> Thus, social hate speech, even when it may be directed at particular individuals, actually disadvantages the entire liberal democratic community.

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<sup>960</sup> See Gabriel A. Almond and Sydney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Boston: Little, Brown and Company, 19653). See also Ronald Inglehart, “The Renaissance of Political Culture,” in *The American Political Science Review*, Vol. 82, No. 4 (December, 1988), pp. 1203-1230.

<sup>961</sup> “Belief in the benignity of one’s fellow citizen is directly related to one’s propensity to join with others in political activity” (Almond and Verba, *The Civic Culture*, pp. 228).

<sup>962</sup> See Eric M. Uslander, “Producing and Consuming Trust,” in *Political Science Quarterly*, Vol. 115, No. 4 (Winter, 2000-2001): “Trusters also realize that it is important for society to be able to reach collective decisions, so they place a high value on compromise and legislative productivity, rather than ideological purity and stalemate” (pp. 570).

These larger, more dispersed harms seem to be behind European-style efforts to limit and punish hate speech. To the extent that a nation state or an international body emphasize the significant public harms created by hate speech—undermining democratic values and compromising political outcomes (in terms of both their representativeness and their efficiency)—they seem more willing to take proactive steps toward limiting it. On the other hand, nation states that tend to focus more on the individual harms that hate speech can produce, such as the United States, often choose to be more legally tolerant and leave the “policing” up to social pressures. In Chapter Seven, I will evaluate these different approaches towards managing hate speech.

#### **IV. Conclusion:**

The preceding sections show how, as venues for social speech, Internet speak, safe spaces and hate speech actually function quite similarly as mechanisms for influencing democratic citizenship and political outcomes. In keeping with the four mechanisms described in Chapter Five, participation in each of the three communicative arenas discussed above: 1) contributes to the development of character traits that are either conducive or detrimental towards full, participatory democratic citizenship; 2) influences the growth of social capital and trust, whether constructively or destructively, inclusively or exclusively; 3) provides individuals with training for their unique political cultures, teaching them about the expectations of citizenship; and 4) establishes the affective and cognitive borders between in-groups and out-groups. It is important to note that each of these mechanisms can function in ways that, to varying degrees, have both positive and negative implications for democratic political outcomes.

In the case of Internet speak, for example, the content and style of social communication significantly affects the impact it will have on democratic character development, social capital formation, dissemination of civic information and community building. While the Internet has often been deemed a disappointment from the perspective of those who hoped it would lead to a

resurgence of the bourgeois public sphere and/or a boost in traditional political action, more generally, looking at it through the lens of the four mechanisms of social speech reveals what a significant impression such informal, unstructured communication truly is making on liberal democratic politics. Social speech on the Internet is an excellent example of the premise that one does not always need to be talking about the *right* things in the *right* way in order to have an effect on politics. Where positive online social speech is used to reveal commonalities, provide cultural and political training and share necessary information about what it means to be a good democratic citizen, Internet speak actually promotes political activity aimed at inclusiveness. However, when certain kinds of Internet speak, such as cyberbullying, seeks only to identify differences and devalue individuals, it leads to a community (or both victims and perpetrators) lacking in the character traits necessary for democratic citizenship, low levels of social trust and weak community ties.

Similarly, safe space speech has the potential to significantly affect democratic citizenship and political outcomes in both positive and negative ways. Through many of the same processes as positive Internet speak (i.e. information dissemination, mutual empowerment and community building) safe space discussions teach participants to build confidence and find their own voices. By engaging in safe, open discourse among peers, members of marginalized groups provide validation for themselves and others and counteract mainstream negative messaging, thus developing the kind of character traits that are a prerequisite for democratic participation. Practice in a deliberative arena (even if that deliberation does not rise to the level of theoretical ideals), also provides the skills that make political action more effective. Finally, safe space participation leads to the creation of unique ideological frameworks of right and wrong, that can be carried into the wider political community. However, despite these potential benefits, when safe space speech aims at separating and insulating the group from mainstream society, rather than building bridges, it serves to undermine the wider democratic political community and its goals of inclusion and equality. The creation (or cementation) of meaningful in-groups and out-



groups may reduce the political involvement of the latter and make democratic compromise especially difficult.

Finally, the example of hate speech affords an opportunity to look exclusively at the divisive potential of social speech. It also provides an especially illustrative example of the theory of social speech in that much of the western world has already publicly acknowledged the harms the hate speech poses for liberal democratic values. Even the United States, which tends to define hate speech and its harms relatively narrowly, concedes that hate speech is not only a political action, but it has political consequences as well. (But as we have seen, it is important to note that the United States veers away from the international community in its conclusion that the potential benefits of protecting hate speech, unless it can be shown to be an incitement to violence, generally outweigh the costs incurred for society.) First, hate speech, especially in the social sphere, tends to increase feelings of worthlessness and powerlessness in its targets, thus compromising their ability and willingness to engage in participatory politics. Second, by diminishing the victim's social standing, social hate speech hardens boundaries between in-groups and out-groups, diminishing social capital and trust on both sides. Thus, even when victims of social hate speech do participate in the larger political sphere, the lack of trust compromises the democratic functionings of the states.

All three venues of social speech discussed in this chapter—Internet speak, safe spaces and hate speech—illustrate the democratic potential of everyday, informal conversation from the perspective of the theory of social speech. It should also be clear from the preceding analyses, however, that the four mechanisms of social speech, while they explain a great deal of this connection, do not represent a completely exhaustive list of the ways in which social speech can and does influence democratic citizenship and political outcomes. The theory of social speech is just a beginning towards understanding how social interactions constitute meaningful political action; there are likely to be many additional mechanisms that are currently unexplained by one

of this theory. One of the benefits of an empirically grounded political theory, however, is that is able to evolve to incorporate new observations and reflections.

As new and unregulated social interactions continue to dominate human life, the need for such theories, based on lived experience, grows. Before decisions regarding the appropriateness and effectiveness of particular legal strategies and social attitudes towards social speech can be made, policymakers must have theories that enable them to at least begin to understand the democratic implications of those choices. In other words, the various ways in which different types of social speech actually do affect democratic citizenship must be parsed out in order to determine how best to encourage those positive effects and discourage the negative ones. I turn to these more practical considerations in Chapter Seven.

## CHAPTER 7

PUBLIC POLICY PROPOSALS FOR PROMOTING BETTER DEMOCRATIC  
CITIZENSHIP THROUGH SOCIAL SPEECH

*“When the circumstances of an individual or of a nation are in any considerable degree under our control, we may, by our knowledge of tendencies, be enabled to shape those circumstances in a manner much more favorable to the ends we desire, than the shape which they would of themselves assume. This is the limit of our power; but within this limit the power is a most important one.”*

- John Stuart Mill, *A System of Logic*<sup>963</sup>

As the preceding chapters made clear, social speech carries the potential to significantly affect democratic citizenship and political outcomes in *both* positive and negative ways. Thus, when designing schemes for harnessing the inherent political power of social speech, one must consider two complementary policy goals: 1) the promotion of social speech that will have a positive outcome on democratic citizenship; and 2) the restriction of social speech that will lead to negative effects on democratic citizenship. While interrelated, these two goals often require two separate sets of policy suggestions, each of which may include several options: formal, legal measures; voluntary, private actions; and/or long-term shifts in public opinion. In this chapter, I describe various circumstances under which all three of these policy options may be appropriate, I also place particular emphasize on the vital role that social pressures play in the long-term regulation of social speech.

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<sup>963</sup> John Stuart Mill, *A System of Logic, Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation*, 8<sup>th</sup> Ed (New York: Harper & Brothers, Publishers, 1882), pp. 1055. Available at: <http://www.gutenberg.org/files/27942/27942-pdf.pdf>

As John Dewey succinctly explains, “[o]ur conduct *is* socially conditioned whether we perceive the fact or not.”<sup>964</sup> Human beings who live in shared communities can expect that others will take account of their actions. They can also expect their choice of actions to be influenced by the social reaction that they receive. When an individual’s community responds negatively to her behaviors—through mockery or shunning, for example—she is likely to modify her conduct, rather than risk further ostracism. Positive social reactions, on the other hand—such as group acceptance and integration into the community—are likely to lead to the continuance of those actions, which garnered such feedback. Once communal norms and expectations have been established, an individual does not even have to wait to see how her community judges her actual behaviors; rather, she should be able to predict her community’s response ahead of time and determine a course of action that presupposes public opinion. This may be a deliberate process, but it may also take place entirely unconsciously. In either case, social pressures are able to get ahead of unpopular actions, stopping them before they even occur.

In *The Spiral of Silence: Public Opinion—Our Social Skin*, Elisabeth Noelle-Neumann provides empirical evidence to prove Dewey’s point that social pressures really do lead individuals to conform to the majority’s expectations and norms.<sup>965</sup> This is particularly true in times of crisis, she argues, when demands for conformity tend to increase and public opinion functions as “the guardian of public morality.”<sup>966</sup> But it is also the case under more benign circumstances as well. Civil society is highly adept at identifying views that diverge from the majority opinion, and then punishing deviant individuals with social isolation.<sup>967</sup> Many (if not

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<sup>964</sup> John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* (New York: Modern Library, 1930), pp. 316.

<sup>965</sup> Elisabeth Noelle-Neumann, *The Spiral of Silence: Public Opinion—Our Social Skin*, 2<sup>nd</sup> Ed. (Chicago: The University of Chicago Press, 1993). This is (*Ibid.*, pp. 136).

<sup>966</sup> *Ibid.*, pp. 136.

<sup>967</sup> The coercive quality of public opinion is built into its very definition: “Public opinion is an understanding on the part of people in an ongoing community concerning some affect- or value-laden question which individuals as well as government have to respect at least by compromise in their overt behavior under the threat of being excluded or losing one’s standing in society” (*Ibid.*, pp. 179).

most) would rather conform to public opinion than risk such seclusion. While the tendency of social pressures to reduce individuality may initially appear troubling, as Noelle-Neumann explains, there are also important communal benefits to conformity. Public opinion may threaten an individual's "social skins" (i.e. social standing and respect) by issuing sanctions if she should happen to express a viewpoint that strays from the majority, but it also acts as the "social skin" that binds a community together. The more that citizens are able to embrace majority opinion, the better integrated they are, as individuals, and the more unified the community can become, as a whole.

Thus, social pressures can be used to not only guide individual actions in ways that suit community norms and standards, but they also serve to unite peoples. This explains why, as John Stuart Mill writes in the opening quotation to this chapter, the power of social censure "is a most important one." It is especially important, he explains, in regards to actions that take place in the social sphere. While public opinion—and the social pressures that enforce it—is highly influential in determining human behavior under all circumstances, it is an especially potent means of control in cases that involve harmful or antisocial acts that fall outside the purview of the law. "The acts of an individual may be hurtful to others, or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights," Mill explains in "On Liberty."<sup>968</sup> In these cases, "[t]he offender may be justly punished by opinion, though not by law."<sup>969</sup> In other words, when wrongs occur between private persons in the social sphere (where it is often inappropriate for the state to intervene), it falls to the community to enforce its own norms and standards.

This can be accomplished in one of two ways. First, the community may choose to

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<sup>968</sup> John Stuart Mill, "On Liberty," in *On Liberty and Other Essays* (John Gray, ed.) (New York: Oxford University Press, 1998), pp. 83.

<sup>969</sup> *Ibid.*

punish the unacceptable actions of its members directly.<sup>970</sup> For example, if an individual were known to have produced and spread petty rumors about her peers, she might find herself excluded from social gatherings. Similarly, if a person tended to renege on her promises, other members of the community might cease doing business with her. Thus, individuals learn that they can engage in antisocial behavior only at the risk of social punishment – a strong deterrent. Second, social censure can be used to influence the development of individual characters traits in order to ensure that the population tends towards positive, community-minded behaviors. As Mill explains, in terms of social control, society is not limited to punishing poor conduct after the fact. Rather, “[s]ociety has absolute power over them [its weaker members] during all the early portion of their existence: it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life.”<sup>971</sup>

These social influences on character development do not end at “childhood and nonage,” however; but they extend into adulthood as well. Indeed, while Mill frequently claims that rational adults ought to be sovereign over their own self-regarding actions, he also suggests that it is each rational individual’s duty to enforce public morality upon her peers. As social beings, he argues, humans are obligated to help one another “distinguish the better from the worse, and [to offer] encouragement to choose the former and avoid the latter.”<sup>972</sup> For Mill, this means that the community is responsible for ensuring that its members grow into the kind of people who have “wise instead of foolish, elevating instead of degrading, objects and contemplations,” and it does so through the threat of social censure.<sup>973</sup> And while he insists that this power is neither absolute nor exact (i.e. as imperfect beings, humans are incapable of breeding perfection), Mill does argue that social influences, when used correctly, can contribute substantially to the positive intellectual

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<sup>970</sup> Not only are individual actions “rightfully subject to moral reprobation,” Mill writes, but so too are the mere “dispositions underlying these actions (e.g. cruelty, malice, envy)” (Ibid., pp. 87).

<sup>971</sup> Ibid., pp. 91.

<sup>972</sup> Ibid., pp. 84.

<sup>973</sup> Ibid., pp. 84.

and moral development of the citizenry. In so doing, they can go a long way in ensuring that individuals behave in accordance with liberal democratic norms and standards.

The philosophies of Dewey and Mill—as well as the empirical evidence presented by Noelle-Neumann—suggest that naturally occurring, social pressures present an especially efficacious option for managing social speech. To the extent that the community is willing to exert its influence upon individuals in order to promote that speech, which serves democratic ends, and also restrain that speech, which leads to isolation and inaction, it is likely to have a more profound positive impact on the content of social speech than top-down action ever could. The challenge, however, is to ensure that society not only chooses to enforce liberal democratic norms, but also that it takes its self-regulatory responsibilities seriously in the case of social speech.

As I explain throughout this project, while social speech can be as important an element of public life as more traditional political activities (e.g. protesting, voting, letter-writing), it is often seen as mundane, trivial or even idle chatter. Therefore, if social pressures are to be expected to mold citizen speak in a democratically responsible fashion, first, I argue that efforts must be made to inform the public about the political implications of everyday communication. My hope is that, once private citizens recognize what is truly at stake when they engage in social speech, they will self-consciously work to ensure that civil society is populated with communication that serves liberal democratic interests.

Where it is possible to shift attitudes towards social speech informally, I would argue that this approach is generally preferable to legal action. Society's dual interests in both maintaining First Amendment liberties and also protecting all citizens' capacities to engage equally in democratic life are often best served when public opinion is free to develop organically and at its own pace. But there are also many instances when such an informal approach will not be sufficient to exact the necessary positive change; in these cases, more organized, proactive efforts must also be made to shift public attitudes regarding social speech. In this chapter, I

explore several such examples in which natural shifts in public opinion must be combined with state, nonprofit and private agents efforts in order to ensure both that positive social speech is encouraged, and also that negative social speech is discouraged. Referring back to the three forms of social speech that I discussed in Chapter Six—Internet speak, safe spaces and hate speech—I offer a wide range of suggestions on how to structure communication within those three spheres in order to best serve democratic needs.

First, in the case of Internet speak, I show how a mixture of legal measures, industry safeguards and efforts to transform public opinion can reconstruct the Internet into a place where people are free to connect with distant others without the fear of the persistent, enduring and anonymous harassment that too commonly leads to feelings of isolation and alienation. My first suggestion involves encouraging schools and community centers to provide, not just access to the Internet, but also training on how it may be used effectively and towards positive ends. I expect online social networking sites to adopt a proactive role as well, both by structuring their websites in such a way that makes it easy for users to police themselves for harmful practices and content, and also by introducing more formal measures to restrict negative social speech. The latter approach can be accomplished through several simple changes, including: 1) modifying the Terms of Use agreements to reflect the public interest in restricting cyberbullying; 2) monitoring sites for harmful speech; 3) ensuring easy reporting mechanisms for abuse; and 4) restricting access for repeat offenders. For these efforts to be fully effective, however, lawmakers must also streamline legislation regarding virtual harassment by pushing forward a federal definition for what constitutes unacceptable harassment, both online and off. These official measures could then be cemented through public awareness campaigns that encourage Internet use for its positive effects (e.g. political mobilization, discussion with distant others) and discourage online harassment.

Next, I suggest a more private, informal approach to the regulation of social speech in safe spaces. Safe spaces are what they are—a location for members of politically marginalized



groups to freely express themselves among their peers—precisely because they are relatively insulated from external pressures. To use legal or commercial reforms to attempt to structure safe space social speech in any particular way would, therefore, be impractical and ineffective, and would also compromise the very purpose of a safe space. Instead, I argue that the best option for lawmakers, in terms of both promoting that safe space speech, which encourages democratic ends (e.g. building a sense of community, developing a willingness to question authority), and also discouraging safe space speech that goes against these purposes (e.g. isolationism), is to sit back as academic and popular influences naturally continue to shift attitudes about the public value of safe space speech. Over time, members of safe spaces will come to see their communication as politically meaningful, which will make them more likely to adopt self-regulatory norms that foster good social speech and discourage bad social speech. Thus, I argue that internal social forces should be a sufficient enforcement mechanism in the case of preexisting, organic safe spaces. For those marginalized groups that do not yet have adequate access to safe spaces, however, I show how the state and nonprofit organizations can work together to foster the creation of new safe spaces that are self-consciously designed to support democratic goals.

Third, I discuss the example of social hate speech, which poses a unique set of regulatory challenges. While there is a clear public interest in protecting American citizens against hate speech—regardless of whether it takes place in the public or social sphere—government attempts to censor such communication have been met with general consternation. In this section, I describe the arguments for and against state censorship of social hate speech, ultimately concluding that, at least in the United States, anti-hate speech bans ought to be avoided. Instead, I offer three suggestions of ways in which the state can effectively and constitutionally contribute towards the diminishment of social hate speech. First, I argue that the state should take a symbolic stance against hate speech by finally offering an official, consistent definition for the moral wrong, one which still stops short of making hate speech illegal. Any such

definition must emphasize three essential traits of hate speech: 1) It is more than mere “fighting words”; 2) It is likely to result in widespread, enduring harms; and 3) It is *at least* equally potent when it takes place in the social sphere as when it takes place in the public sphere. Second, I suggest that, by putting forth a public policy agenda that stresses the values of inclusiveness and egalitarianism, the state will be able to send a clear message about the unacceptability of discriminatory ideologies without addressing hate speech directly. Third, I argue that the problem of social hate speech would be greatly reduced if American politicians and lawmakers addressed the socioeconomic imbalances that breed hateful ideologies in the first place. These three sets of political actions, taken together, should be enough to increase public awareness about the harms of social hate speech, while also helping to produce social norms that are less tolerant of hate. These anti-hate speech social mores will, in turn, serve as the most effective possible means of restricting hate speech.

In the final portion of this chapter, I consider some final thoughts on the theory of social speech. I suggest that such a theory could have significant implications for the understanding of transnational and supranational models of citizenship, and I encourage future research into the ways that everyday, social interactions affect liberal democratic politics.

#### **I. Internet speak:**

As Chapter Six demonstrated, Internet communication affects the quality of democratic citizenship and political outcomes, in both positive and negative ways. By providing information about what it means to be a good citizen, increasing opportunities for building social capital and helping to define the borders of affective communities, positive Internet speak not only facilitates political coordination, but it also increases the likelihood of an individual engaging in meaningful political action. When Internet speak is aimed at highlighting difference and stratifying groups, however, it can result in the opposite outcomes—alienation, eroding social trust and weak

community bonds—all of which compromise the effectiveness and representativeness of democratic governance.

Given the growing prevalence of online communication and its potential to significantly impact democratic society, there is a public interest in increasing not only equality of access, but also equality of usage. The effects of social speech online may currently be experienced to a greater or less degree depending on one's social standing because, while the Internet is nearly ubiquitous in the United States—and in that sense, the digital divide *has* shrunk—different demographic groups still do not use the Internet equally effectively.<sup>974</sup> As Zizi Papacharissi explains, although the Internet provides unprecedented access to information, access alone “does not automatically render us better informed and more active citizens.”<sup>975</sup> Individuals require more than just a computer and an Internet router to experience the democratic potential of the Web; they also need the experience, understanding and technical savvy to sort through and appreciate the information available to them.

Unfortunately, in the United States, Internet literacy is not equally distributed among demographic groups. Those who are male, young, white, wealthy and college-educated have proven themselves especially capable of navigating the Internet in ways that enhance their individual capacities for democratic citizenship. In other words, those who are politically active online tend to be the same individuals that are already more likely to be involved in traditional political action offline.<sup>976</sup> To the extent that Internet activity increases the ability and willingness to

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<sup>974</sup> See Eszter Hargittai, “Second-Level Digital Divide: Differences in People’s Online Skills,” in *First Monday*, Vol. 7, No. 4 (April 2002). Available at: [http://firstmonday.org/issues/issue7\\_4/hargittai/index.html](http://firstmonday.org/issues/issue7_4/hargittai/index.html); Paul DiMaggio, Eszter Hargittai, Coral Ceste and Steven Shafer, “Digital Inequality: From Unequal Access to Differential Use,” in *Social Inequality*, Kathryn Neckerman (ed.) (New York: Russell Sage Foundation, 2004), pp. 355-400; Pippa Norris, *Digital Divide: Civic Engagement, Information Poverty and the Internet Worldwide* (Cambridge: Cambridge University Press, 2001); Jan A.G.M. van Dijk, *The Deepening Divide: Inequality in the Information Society* (Thousand Oaks, CA: Sage Publications, Inc., 2005).

<sup>975</sup> Zizi Papacharissi, “The Virtual Sphere: The Internet as a Public Sphere,” in *New Media & Society*, Vol. 4, No. 1 (2002), pp. 14-15.

<sup>976</sup> See Norris, *Digital Divide*.

participate in democratic politics of those who are already best represented in American political institutions, that group is doubly advantaged. The corollary is also true: To the extent that women, racial minorities and lower income Americans are less likely to effectively engage in Internet speak, they are doubly disadvantaged. Thus, any proposals to regulate online communication in ways that enhance democratic outcomes for all must begin with an attempt to create more equal access and usage patterns across demographic groups.

The public school system serves as an ideal starting point.<sup>977</sup> Many primary and secondary schools already have computer education classes in place in order to establish baseline Internet proficiency at a young age. States should mandate that these courses be available to all students (either by making it part of the required course load, or by allowing students who do not have these services in their own schools to access them in schools that do provide them), and that their curricula should include information about how to *best* navigate online communication. These curricula would have to be updated regularly in order to account for the rapidly changing landscapes in Internet communication—especially social networking sites—but it is feasible for such efforts to begin to equalize Internet skill levels across demographic groups.

Comparable efforts may extend outside of the official school system as well. In many disadvantaged neighborhoods where schools have not been able to provide sufficient computer education, community centers and nonprofit workforce development programs have stepped in to

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<sup>977</sup> As Marc G. Yudof explains, mandatory public education is a particularly effective way of influencing students. Even when the state is not actively pursuing a particular ideology, the school system enables it to deeply affect the way that citizens perceive the options with which they are presented. First, students are required to pay attention to the lessons and have not yet established methods for critical evaluation of the information they receive. Second, the arguments put forth by educators are not thought of or perceived of as advertisements. Third, young students are unlikely to question a teacher's knowledgability. Fourth, students are punished or rewarded based on how well they absorb their lessons, not on their willingness to doubt accepted doctrines. See Marc G. Yudof, "When Governments Speak: Toward a Theory of Government Expression and the First Amendment 57," in *Texas Law Review*, Vol. 863, No. 875 (1979).

fill the void (either as replacements or supplements to public school efforts).<sup>978</sup> Formal mentoring programs have also emerged to assist recent immigrants and young people from poorer areas—who may not have the formal education necessary to compete in a skilled job market—by providing them with a technology-mediated learning environment.<sup>979</sup> Additional funding could be granted to these and similar organizations so that they can continue to perform these services and bring new programs to even more communities.

Currently, much of the funding for nonprofit computer literacy programs comes from corporate grants. Most notably, many media conglomerates have taken it upon themselves to promote and support programs that provide broader access to Internet education. For example, in 2012, Advance Publications' NOLA Media Group (which encompasses NOLA.com and *The Times-Picayune*) launched its NOLA Access Initiative in an effort to increase digital literacy in the New Orleans area.<sup>980</sup> The initiative began as a partnership between the Greater New Orleans Foundation and the NOLA Media Group, which has established a \$500,000 fund for the express purpose of supporting programs that increase access to the Internet and teach online skills to those who might not otherwise have had these educational opportunities.<sup>981</sup> In a statement released by Ricky Mathews, the president and publisher of the NOLA Media Group explained that these efforts stem from the belief that a “digitally connected and engaged community is an empowered community.”<sup>982</sup>

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<sup>978</sup> See Karen Chapple, *From Promising Practices to Promising Futures: Job Training in Information Technology for Disadvantaged Adults* (San Francisco: Bay Area Video Coalition, 2000), pp. 2-5.

<sup>979</sup> See Mitchel Resnick and Natalie Rusk, “Computer Clubhouses in the Inner City: Access Is Not Enough,” in *The American Prospect*, Vol. 27 (July-August, 1996), pp. 60-68.

<sup>980</sup> See NOLA Media Group, “About Us.” Available at: <http://www.nolamediagroup.com/about/>.

<sup>981</sup> To that end, in 2012 and 2013, the NOLA Access Initiative awarded grants to several nonprofit organizations aimed at increasing online literacy, including the Youth Empowerment Project, the Bayou District Foundation; the Boys & Girls Clubs of Southeast Louisiana; the Community Center of St. Bernard; the New Orleans Public Library Foundation and the Youth Service Bureau.

<sup>982</sup> See NOLA.com, “NOLA Media Group launches \$500,000 effort to boost community access to digital technology, information” (September 24, 2012). Available at: [http://www.nola.com/business/index.ssf/2012/09/nola\\_media\\_group\\_launches\\_5000.html](http://www.nola.com/business/index.ssf/2012/09/nola_media_group_launches_5000.html).

Like Mathews, many members of the television and news media believe that they have a civic responsibility to educate and inform their communities. Even though the information industries have often failed to live up to their own ideals, they have always seen themselves as having been endowed with a public trust.<sup>983</sup> Thus, it is reasonable to expect that they will continue to privately support efforts to edify the public. In the coming years, Americans should also expect the new online media to follow suit, with digital giants (e.g. Google, Amazon, Yahoo) recognizing that they have a duty to not only provide entertainment and increase shareholder profits, but also to contribute towards social progress and equality. To the extent that the new media promotes programs that increase access to and proper usage of the Internet, they may even be able to simultaneously contribute to both goals – contributing towards democratic citizenship while also creating new potential users for their sites. Thus, these massive conglomerates ought to willingly place themselves at the forefront of Internet education, developing and funding programs to provide more equal usage of the Internet.

Private efforts to increase Internet literacy will not be enough to erase the digital divide, however. Given that online inequality is a public problem, additional funding for schools and nonprofits—most likely, at the federal, state *and* local levels—ought to come from government sources as well. Fortunately, it should not be prohibitively challenging to attain these allocations through the political process. As explained throughout this project, the United States prides itself on the supreme value it places on freedom of expression. American lawmakers and politicians frequently point to the fundamental role that free and open communication plays in the functioning of its democratic institutions – the imagery of the marketplace of ideas represents the backbone of American democracy. However, as Internet speech has not been equally distributed in the

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<sup>983</sup> In the case of the broadcast media, legislators have traditionally shared this perspective, formalizing the relationship between private organizations and the public interest. For example, the Radio Act of 1927 established an exclusionary licensing arrangement on the condition that broadcasters act as public fiduciaries whose primary interest is to serve “the public interest, convenience and necessity.” See Radio Act of 1927, Public Law No. 632, February 23, 1927, 69<sup>th</sup> Congress. An Act for the regulation of radio communications, and for other purposes.

United States, certain ideas and perspectives have not been able to compete freely in the marketplace of ideas. By silencing particular demographic groups, these imbalances have compromised egalitarian, democratic governance.

Considering the rhetorical emphasis American lawmakers and politicians have placed on freedom of speech for all, it would seem to be of the utmost importance that they seek to remedy this state of affairs. One potential policy option might be for the United States to create endowments for Internet education from the assets on the sale, transfer, and auctioning of media companies and of the portion of the electromagnetic spectrum earmarked for telecommunications services. But there are also innumerable ways through which Congress and state legislatures could raise the funding necessary for these programs.

Public and private efforts must not stop there, however. Just as important as establishing equal access to and proficiency in Internet speak is ensuring that the resulting speech be of a character that is conducive to democratic citizenship and positive political outcomes. Policymakers must keep in mind that Internet speech is neither inherently positive nor negative, but is essentially neutral from the perspective of liberal democratic values. It is what individuals do with these spheres of communication that decides how it will affect them and their communities. Therefore, governments, corporations and private citizens must aim to both encourage positive, community-building Internet speak and also discourage negative, divisive online communication. In the following sections, I suggest several approaches that call upon all three actors to influence the form and content of online social speech in ways that will prove advantageous to democracy.

*A. Proposals for encouraging positive Internet speak*

As explained in Chapter Six, while the Internet may not provide a panacea for weak

democratic citizenship, the interactive, democratic and informative nature of online social communication has meant that virtual discussion forums, when they are focused on empowering users, building connections and discovering commonalities, may actually increase the probability of an individual engaging in meaningful political action offline. This positive relationship is defined by three of the mechanisms discussed in Chapter Five. First, online social communication teaches users about the norms and expectations of their particular communities, while also providing them with the logistical information that makes political action possible. Through repeated practice in Internet discussions, users acquire the skills, confidence and desire to engage in more traditional political participation. Second, the Internet, as an inherently intimate medium, encourages many users to openly share their hopes, interests and goals with one another, thus increasing the potential for stronger affective connections and increased social trust. This social trust is a necessity for liberal democratic states, which require citizens to make personal sacrifices for the greater community. Finally, because Internet communication tends to resemble the kind of organic, informal exchanges that take place between friends, acquaintances and families in civil society (i.e. social speech), it is often more accessible to members of traditionally disenfranchised groups. Thus, Internet speak has the potential to be more inclusive than other forms of communication. Members of demographic groups that have been excluded from formal political dialogue are more likely to not only contribute to online discussion, but also to really be heard within these virtual forums. The diversity of Internet discussions helps participants develop empathy for disparate others and to connect their personal well being with ever larger, more inclusive imaginary communities.

The three processes that occur when individuals engage in positive social speech online—providing information, building social trust and helping to define broader affective communities—all result in participants experiencing stronger feelings of political efficacy and connectedness. In these ways, online social speech serves as an important tool for ensuring an engaged, active, egalitarian democratic citizenry. Thus, communities that value liberal



democratic principles have a strong interest in not only protecting positive Internet speak, but also in promoting it.

Fortunately, the nature of Internet speak means that much of this work is already done automatically. The challenge from a policy perspective is neither to encourage more people to engage in social speech online, nor to ensure that those who already take advantage of informal Internet forums do so more often. One of the advantages of social speech online is that it comes naturally for most users. While it may be difficult to design measures that actively pull Internet users' attention towards overtly political or news sites, most people already actively choose to engage in social speech when they log on. People are constantly creating their own Internet forums for casual, social discussion. But while official efforts may not be necessary in order to increase the availability of online spaces for social speech, there is still room to influence the quality of Internet speak in positive ways.

Much of this work may be best accomplished outside of the political establishment, through the use of informal community enforcement. As stated above, social pressures are often the most effective way of promoting particular speech patterns without unduly infringing upon citizens' First Amendment rights. Where certain attitudes and perspectives are met with respect by the community, they are likely to be widely (if often unconsciously) replicated. In the case of Internet speak, participants can only be expected to willingly engage in positive, inclusive, affirming social communication where online community norms and expectations have been structured to prize such behaviors. To that end, many websites have already implemented strategies for encouraging their populations to value speech that is conducive to liberal democratic outcomes (i.e. respectful, egalitarian deliberation and thoughtful, community-minded information dissemination).

In this section, I examine two online communities that have instituted practices, which have successfully established norms in favor of good democratic speech. In the first example,

Reddit, website designers initially employed a ranking system to establish positive norms and standards, which encourage users to self-regulate in favor of speech that advances democratic goals. In the second example, League of Legends, a group of software engineers sought to do the same, except this time, within a society that was already characterized by hateful, vulgar harassment. The success of these sites not only proves that it is possible to raise the level of discourse online through relatively minor structural changes, but they also offer a transferable model for other online communicative spheres.

To begin, Reddit, one of the most popular anonymous communicative sites online, acts as a self-correcting, un-commercialized marketplace of ideas, where users (“Redditors”) encourage one another to contribute thoughtful content that promotes and furthers discussion.<sup>984</sup> Reddit is essentially a message board, wherein users can submit links and post comments that are shared with a wide audience of official users and visitors. The community is constantly curating this content, determining what is of value and what is not. Posts that are considered worthy are “upvoted” and those that are deemed unworthy are “downvoted,” thus establishing their positioning on the site.<sup>985</sup> Consequently, in order to determine the norms and expectations of the Reddit community, one may simply look to see what kinds of posts make it to the Front Page or the top of a discussion thread, and which do not.

Upon examination, one finds that, as a rule, the value of a Reddit post is determined by its ability to contribute to the good of the entire community, either by offering new information, opening up a lively discussion or providing a clever perspective. These standards are what

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<sup>984</sup> In October, 2013, Reddit boasted 85,901,746 unique visitors, hailing from over 186 different countries. See Reddit, “about reddit.” Available at: <http://www.reddit.com/about/>. Even President Barack Obama has taken note of Reddit’s influence, becoming the first active American president to host an “AMA” (i.e. an informal Q&A segment) on August, 2012. For a transcript of the event, see: Reddit, “I am Barack Obama, President of the United States – AMA.” Available at: [http://www.reddit.com/r/IAmA/comments/z1c9z/i\\_am\\_barack\\_obama\\_president\\_of\\_the\\_united\\_states/](http://www.reddit.com/r/IAmA/comments/z1c9z/i_am_barack_obama_president_of_the_united_states/).

<sup>985</sup> Posts that make it to the “Front Page” are often seen and assessed by hundred of thousands of visitors.

differentiate Reddit from many other online information networks. The general Reddit population is committed to explicitly encouraging positive, community-minded speech, and this shows in its content – top rated comments usually either enlighten (through clarification or edits for accuracy) or instigate debate. Where disagreements occur, nastiness and disrespect are often met with calls for civility and downvotes.<sup>986</sup>

It is important to note that these norms in favor of courteous, inclusive, educational discussion are enforced by the Reddit community itself. As a group that self-consciously leans libertarian, top-down censorship is generally frowned upon on the site. Redditors tend to prefer to self-regulate according to their own democratic values, and they pride themselves in their demonstrated history of promoting speech that is in line with those principles.<sup>987</sup> However, these norms and expectations did not spring up entirely organically. The site creators have played an essential role in determining the tone of community standards.

One of Reddit's most notable initiatives aimed at achieving democratic social norms is its "karma" ranking system.<sup>988</sup> Karma is defined as a reflection of goodwill, or a measure of "how much good the user has done for the Reddit community."<sup>989</sup> Redditors earn karma by submitting links that other members of the community like and are willing to vote for, according to the parameters discussed above. On the other hand, users can lose karma by contributing rude, divisive or spamming content to the site. A numerical marker of karma is displayed prominently next to each Redditor's username. Karma does not provide users with any formal influence, nor

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<sup>986</sup> This does not mean that Reddit is entirely without divisive, hateful content, however. If one were to search for it, she would certainly find examples of racism, pornography, misogyny, pedophilia, etc. on the site. These comments and posts tend to be downvoted by the wider Reddit community, but they often find a home in more specific, subreddits.

<sup>987</sup> Beyond simply voting on content, Redditors are also called upon to volunteer as moderators for particular subreddits. Moderators are given several responsibilities, including configuring the parameters for the community, removing links they find objectionable and banning abusive users. See Reddit, "Frequently Asked Questions." Available at: <http://www.reddit.com/wiki/faq>.

<sup>988</sup> There are two types of karma—link and comment—both of which are prominently displayed on a user's profile. Link karma refers to the benefit the community has gleaned from posts, whereas comment karma only takes into account discussion threads within posts. See *ibid*.

<sup>989</sup> See *ibid*.

can it be redeemed for anything, even on the website. Nevertheless, many Redditors take pride in achieving a high karma score. A high karma score is equated with respect and good social standing, alerting users that an individual adds value to the community and merits consideration. Thus, informally, Redditors with higher karma ratings are likely to exert significant influence on others. As demonstrated community leaders, their tone and the style of their comments and posts are likely to be duplicated by others in search of peer recognition.

By introducing karma as a way of measuring value added to the community, the Reddit designers clearly set the tone for a site that attaches importance to speech, which advances democratic ends. With these norms firmly established, Redditors are now able to police their own site in accordance with these standards. However, since karma has always been an element of Reddit, it is impossible to judge for certain exactly what its influence has been and how social norms might have developed without it. It is reasonable to draw a connection between karma rankings, which highlight community achievements, and Reddit's generally positive content, but it is difficult to definitively determine the degree of causation. In order to measure the full potential impact of website design on the nature of online communication, it is also useful to look at examples in which initiatives were added *after* communication had already deteriorated into divisive, hateful discord.

One such example comes from Riot Games' massively multiplayer online role-playing game (MMORPG or MMO), League of Legends.<sup>990</sup> Like many MMOs, League of Legends initially struggled with developing strategies to combat the online harassment being experienced by its

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<sup>990</sup> MMOs are especially well placed to experiment with methods for establishing and maintaining social norms. As Caroline Bradley and Michael Froomkin explain in their article, "Virtual Worlds, Real Rules," the virtual worlds that characterize MMOs may permit experimentation without any of the real world costs of "bad rules." See "Virtual Worlds, Real Rules," in *New York Law School Law Review*, Vol. 49, December 8, 2004, pp. 103-104. Role playing games tend to be structured similarly to the real world, in everything from their internal market regulations to their family structures. And because it is not uncommon for players to invest hundreds of hours and (often) large sums of money into developing their characters, avatars tend to behave similarly to their real life counterparts. Thus, the results of behavior modification experiments within these controlled environments tend to have widespread applicability.

members. While the game had procedures in place for lodging complaints (after enough complaints were filed against an individual user, she would be banned from the game), the developers did not feel like those efforts were adequate for curtailing “toxic” behavior (e.g. negative chats, offensive language and verbal abuse) and improving the virtual atmosphere. So in 2012, Riot Games established Team Player Behavior (a.k.a. “Team PB&J”), a group of experts in psychology, neuroscience and statistics, in order to develop new policies towards interpersonal communications. Headed by Jeffrey “Dr. Lyte” Lin, the lead designer of social systems at Riot, Team PB&J sought to shift its focus away from simply punishing bad behavior and towards actively rewarding interactions that represented good citizenship values.<sup>991</sup> This involved a two-part process: 1) alerting players when they have engaged in socially unacceptable online behaviors (and doling out punishment where necessary) and 2) creating a system for quantifying behaviors that contribute positively to the online community.

First, Team PB&J established a Tribunal system, which fields reports of negative player conduct, and metes out warnings and bans. The Tribunal provides feedback regarding negative community behavior through the use of Reform Cards that document chatlogs and team scores from player reports. Many, including Lin, believe that by simply informing players when they have misbehaved in ways that damage the community, the Tribunal goes a long way towards discouraging such behavior in the future. Lin tells a story from when Reform Cards first went live, in which he “actually got an email from a 10-year-old boy who said ‘Dr. Lyte, this is the first time somebody has told me that I can’t say that word online. I’m really sorry and I’ll never do it again.’”<sup>992</sup> Lin describes how he showed this letter to the entire team, proudly proclaiming, “Can you guys see the difference you’re making in peoples’ lives? This is not about games anymore,

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<sup>991</sup> “Toxic players” would, however, continue to be subject to a community peer review system, the League of Legends Tribunal, which asks players to vote on how to handle bad behavior perpetrated by other players.

<sup>992</sup> See Michael McWhertor, “The League of Legends team of scientists trying to cure ‘toxic behavior’ online,” in *Polygon* (October 13, 2012). Accessed at: <http://www.polygon.com/2012/10/17/3515178/the-league-of-legends-team-of-scientists-trying-to-cure-toxic>.

you guys are impacting these players.”<sup>993</sup>

While the Tribunal system may be making a significant difference in the lives of individual gamers, the more radical policy proposed by Team PB&J was its Honour Initiative. Instead of merely censuring bad behavior and speech, users were encouraged to report positive qualities in others, such as helpfulness, friendliness, teamwork and good sportsmanship.<sup>994</sup> In other words, players were called upon to recognize the same positive, inclusive, affirmative, community-minded interactions that are likely to result in a more active, egalitarian democratic citizenry (as explained in Chapter Six). This was called “honoring” a player.<sup>995</sup> After receiving enough of these positive reviews, a user’s name would be highlighted online so that it became easy to spot “good” gamers before others ever had to interact with them.

The results of this initiative were swift and dramatic. Just one week after the launch of the Honour Initiative, the makers of the game noted that Negative Attitude reports saw a 39% decrease in normal and 11% in ranked games; Offensive Language reports saw a 35% decrease in normal and 20% in ranked; and Verbal Abuse reports saw a 41% decreased in normals and

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<sup>993</sup> Ibid.

<sup>994</sup> Helpfulness is described thusly: “There are those summoners who have the know-how to help you step up your game and are always willing to share. If one of your teammates makes you feel like you’re attending a master class on League of Legends, be sure to recognize him for being a helpful teammate.” Friendliness: “Ever meet one of those summoners who – win or lose – is just a pleasure to play with? This acknowledgement goes out to those unsung heroes of the Fields of Justice whose friendly demeanor keeps everyone having a good time even when the chips are down.” Teamwork: “Some players really put the needs of the team over their personal interests. These players lead the way on the Fields of Justice, support struggling teammates, and are always the first to step up and select a role the team needs. This acknowledgement is for all those players who understand that a chain is only as strong as its weakest link.” Good sportsmanship: “Sometimes you run into an opponent who is humble in victory and graceful in defeat. Be sure to acknowledge those adversaries who embody the spirit of sportsmanship as Honorable Opponents.” See Riot Games, Inc., “Honor.” Available at: <http://na.leagueoflegends.com/honor>

<sup>995</sup> From the company’s own website: “Through Honor, you can acknowledge summoners who helped make your game awesome by clicking on the ‘thumbs up’ icon next to the summoner name at the post-game lobby. You’ll also receive Honor of your own when you impress your fellow summoners with your sportsmanship in the game” (Ibid.).

17% in ranked matches.<sup>996</sup> Almost immediately, bloggers noted that League of Legends “has become a completely different game.”<sup>997</sup> By February 2013, Negative Attitude reports saw a 40% combined decrease in both normal and ranked matches; Offensive Language reports saw a 55% combined decrease in both normal and ranked matches; and Verbal Abuse report saw a 58% combined decrease in both normal and ranked matches.<sup>998</sup>

Team PB&J also tracked the behavior of its players and found some encouraging results. As it turned out, the users whose names were highlighted in recognition of their good speech were actually more successful in the game than their meaner, foulmouthed peers. Not only that, but users actually seemed to be enjoying the new standards of decency. Representative postings on the game’s message board in response to the program included: “I’ll be the nicest son of a b ever” (sic); “This has been something asked for by the community for a *long* time;” “Hmmm...I guess that’ll be more effective than my current ‘*shut up and stop fighting*’ strategy.”<sup>999</sup>

By instituting these simple measures the design team behind League of Legends was able to dramatically modify the tenor of its online discussion, resulting in a shift towards speech that promotes democratic values and outcomes. As it became clear that the community valued more democratic, community-minded speech, individual users began to self-regulate and police themselves in ways that created a less hostile environment. It is important to note that the makers of League of Legends and Reddit are not forcing these institutional policies on their users. Rather, they are creating an environment conducive to the flourishing of positive democratic speech, thus tapping into what seems to be a preexisting desire of their users to be

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<sup>996</sup> Riot Games, Inc., “Initial Honor Results” (October 9, 2012). Available at: <http://na.leagueoflegends.com/news/initial-honor-results>. Ranked and normal games are essentially identical. The only difference is that ranked matches contribute to a player’s overall ranking. As players improve in their rankings, they are pitted against stronger opponents.

<sup>997</sup> Blaine Smith, “How’s that League of Legends Honor Initiative working out?” *MMO Attack* (February 11, 2013). Available at: <http://blog.games.com/2013/02/11/league-of-legends-honor/>

<sup>998</sup> Ibid.

<sup>999</sup> Riot Games, Inc., “League of Legends Community: Introducing Honor!” Available at: <http://na.leagueoflegends.com/board/showthread.php?p=29448823>

part of a cordial, accepting, democratic community.

The lesson to be learned from these examples is that, while policymakers may not be able to force private citizens into adopting social norms that encourage positive democratic speech using a top-down approach, website creators and game developers can take proactive steps to shape the framework within which community standards develop. And as these examples show, it often takes very little effort to achieve the desired norms and expectations. A simple ranking system that emphasizes democratic contributions to the community (even when rankings do not confer any external benefits upon users) may go a long way in ensuring that the majority of (or at least the most visible) speech on a given site be informative, inclusive and respectful. This is a measure that could be adopted by any number of games and websites.

Already, many sites (including industry leaders, like Facebook) have incorporated some mechanism for rating content. Through three low cost modifications to a general rating system, nearly any online community could replicate the results achieved by Reddit and League of Legends. First, sites would need to express clear expectations for what constitutes a high rating. Second, those expectations would need to emphasize speech that serves community interests. Finally, by using content ratings to determine a visible ranking of individual users, websites could expect to see people become more accountable for their speech. To the extent that good democratic speech becomes associated with high social standing online, most responsible users will choose to engage in interactions that are in line with those values.

#### *B. Proposals for discouraging negative Internet speak*

While the encouragement of positive social speech online ought to improve democratic citizenship and political outcomes for all, this approach needs to be combined with efforts to discourage that Internet communication, which actively seeks to divide communities and isolate



individuals, such as cyberbullying. As described in Chapter Six, the anonymous nature of Internet communication leads many users to address one another more harshly than they might do in person. For evidence, witness the rise of a new kind of virtual bully and heckler – the Internet troll, who exists entirely to “intentionally [disrupt] online communities.”<sup>1000</sup> For many Internet users, cyberbullying is a part of daily life, experienced either as perpetrator or victim (or both). The long arm of the Internet and the permanence of the messages contained within tend to amplify the negative effects of cyberbullying, resulting in deeper psychological scarring than that which generally stems from most other forms of harassment. This emotional scarring goes on to limit those affected by cyberbullying in terms of both their democratic character development and their relationships to their political communities.

Not only does cyberbullying lead to significant individual and societal harms, but it has also proven itself to be challenging to control. The same anonymity that breeds cyberbullies also makes them difficult to find and hold accountable for their actions. Furthermore, the organic, informal and (often) amorphous nature of the social speech forums that arise online has meant that policing them necessarily presents challenges from the standpoints of both practicality and legality. Because the widespread harms of cyberbullying and other forms of online harassment are only beginning to be understood and officially recognized, the rules concerning the regulation of such offensive, harmful speech are still in their formative stages, and thus, remain unclear. In the United States, for example, laws concerning cyberbullying have been developed piecemeal, differing widely from state to state.<sup>1001</sup> In 2009, a bill was introduced in Congress [H.R. 1966] to at least establish a unified, federal definition for the term “cyberbullying,” but the proposal was

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<sup>1000</sup> See Mattathias Schwartz, “The Trolls Among Us,” in *The New York Times* (August 3, 2008).

<sup>1001</sup> More than twenty states have enacted some form of legislation in order to address cyberbullying, but these laws vary considerably, including: statutes that mandate that school boards adopt policies to address cyberbullying; statutes that criminalize the act of harassing minors online; and statutes aimed at providing education about cyberbullying. For a full list of state legislation on cyberbullying, see: National Coalition Against Censorship (NCAC), “Cyberbullying: Statutes and Policies.” Available at: <http://www.ncac.org/List-of-Cyberbullying-Statutes-and-Policies>

criticized for being too broad and did not advance.<sup>1002</sup> As of now, there are no federal laws prohibiting cyberbullying or establishing accountability.

As a result of this lack of federal legislation, Americans have looked to the judiciary to define online abuse and to determine which bodies ought to be held responsible for policing the Internet.<sup>1003</sup> Thus far, the courts have evaluated two distinct strategies for establishing liability. First, they have analyzed efforts from the school system to control cyberbullying. The results have been mixed, with the higher courts arguing that student speech is *generally* protected under the First Amendment unless it poses a *real* threat, but that schools do not *always* have the authority to punish student speech on the basis of content *even if* they find it to be harmful. Second, the courts have evaluated attempts to hold Internet service providers accountable for monitoring cyberbullying and online harassment on their sites. While the American judiciary has not always been receptive to this approach, it is proving successful in other western nations.

In this section, I describe the American judiciary's reaction to these two strategies, highlighting their advantages and disadvantages. Ultimately, I conclude that, despite limited popular support for approaches that require Internet service providers to manage the speech on their websites, this option is both more feasible and less constitutionally problematic than relying on the school system to control cyberbullying. That is not to say, however, that private regulation is sufficient to discourage cyberbullying and other forms of online harassment. Rather, any plan to eradicate cyberbullying must involve a comprehensive approach that includes Internet service providers, state officials and private citizens. At the end of this section, I offer several policy suggestions for all three actors.

To begin, the idea of using the school system as a potential alternative (or supplement) to federal legislative action challenging cyberbullying has gained significant public traction in recent years. Focusing on the prevalence of this phenomenon among children and teenagers, several

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<sup>1002</sup> H.R. 1966. Available at: <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966>

<sup>1003</sup> See Chapter Six for a more in depth discussion of the attempts to define cyberbullying.

states have recently been experimenting with laws that require school districts to punish students for their online activity if they believe it constitutes a “threat,” either to specific individuals (i.e. “fighting words”) or to school operations more generally. For example, in 2011, propelled by the Clementi suicide (discussed in Chapter Six), the New Jersey state legislature unanimously approved an extension to its 2002 anti-bullying law (N.J.S.A. 18A:37-13) in order to incorporate cyberbullying, using the educational system as its enforcement mechanism. The new law established an Anti-Bullying Bill of Rights, demanding that all public schools: 1) adopt comprehensive anti-bullying policies (incorporating eighteen pages of “required components”); 2) increase staff training; and 3) adhere to strict deadlines for reporting all bullying episodes.<sup>1004</sup> The New Jersey law presents a layered educational approach to managing cyberbullying, involving individuals, schools, school districts and state agencies. Each New Jersey school must establish a “safety team” (comprised of teachers, staff and parents), as well designate an anti-bullying specialist to review and investigate complaints. Each school district, in turn, must keep an anti-bullying coordinator on staff, and superintendents are required to provide biannual reports to the state capital detailing every episode of bullying in schools under their purview. The State Education Department then evaluates these efforts, grading the schools and districts based on their records. Educators who fail to comply with these regulations face the loss of their licenses.

While the New Jersey efforts have received widespread public support, many educators are concerned about their feasibility, especially given that cyberbullying regulations often extend to speech that takes place off campus. “I think this had gone way overboard,” explains Richard G. Bozza, executive director of the New Jersey Association of School Administrators. “Now we have to police the community 24 hours a day. Where are the people and the resources to do this?”<sup>1005</sup> Cyberbullying is a widespread problem that may take place at any time and in any

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<sup>1004</sup> New Jersey Anti-Bullying Bill of Rights Act, P.L.2010, Chapter 122, approved January 5, 2011, Assembly, no. 3466. Available at: [http://www.njleg.state.nj.us/2010/Bills/AL10/122\\_.PDF](http://www.njleg.state.nj.us/2010/Bills/AL10/122_.PDF)

<sup>1005</sup> Winnie Hu, “Bullying Law Puts New Jersey Schools on Spot,” in *The New York Times* (August 30, 2011).

number of arenas. Furthermore, it is not only students who engage in cyberbullying, but adults as well. As of now, the American school system does not have the authority or the resources to handle such a massive societal undertaking. To demand that the educational system be held responsible for its eradication saddles an already overburdened institution with a herculean (perhaps impossible) task.

Not only is it unrealistic for state and local laws to require schools to manage the extensive problem of cyberbullying, but these policies also raise free speech concerns. After all, as several recent cases have shown, students do retain some First Amendment rights both on campus and off. Schools do not have unlimited constitutional authority to limit the speech of their students, even when that speech clearly constitutes cyberbullying. In the 2001 case, *Killion v. Franklin Regional School District*, for example, a high school student, Zachariah Paul, sued his school after administrators suspended him for "abusive, lewd, and vulgar" comments made online about the school's athletic director.<sup>1006</sup> These comments were presented in the form of a "top ten" list, and were created on Paul's home computer before emailing a copy to his friends. Within a few weeks, copies of the list were distributed school-wide. A federal district court ruled against Paul's suspension, stating that the website, while in poor taste, did not constitute a substantial threat to school operations and that the student's actions were not punishable by the school because the website was created off school grounds on the student's personal computer.<sup>1007</sup>

The following year, in *Justin Swidler v. Bethlehem Area School District*, the courts changed course when a fourteen year-old student was accused of creating a website that included violent, malicious images and texts directed at his principal and algebra teacher.<sup>1008</sup> The

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<sup>1006</sup> Paul reportedly posted these comments in anger, after being refused a student-parking permit due to new regulations that impacted the school's track team. See *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (2001).

<sup>1007</sup> See *ibid.*

<sup>1008</sup> Among other things, the website featured a picture of Swidler's teacher's head dripping with blood and a caption that read, "Why should she die?" which was accompanied by several

teacher was so upset by this incident that she filed for medical leave to cope with her psychological distress. Because the school board believed this website to have had a deleterious effect on the entire school community, they sought to expel Swidler. Swidler challenged his expulsion in the Supreme Court of Pennsylvania, which ruled partly in his favor, finding that the messages on his website did not constitute a true threat to the teacher. The majority did, however, agree that his expulsion was not a violation of his First Amendment rights, as "the website created disorder and significantly adversely impacted the delivery of instruction."<sup>1009</sup>

In 2005, in *Ryan Dwyer v. Oceanport School District*, an eight-grade student was suspended after creating a website on his home computer titled, "I Hate Maple Place."<sup>1010</sup> On this site, Dwyer and several other students posted inappropriate content about his school and several teachers. School officials suspended Dwyer when they learned of his site. Dwyer, with the help of the ACLU, sued the school district, claiming that his suspension violated his Fifth Amendment right to due process. The court granted a partial summary judgment in his favor. The parties settled, and the school district issued an apology and paid \$117,500 in damages and lawyers' fees.

Finally, in the 2007 case, *State of Indiana v. A.B.*, the state of Indiana filed a delinquency petition against a Greencastle Middle School student after the school's principal discovered a MySpace web page where the student posted "vulgar" criticism of the school's anti-body-piercing policy, formed a publicly accessible group criticizing the school principal, Shawn Gobert, and created a fake user account in Gobert's name.<sup>1011</sup> The juvenile court ruled that, had an adult made these postings, they would indeed constitute criminal harassment. The Court of Appeals of Indiana, however, found that these comments were political speech, protected by the First

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reasons why she deserved to be killed. See *J. S. v. Bethlehem Area School District*, 807 A.2d 803 (Pa. 2002).

<sup>1009</sup> *Ibid.*

<sup>1010</sup> See *Ryan Dwyer v. Oceanport School District*, Civ. No. 03-6005 (SRC) (2005).

<sup>1011</sup> See *A.B. v. State of Indiana*, 67A01-0609-JV-372 (2007).

Amendment. In 2008, the Indiana Supreme Court upheld the appellate ruling but dismissed the Court of Appeals' rationale. The justices ruled that the state had not shown beyond a reasonable doubt that the student posted with the intent "to harass, annoy, or alarm," the principal, and that she had "no intent of legitimate communication" because she posted on her personal MySpace page, to which Gobert did not have access.

These four representative cases demonstrate the American judiciary's ambiguous response to the school system's attempts to punish cyberbullying. While the courts have found that cyberbullying, to the extent that it cannot be proved to constitute a real threat, either to an individual or to school operations, is *generally* protected under the First Amendment freedom of speech, they have also conceded that schools do not always have the authority to punish their students for the content of their speech, even if they find that harmful cyberbullying has taken place. As this imprecise framework suggests, the myriad judicial reactions to schools' attempts at regulating cyberbullying are not always consistent or predictable, but often appear to be decided on an ad hoc basis.

This case-by-case, court-by-court approach to determining what constitutes a real threat to school operations may stem from some uncertainty regarding the constitutional limitations placed on student speech by the landmark decision in *Tinker v. Des Moines Independent Community School District*. As discussed in Chapter Three, this case considered the right of three Iowa students to wear black armbands to school in protest of the Vietnam War. Ultimately, the majority observed that neither students nor teachers should be expected to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates."<sup>1012</sup> However, the court also conceded that the right to freedom of speech on campus is not absolute. The majority opinion continued on to say that, in order for school officials to justify censoring speech, they "must be able to show that [their] action was caused by something more than a mere desire

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<sup>1012</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>1013</sup>

In other words, schools can ban expression that would “materially and substantially interfere with the requirements of appropriate discipline in operation of the school.”<sup>1014</sup>

While subsequent cases have attempted to clarify what would constitute a material and substantial interference with the operations of a school, *Tinker’s* application is still unclear.<sup>1015</sup> Justice Clarence Thomas admits as much in his concurring opinion in *Morse v. Frederick* (a.k.a. the “Bong Hits 4 Jesus” case). In this case, the Supreme Court ruled that the free speech rights of a high school student, Joseph Frederick, were not violated when his Alaska high school suspended him for unveiling a 14-foot banner (reading, “Bong Hits 4 Jesus”) on a public sidewalk outside of the schoolhouse. The majority opinion, delivered by Chief Justice John Roberts, cites heavily from *Tinker*. While agreeing with the majority in its decision, Thomas did not sign on to the broader free speech limitations it placed on students, calling for a more precise framework for judging the constitutionality of student speech. “We continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not,” wrote Thomas. “I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not.”<sup>1016</sup> Such an ad hoc approach is bound to result in inconsistencies and a lack of clarity concerning students’ rights – this is as true for cyberbullying as it is for more traditional forms of political speech.

Thus, the educational system’s approach towards policing cyberbullying fails in two

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<sup>1013</sup> *Ibid.*

<sup>1014</sup> *Ibid.*

<sup>1015</sup> In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the Supreme Court upheld *Tinker*, but limited its scope by finding that a high school student’s sexual innuendo-laden speech at a student assembly did not merit free speech protections, despite the fact that such “indecent” speech may not undermine the educational process. Two years later, in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1966), the majority of the court further narrowed the decision in *Tinker* by allowing schools to regulate the content of “school sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,” “so long as their actions are reasonably related to legitimate pedagogical concerns.”

<sup>1016</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

respects. First, it is unrealistic to expect teachers and administrators to monitor the democratically disruptive speech of all its students, both on campus and off (to say nothing of all the cyberbullying victims and perpetrators who are no longer school-aged). Second, the unclear constitutional status of student speech has meant that the rules are uncertain and punishments are unpredictable. Internet speak defies traditional boundaries of organization. It does not take place within one community, one school, one town, one state or one nation. Online harassment may come from a classmate or a neighbor, or it may come from a stranger on the other side of the world. When traditional political institutions, tied to a particular geographical locale (e.g. school districts and states) attempt to address cyberbullying, they are limited by the boundaries of their authority. How do state courts handle online harassment that crosses state borders? National borders? If Americans are to place responsibility for cyberbullying on the local community by insisting that the school system regulate online behaviors, how do they limit its power? Does a school have the authority to regulate actions that take place entirely outside of school property, for example? If so, how does it account for its limited access to students' off-campus lives? And what if the cyberbully is an adult – do the schools still have the obligation and the authority to act? To whom do adults appeal when they are the victims of online harassment?

A more promising alternative to using schools as the enforcement mechanisms against cyberbullying, which takes into account all of these concerns, is to enable Internet service providers to police their own websites. Not only does this approach not interfere unduly with the First Amendment right to freedom of expression, but it is also able to account for the fluid boundaries of Internet communication.

Holding Internet service providers and individual websites accountable for the speech that occurs on their sites actually provides the least possible infringement upon the constitutional right to free expression, while still acknowledging the rights of individual users to be free from harmful online harassment. By its own language, the First Amendment applies only to Congress ("*Congress shall make no law...*"). Citing the Equal Protection Clause of the Fourteenth



Amendment, the Supreme Court has also extended freedom of expression to state and local governments in *Gitlow v New York*, thus ensuring that limitations on speech by all levels of government must pass muster under the First Amendment.<sup>1017</sup> These restrictions have been further expanded to corporations that work in concert with or on behalf of the government, such as government contractors.<sup>1018</sup> Otherwise, the First Amendment does not apply to non-governmental entities. This has meant that private corporation and organization are entitled to restrict speech, as long as such censorship is not shown to be discriminatory. This includes Internet service providers and websites. These private corporations may be offering a public service by limiting harmful speech, and in doing so, since they are not acting as state oppressors, they are acting within the limits of the First Amendment.

The first (semi) successful attempt to hold Internet service legally providers responsible for cyberbullying was evaluated in *United States v. Lori Drew*.<sup>1019</sup> Drew was a Missouri mother who, in concert with two others, created and operated a MySpace account in the name of a fictitious teenage boy, “Josh Evans,” in order to manipulate and harass a thirteen year-old girl named Megan Meier. (Meier was a neighbor and schoolmate of Drew’s daughter, who Drew suspected of spreading false rumors about her daughter.) In fall 2006, “Evans” reportedly sent Meier a message to the effect that the world would be a better place without her.<sup>1020</sup> This message set off a wave of communications from “Evan’s” MySpace connections, urging Meier to kill herself. Shortly thereafter, Meier committed suicide.

Drew was charged on four counts. Most controversially, she was charged with conspiracy arising out of a charged violation of 18 U.S.C. § 371, namely that Drew and her co-conspirators agreed to violate the Consumer Fraud and Abuse Act, 18 U.S.C. § 1030 (CFAA) by

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<sup>1017</sup> See *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>1018</sup> See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1995); and *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

<sup>1019</sup> *United States v. Lori Drew*, CR 259 F.R.D. 449 (C.D. Cal. 2009).

<sup>1020</sup> *Ibid.*

intentionally accessing a computer used in interstate commerce "without authorization" and in "excess of authorized use," and by using interstate communication to obtain information from the computer in order to inflict emotional distress in violation of 18 U.S.C. § 1030(a)(2)(C).<sup>1021</sup> Counts Two through Four alleged that Drew violated the CFAA by accessing MySpace servers to obtain information regarding Meier in breach of the MySpace's Terms of Service agreement on two separate occasions.<sup>1022</sup> The jury deadlocked on Count One, found not guilty on Counts Two through Four, and found Drew guilty of a misdemeanor violation of the CFAA.

The following year, however, the verdict was thrown out by United States District Judge George H. Wu, who stated that allowing a violation of a website's Terms of Service to constitute an intentional access of a computer without authorization or exceeding authorization would "result in transforming section 1030(a)(2)(C) into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanant criminals." For these reasons, Wu granted Drew's motion for acquittal. The government did not appeal.

While this action was not immediately successful in establishing a legal avenue for prosecuting cyberbullying in the United States, it ultimately did lead to a positive outcome. In response to the Drew case, on May 16<sup>th</sup>, 2008, Missouri legislators approved an amendment to the state's harassment law to include penalties for bullying via computers, other electronic devices, or text messages. Since then, other nations have also developed precedent for appealing to both the Internet service providers and individual websites in order to combat cyberbullying.

For example, in the United Kingdom, in 2012, Nicola Brookes was granted a high court order to force Facebook to reveal the identities of cyberbullies who had been targeting her with abusive messages on the social media website. Earlier that year, Brookes had been attacked with "vicious and depraved" abuse after she posted a comment in support of the former The X

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<sup>1021</sup> *Ibid.*

<sup>1022</sup> *Ibid.*

Factor contestant, Frankie Coccozza. Cyberbullies set up fake profiles, through which they spuriously claimed that Brookes was a pedophile and a drug dealer. Because the fake profiles created anonymity for the abusers, Brookes was unable to prosecute them. Once Facebook was required to reveal the names, email and IP addresses of those behind the abusive messages, Brookes was able to sue them each, individually. Unfortunately, these efforts may not amount to much in practice. While there are laws in place in the United Kingdom to help people like Brookes, by compelling website providers to combat cyberbullying, the state does not yet possess the necessary enforcement mechanisms. “This [harassment] is a criminal offence and we have the legislation to protect us, but what’s missing is the enforcement. This is where the system is failing us,” explained Rupinder Bains, a partner at the law firm, Bains Cohen (which is representing Brookes).<sup>1023</sup> “In the States people have committed suicide over this and that’s what will happen over here if things don’t change.”<sup>1024</sup>

Despite these failings, the Drew and Brookes cases are particularly interesting in that they highlights two aspects of cyberbullying that may pose challenges for schools and states that try to regulate it, but that are relatively easily managed by private websites: 1) the diversity of victims and perpetrators<sup>1025</sup> and 2) the lack of respect for physical boundaries.<sup>1026</sup> As these

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<sup>1023</sup> Josh Halliday, “Facebook forced into revealing identities of cyberbullies: Woman wins high court backing after she received abusive messages about post on The X Factor’s Frankie Coccozza,” in *The Guardian* (June 8, 2012).

<sup>1024</sup> *Ibid.*

<sup>1025</sup> A second recent example of cyberbullying that affected individuals of all ages and all stations of life involved the controversy surrounding England’s 2013 decision to replace Charles Darwin with Jane Austen on the on the £10 note. As the New York Times reported, this seemingly minor effort to accommodate a feminist campaign that called for the addition of a female image to the national currency (Queen Elizabeth II will soon be the only woman featured on an English banknote) was met with vitriolic messages online “including threats of rape and death, against several high-profile women.” Caroline Criado-Perez, one the founders of this campaign, reported receiving tweets, such as “I’m going to pistol whip you over and over until you lose consciousness,” on the day the decision was announced. Some cyberbullies offered still more specific threats; for example, Stella Creasy, a Labour Party legislator, was told “I will rape you tomorrow at 9pm. Shall we meet near your house?” See Katrin Bennhold, “Bid to Honour Austen Is Not Universally Acknowledged,” in *The New York Times* (August 4, 2013).

<sup>1026</sup> According to a January 2012 Ipsos poll for Reuters News, all 24 countries surveyed reported parental awareness of cyberbullying taking place within their communities. Although the rates of

cases show, cyberbullying is not a problem reserved only for children and teens. Brookes was in her mid-40's at the time this harassment took place, and her harassers likely included people from various races, age groups and socioeconomic backgrounds.<sup>1027</sup> And while Drew's victim was a schoolchild, Drew, herself, was the mother of a teenage girl. Brookes' experiences also demonstrate just how difficult it is to capture cyberbullying; bullies followed her from Facebook all over the Internet, even to such innocuous websites as recipe forums. They did not harass her from one physical location, but from all over the world, under various legal jurisdictions. Because Internet service providers are designed to exist beyond the confines of traditional political institutions and to manage all users, regardless of age or location, they are not bound by many of the same limitations plaguing state actors. Thus, they are especially well placed to take on at least some of the responsibility for policing cyberbullying.

Nevertheless, American public opinion has not been entirely favorable towards attempts to hold Internet service providers *legally* responsible for cyberbullying. In the Drew case, for example, many legal commentators expressed the "slippery slope" concern that the prosecution was seeking to criminalize *any* violation of web site terms of service. Andrew Grossman, a senior analyst for the Heritage Foundation, issued a statement against the lower court's decision: "If this verdict stands... it means that every site on the Internet gets to define the criminal law. That's a radical change. What used to be small-stakes contracts become high-stakes criminal

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awareness ranged significantly (15 percent for France to 77 percent for India), the mean international awareness of cyberbullying was a significant 38 percent. See Ipsos, "Three Quarters (77%) of World Citizens Say Cyberbullying Needs Special Attention and Cannot be Addressed Through Existing Anti-Bullying Measures" (January 9, 2012). Available at: [http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=5462#.Tw6exyC2\\_s.twitter](http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=5462#.Tw6exyC2_s.twitter).

<sup>1027</sup> While adults are often victims and perpetrators of cyberbullying, research tends to focus only on children and adolescents, "due to their tenuous developmental stage." As Peter Vishton, a program director in the National Science Foundation's Directorate for Social, Behavioral and Economic Sciences explains, although "adult cyberbullying is a problem, it's not an emergency situation." See Jennifer L. Thornhill and Bobbie Mixon, "Recognizing a Cyberbully: Anonymous nature of digital aggression clouds identities of virtual bullies." Available at: [http://www.nsf.gov/discoveries/disc\\_summ.jsp?cntn\\_id=122271](http://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=122271).

prohibitions.”<sup>1028</sup> Likewise, Jennifer Grankick, the civil liberties director at the Electronic Frontier Foundation, an organization dedicated to protecting First Amendment rights online, claimed that “[t]his is a novel and extreme reading of what [the law] prohibits. To say that you’re violating a criminal law by registering to speak under a false name is highly problematic.”<sup>1029</sup>

While any legal obligations placed on website operators have drawn criticism in the United States, voluntary efforts on the part of individual websites have generally been met with public approval. In terms of the latter, most criticism actually tends to argue that these sites are not choosing to do *enough*. Thus, many Internet service providers have already voluntarily adopted policies that attempt to eradicate cyberbullying and punish perpetrators. For example, Facebook decided to tackle its cyberbullying problem head on.<sup>1030</sup> Facebook has a Family Safety Center on its site, which offers advice for parents, teachers, teens and law enforcement agents. While some of these suggestions may not appear terribly powerful—the first step that they advise is for cyberbullying victims to simply “unfriend” or “block” their attackers—Facebook also has policies in place to confidentially report abuse with the click of only a few buttons. In November, 2013, the social network unleashed its Bullying Prevention Hub, which enables users to anonymously report bullying incidents, and also provides information for victims on what they can do when they find harassing content, recommendations to parents who want to help and guidance to the bully so that she can better understand her actions. Users are encouraged to report any abuse they come across, whether that be on their own page or someone else’s page, thus enabling them to police one another. At least in theory, a member of the anti-bullying team

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<sup>1028</sup> Brian Stelter, “Guilty Verdict in Cyberbullying Case Provokes Many Questions Over Online Identity,” in *The New York Times* (November 28, 2008).

<sup>1029</sup> See Kim Zetter, “Experts Say MySpace Suicide Indictment Sets ‘Scary’ Legal Precedent,” *Wired* (May 15, 2008). Available at: <http://www.wired.com/threatlevel/2008/05/myspace-indictm/>

<sup>1030</sup> In 2011, Consumer Reports estimated that one million of Facebook’s twenty million teenage and pre-teenage users had experienced bullying, harassment or threatening language on its site in the previous year. See Consumer Reports, “Online Exposure: Social networks, mobile phones, and scams can threaten your security” (June 2011). Available at: <http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/online-exposure/index.htm>.

reviews each of these reports so that appropriate actions can be taken.

An Internet service provider does not need to be as large or well funded as Facebook, however, to implement measures to limit online harassment. I suggest four options that nearly all Internet service providers and websites could adopt in order to address the problem of cyberbullying: 1) modify Terms of Service agreements to include clauses against harassment; 2) monitor their sites for harmful content; 3) ensure easy (and anonymous) reporting mechanisms for harassment; and 4) restrict access for those who have repeatedly infringed upon the rights of others. The fact that many social networking sites already have similar mechanisms in place proves that they are both feasible and publicly desirable. As smaller websites try to emulate industry leaders, like Facebook, the public should expect to see similar policies expand so that they exist universally.

It is not enough, however, to rely solely on the efforts of Internet service providers and websites to solve the societal problem of negative online social speech. After all, cyberbullying is not a problem that is entirely of the Internet's making. If there is any hope to stop cyberbullying and other forms of online harassment, there must be a joint effort between Internet service providers, state actors and private citizens.

In terms of government action, legislators need to recognize that private policing will never be fully effective until the United States develops unified standards for what constitutes "cyberbullying." That is why I suggest that Americans begin by encouraging Congress to take a second look at H.R. 1966, and to develop a definition for cyberbullying that is no longer "too vague" to be effective. Several federal organizations are already working towards this goal. The U.S. Department of Health and Human Services, for example, has its own website dedicated to clarifying to concept of cyberbullying and spreading awareness:

<http://www.stopbullying.gov/cyberbullying/>. This website contains a special section devoted to cyberbullying with advice and videos geared towards children. It clarifies the distinction between

cyberbullying and traditional, face-to-face bullying, as well as offers suggestions to parents and children for how to prevent and report cyberbullying.<sup>1031</sup> On this site, one can also find a list of all state rules regarding cyberbullying – the authors include a December 2010 study by the U.S. Department of Education, which reviews state laws and identifies eleven common, key components of cyberbullying regulations.<sup>1032</sup> Efforts such as these, performed by administrative agencies, ought to make the legislative task of defining cyberbullying that much easier.

By opening up the discussion about cyberbullying, and by recognizing that there is a national interest in protecting citizens from harassing social speech, attitudes about what is acceptable to say online should begin to change. The most powerful option for limiting exposure to negative social speech is for people *not to want to engage in it*. This means changing people's sensibilities and making them aware of the potentially far-reaching effects of their negative social speech online. As Arturo Bejar, Facebook's director of engineering (who is credited with developing the site's custom-made system for addressing bullying and harassment) explained in an interview with Emily Bazelon, social networking sites are not distinct from the offline world. The way people treat one another online is just another expression of the community norms and values that they hold offline. "Everyone I talk to has a big divider in their head, as if the way to resolve conflict is different if a kid is online versus sitting in a park... But our biggest insight, in the work we're doing now, is that there isn't a big separation between online life and real life in terms of social structures. Facebook shouldn't be in the business of dictating and enforcing community norms. People should enforce their own norms."<sup>1033</sup> To be effective, social networking sites

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<sup>1031</sup> Note that one of the suggestions for reporting cyberbullying is to appeal directly to online service providers. The site reminds users that cyberbullying is often a violation of the terms of service established by social media sites and Internet providers. See [stopbullying.gov](http://www.stopbullying.gov), "Prevent Cyberbullying," United States Department of Health and Human Services. Available at: <http://www.stopbullying.gov/cyberbullying/prevention/index.html>.

<sup>1032</sup> [stopbullying.gov](http://www.stopbullying.gov), "Key Components in State Anti-Bullying Laws," United States Department of Health and Human Services. Available at: <http://www.stopbullying.gov/laws/key-components/index.html>

<sup>1033</sup> Emily Bazelon, *Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy* (New York: Random House, 2013), pp. 260.

cannot be the sole actors when it comes to policing behaviors. The most important step is for people to work together to develop standards that encourage good democratic citizenship and discourage harassment.

The current “Be More Than a Bystander” campaign, organized by the Advertising Council, offers a model for how to go about increasing awareness and changing people’s attitudes towards harassment, generally, and cyberbullying in particular.<sup>1034</sup> This campaign has its own website, and also puts forth a series of print and online ads that promote the idea that it is not enough simply not to bully others – spectators also need to speak up in the face of abuse, whatever the form and wherever the context. The “Be More Than a Bystander” ideology is based on the premise that, if witnesses know what to do, they can take steps, as private individuals (e.g. removing the victim from the situation or reporting to an adult), to defuse bullying. In other words, the key to combatting cyberbullying is to build awareness that cyberbullying is a problem, not just when it happens to you, but when it happens to anyone.

“Be More Than a Bystander” is highly integrated with social networking website providers, government actors and private citizens. The very approach of targeting spectators was inspired by studies of students done by Facebook, which found that half of all teens surveyed had either done little to help or had not seen someone else help in cases of bullying.<sup>1035</sup> In addition to

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<sup>1034</sup> See the [stopbullying.gov](http://www.stopbullying.gov), “Be More Than a Bystander.” Available at: <http://www.stopbullying.gov/respond/be-more-than-a-bystander/>.

<sup>1035</sup> See DoSomething.org, “The Bully Report: Trends in Bullying Pulled from Student Facebook Interactions.” Available at: [http://files.dosomething.org/files/campaigns/bullyreport/bully\\_report.pdf](http://files.dosomething.org/files/campaigns/bullyreport/bully_report.pdf). According to a PEW Internet Research Center Survey, 95 percent of social media-using teenagers who have witnessed cyberbullying say that they have seen others ignoring this behavior. Fifty-five percent witness this frequently. Similarly, ninety percent of social media-using teenagers admit to personally ignoring cyberbullying when they witness it. Thirty-five percent confess to doing this frequently. See Amanda Lenhart, Mary Madden, Aaron Smith, Kristen Purcell, Kathryn Zickuhr and Lee Rainie, “Teens, Kindness and Cruelty on Social Networking Sites: How American teens navigate the new world of ‘digital citizenship,’” Pew Research Center’s Internet & American Life Project. Available at: [http://www.pewinternet.org/~media/Files/Reports/2011/PIP\\_teens\\_Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://www.pewinternet.org/~media/Files/Reports/2011/PIP_teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf)



Facebook, the campaign is also working with groups like AOL; the federal education and health departments; and more established anti-bullying agencies, such as the Free to Be Foundation. By encouraging private citizens, social media websites, Internet service providers and government actors to work together to combat abusive social speech online, “Be More Than a Bystander” is especially well poised to change attitudes. Through its ads, videos and celebrity public service announcements (featuring: Marlo Thomas, Alan Alda, Anderson Cooper, Brian Kenny, Sean Casey, Dan Plesac), has managed to get its message heard by a wide, bilingual audience. (Univision has Spanish-language ads for television, radio and online.) And it does seem to be increasing awareness. Facebook has been promoting the campaign by hosting a “Stop Bullying: Speak Up” page, and it already has over 1.3 million “likes” and nearly 140,000 pledges to stop bullying.

By investing resources into expanding campaigns that educate the public about cyberbullying and developing a clear understanding of the problem, state and private actors should be able to go a long way towards preventing cyberbullying and other forms of negative social speech online. The more that average individuals understand what cyberbullying is, how to prevent it and what is at stake when they are taking part in negative social speech online, the less likely they will be to engage in cyberbullying or condone such behavior in others. To the extent that these problems continue to occur, empowering Internet service providers to police the communication on their sites offers a constitutional and effective option for reducing instances of cyberbullying. By working together to eliminate cyberbullying, Internet service providers, state actors and individual citizens will also minimize the potential harms that such negative communication pose for democratic citizenship, such as alienation, eroding social trust and weakened community ties.

## **II. Safe spaces:**

While the previous sections identify several easily implementable policy suggestions for both encouraging online social speech that positively contributes to democratic citizenship and also discouraging online social speech that has a negative impact, safe spaces represent one area of social speech where external regulations on internal communication can often have a deleterious effect. That is because safe spaces, by definition, exist outside of traditional, politicized structures that favor white, male, middle class values. As Chapter Six described, safe spaces are places where those who have traditionally been marginalized and underrepresented by conventional political processes can feel at ease to express themselves openly among peers who share similar backgrounds and experiences of oppression. Where communities have spontaneously developed safe spaces, they have already recognized the need for communal areas that are relatively insulated from mainstreams norms, values and judgments. To paternalistically insert external regulations into these spaces might compromise the participants' abilities to communicate freely and openly, thus defeating the very purpose of their existence.

Thus, in this first part of this section, I argue that, where safe spaces already exist naturally, the strongest option for positively influencing the character of the safe space social speech is to allow members of these discussion groups to self-regulate. In order to remain true to the objectives of safe space communication, most of the structuring of these forums should take place informally and through in-group social pressures. However, since any internal enforcement mechanisms will be colored by external official and cultural influences, it is also important that efforts be made to teach the majority community to appreciate safe space speech for their potential impact on liberal democratic governance.

On the other hand, there are certain safe spaces that may benefit from more formal regulation and external input. Where subjugated groups have not seen a sufficient number of safe spaces spring up organically, actors may be called upon to purposefully build such discursive arenas and establish rules of conduct. These safe space architects may be in-group members and potential participants, or they may be "allies" who come from the mainstream

community. In either case, by influencing the institutional arrangements of their artificially constructed safe spaces, these actors are able to shape the nature of safe space social speech in ways that make it especially likely to contribute *positively* towards democratic citizenship. While this may not be ideal for all communities (especially those that already have a long tradition of safe space communication), these purposefully constructed safe spaces have been found to be a useful tool in improving confidence in their participants, uniting marginalized communities, and building democratic values.

In the latter portion of this section, I assess the example of a Massachusetts middle school that built and utilized safe spaces in order to successfully improve its achievement gap and unite the student body. I also look to efforts at the university and professional level to create safe spaces and control the level of conversation that takes place within them. Ultimately, I conclude that, to the extent that these programs are able to actively push for social speech that educates and unites participants while at the same time discouraging communication that might lead to increased isolation and polarization, they serve a useful purpose, not only for the community being addressed, but also for society as a whole. Thus, these voluntary efforts to establish and regulate safe spaces should be encouraged, through additional funding and easy access to information.

#### *A. Proposals for improving traditional safe spaces*

Before examining consciously constructed safe spaces, it is important to consider how their naturally occurring counterparts should be structured in order to best develop positive democratic character traits (e.g. confidence and eagerness to participate), provide civic education and promote ideological advancement, while still avoiding the pitfalls of group polarization and alienation. There are many different avenues to achieving these goals. However, at a minimum, safe space institutions should maintain three characteristics: 1) internal freedom and equality, 2)

reflectivity and 3) an orientation towards social inclusiveness.

First, in order to promote good liberal democratic citizenship, safe spaces must ensure that conversation is as free and egalitarian as possible. Even within safe spaces, hierarchies and power imbalances still persist. This may lead some participants to contribute less—in terms of both frequency and strength—than others. Since safe spaces should ideally both demonstrate to members of marginalized groups that they and their opinions are of value, and also provide them with the opportunity to practice democratic citizenship activities, once they are a part of the group, it is important that everyone be supported and encouraged to contribute.

Second, not only should safe space participants share their experiences with one another, but they also ought to be encouraged to make sense of them as a unit. Safe space interactions enable participants to communally evaluate their life experiences and relative social positioning. The ability to freely disclose personal anecdotes is important in itself, but so too is the opportunity to discuss what they mean in a wider context. It is by promoting these kinds of evaluative group conversations that safe spaces make it possible for individuals to define themselves (in contrast to the majority culture) and develop group-specific moral codes.

Finally, safe space communication should maintain the goals of bridging communities and getting members of subjugated ascriptive groups to become more active in wider political affairs. After all, the idea is not for participants to live inside of safe spaces; rather, these communicative arenas are meant to act as islands of safety into which members of marginalized groups can retreat and regroup, but primarily in order to better arm themselves for their interactions with the majority community. It is for that reason that safe space social speech that emphasizes difference and isolation, must be avoided. Instead, safe space social speech should attempt to discover commonalities, not just within the in-group, but also within the entire political community. Furthermore, participants should use safe space interactions to experiment with strategies and positions that might facilitate democratic cooperation. In these ways, safe space

social speech is able to promote the liberal democratic values of inclusiveness and equality.

These three characteristics—freedom/equality, reflectivity and inclusiveness—should not necessarily be imposed upon safe spaces from the outside, however. As discussed above, often, the most effective and lasting tool for regulating human interaction is social pressure. This is especially true in the case of safe spaces, where outside involvement may threaten the very purpose of these institutions. Thus, rather than imposing external regulations, I believe that the best method for promoting the kind of safe space social speech that would be most likely to lead to positive democratic outcomes is to work to change the attitudes of those inside the group. Too often, participants in safe spaces see their activities as something outside and apart from political action. Speakers may actually trivialize their own achievements, thus making it less likely that they will thoughtfully consider the tone and content of safe space dialogues. A primary reason for this attitude is that there has been limited mainstream recognition of the vital role that safe spaces play in building political skills, forging confidence and fostering a sense of community.

It is in this area that the outside community can rightfully influence the nature of safe space social speech. Studies such as this one, which aim to increase awareness of the role that social speech plays in democratic life, may eventually come to refine attitudes towards social speech more generally. The more that people understand the functions of social speech and come to appreciate the potential democratic impact of everyday communication, the more likely that such discursive activities will receive official, formal recognition. And through efforts by identity scholars—such as black feminist and LGBTQ (Lesbian, Gay, Bisexual, Trans\* and Questioning\*) theorists—to elevate the status of safe spaces and include them in discussions about social speech, a more accepting attitude should, over time, come to apply to these spaces as well.

The academic community need not act alone in order to transform the average American's sensibilities regarding safe space social speech, however. The media may also be

looked to in order to spread the idea that informal, everyday conversation can have real, lasting effects on liberal democratic citizenship. Already, Hollywood has taken it upon itself to distribute several films that promote the value of safe space communication and validate the lives of safe space participants. Tim Story's *Barbershop* movie franchise, for instance, highlights the experience of everyday communication in a safe space, drawing attention to the ways by which these seemingly innocuous experiences add up to a lasting sense of community.<sup>1036</sup> By painting these activities in a positive light, the *Barbershop* films—as well as other media efforts to portray the actual social experiences of so many minority Americans—have connected with a large audience and have proven themselves to be major box office draws.<sup>1037</sup> Thus, these films not only validate the experiences of individuals who personally engage in safe space speech, but as a result of their popularity, they also develop awareness among members of the majority community, who might never have engaged in safe space social speech.

Developing a general consciousness of the value of social speech in safe spaces and its potential political outcomes is an important step in both positively influencing the nature of such speech and also decreasing its potential negative effects. Much as in the case of Internet speak (discussed above), more widespread acknowledgement that social speech is, itself, a political act, will likely encourage individuals to approach their social interactions more thoughtfully. This should mean that participants choose their words and their tone more carefully from the perspective of liberal democratic values, adhering to the three qualifications described earlier in this section. It should also mean that they utilize informal social enforcement to encourage other members of their discursive communities to do the same. In other words, if there is a sense that what takes place in safe spaces matters for political outcomes, groups will be likely to take on a

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<sup>1036</sup> The movie franchise includes: *Barbershop* (2002), *Barbershop 2: Back in Business* (2004) and *Beauty Shop* (2004). The films also spurred a series on the Showtime cable network, titled *Barbershop: The Series*.

<sup>1037</sup> The first two *Barbershop* films, alone, raked in \$142,924,054.00 in worldwide box office sales. See “Box Office History for *Barbershop* Movies,” The-Numbers.com. Available at: <http://www.the-numbers.com/movies/franchise/Barbershop>.

more active role in self-regulation. Social pressures could be used to ensure that safe space speech be positive and affirming, and also to limit its exclusionary potential.

Furthermore, if participants (and potential participants) in safe space social speech understand their communication to be, not just idle chatter, but part of a larger network of political action that will lead to their own empowerment, they are likely to feel less guilty about the time they spend in informal, social gatherings. They might, therefore, also become more likely to increase the length and frequency of these gatherings. As for the people who manage these spaces (i.e. homeowners, barbershop owners, etc.), awareness of the value of social speech should encourage them to make their safe spaces more available and conducive to communication. This could mean anything from keeping longer business hours to encouraging patrons to stick around after services have been completed.

#### *B. Proposals for structuring artificial safe spaces*

While the previous section considered informal, naturally occurring safe spaces, it is important to note that some safe spaces are developed more formally and deliberately. As Patricia Hill Collins explains in *Black Feminist Thought*, safe spaces may present themselves in several different forms. “In some cases,” Collins writes, “such as friendships and family interactions, these relationships are informal, private dealings among individuals. In others, as was the case during slavery, in Black churches, or in Black women’s organizations, more formal organizational ties have nurtured Black women’s communities.”<sup>1038</sup> But there is also a third option – a hybrid that incorporates the informal purpose and style of friendship and family interactions with the formal institutional arrangements of black churches and women’s organizations. These safe spaces are the result of programs explicitly designed to establish communicative arenas—either through members of the in-group or by outsiders—in order to provide members of

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<sup>1038</sup> Patricia Hill Collins, *Black Feminist Thought* (New York: Routledge Classics, 2009), pp. 112.

marginalized groups with places where they can communicate casually and socially with one another. Because of their more formal and institutionalized nature, these manmade safe spaces can be structured to encourage that communication that unites and discourage that, which divides.

As safe spaces have begun to earn recognition for the role they play in determining democratic outcomes, it has become increasingly popular for state and nonprofit organizations to institute programs that build safe spaces where they have not already arisen organically. Such programs are varied, but overall, the results appear to have been encouraging from the perspective of liberal democratic values. For example, in her book, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race*, Beverly Daniel Tatum positively evaluates safe space efforts at a Massachusetts middle school, which participated in the Metropolitan Council for Educational Opportunity (METCO) program.<sup>1039</sup> Under the METCO program, suburban schools could opt to undergo voluntary desegregation by bussing students in from nearby Boston. Unfortunately, as Tatum explains, METCO schools often found themselves with a large achievement gap between the (mostly black) students who were bussed in and the (mostly white) students who already belonged to the district. In order to reduce this gap and increase academic achievement overall, the school under review introduced Student Efficacy Training (SET). Under this program, Boston students (along with two staff members) were required to meet for one period each day to talk to one another, essentially creating a mandatory safe space.<sup>1040</sup> As Tatum reports, within these supportive communities, students discussed their schoolwork, but even more importantly, they also talked about their experiences of racism, anxiety, feelings of isolation, etc.

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<sup>1039</sup> Beverly Daniel Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race* (New York: Basic Books, 1997), pp. 71-74.

<sup>1040</sup> These meetings took place instead of elective courses, such as physical education, home economics and study hall.



Despite initial skepticism, within only a short period of time, both students and faculty came to see the safe space program as a success.<sup>1041</sup> In her book, Tatum points to school records, as well as student accounts of the program, in order to demonstrate SET's significant positive impact on the grades of Boston students. Such improvements are largely attributed to the rules and standards of SET safe spaces, which encourage students to engage in discussions that emphasize unity, strength through community and social success.

As one of the SET students explains, the frank, open dialogues, which take place within the psychological safety and support of their own peer group, have enabled students to "become like one big family."<sup>1042</sup> The same student goes on to explain how, as with a family, SET students tend to look out for one another, even outside the insulation of their safe spaces: "We always stay on top of each other 'cause we know it's hard with African American students to go to a predominantly White school and try to succeed with everyone else."<sup>1043</sup> Besides just encouraging affective bonds within the group, SET discussions are specifically directed so that they emphasize strategies for success within the wider community. As a result, these safe space interactions have been able to actually change the peer culture from one that encouraged separatism and nonconformity to "one that supported academic performance."<sup>1044</sup> As one of the instructors of SET students describes, involvement in this program did ultimately result in greater participation of Boston students within the wider school community. "My students are more engaged," she explains. "They aren't battling out a lot of issues of their anger about... where do I

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<sup>1041</sup> When SET was first introduced, many of the Boston students were "resentful" at being separated and forced to miss class. However, these attitudes quickly changed. One student, in particular, attributed her improved feelings towards SET to the performance records: "I know that last year out of all the students, sixth through eighth grade, there was, like, six who were actually good students. Everyone else, it was just pathetic, I mean, like, they were getting like Ds and Fs... The eighth grade is going much better this year. I mean, they went from Ds and Fs to Bs and Cs and occasionally As... And those seventh graders are doing really good, they have a lot of honor roll students in seventh grade, both guys and girls. Yeah it's been good. It's really good" (Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria?* pp. 72).

<sup>1042</sup> Ibid.

<sup>1043</sup> Ibid., pp. 72-73.

<sup>1044</sup> Ibid., pp. 72.

fit, I don't belong here... I think [these issues] are being discussed in the SET room, [and thus] the kids feel more confidence. The kids' grades are higher, the homework response is greater, they're not afraid to participate in class, and I don't see them isolating themselves within class. They are willing to sit with other students happily."<sup>1045</sup>

While "[i]t might seem counterintuitive that a school involved in a voluntary desegregation program could improve both academic performance and social relationships among students by *separating* the Black students for one period every day," as Tatum explains, "if we understand... the legitimate need they [adolescents of every color] have to feel supported in their identity development, it makes perfect sense."<sup>1046</sup> As discussed in Chapter Six, for many members of ascriptive groups that have traditionally been excluded from mainstream political and social recognition, before they can be expected to willingly and effectively engage in community life, they must be afforded the opportunity to develop a positive sense of their own group identities. When this process of self-identification takes place in an environment that also emphasizes empowerment, community participation and integration, safe space participants are especially likely to become engaged with the wider community.

Thus, the SET framework appears to have been successful because, not only does it recognize a need for safe spaces, but it also established norms and standards that ensure democratically productive speech. SET staff members (and later the students, themselves) actively encourage positive, supportive, community-minded communication, while stifling more divisive content and negative attitudes. This teaches participants to identify with and support one another, while also focusing on integration and strategies for achievement within the wider community. Thus, the example of programs like SET may alleviate some of the concerns that exclusionary safe spaces lead participants to isolate themselves from the wider society. When

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<sup>1045</sup> *Ibid.*, pp. 73.

<sup>1046</sup> *Ibid.*, pp. 73-74.

properly managed to encourage positive social speech and limit negative social speech, safe spaces can serve as a tool for social integration.

The benefits of programs that are aimed at establishing safe spaces and populating them with positive, democratic social speech are not only applicable to middle school students, however. As Tatum argues, racial development does not end at puberty. This also applies to gender and sexuality development. The process of defining one's self-identity and her relationship to her community is an ongoing, life-long activity for many members of marginalized groups based on ascriptive characteristics. In recognition of this fact, a number of organizations have recently sprung up, which introduce formal safe spaces into university and professional settings.

The LGBTQ community has been notably proactive in instituting such programs. The Safe Zone Movement, as it has been called, aims to introduce highly structured safe spaces to adult communities in order to provide LGBTQ individuals (and their allies) with zones of free and open communication. Many universities now have their own safe zone programs; however, several nonprofit organizations have also recently emerged to provide more uniform training and guidelines for development of school and workplace safe spaces.<sup>1047</sup>

For example, the Gay Alliance organization runs its SafeZone program, which is available to colleges, universities and private employers. According to their website, this program is designed to "develop, enhance and maintain environments in workplaces, schools and other social settings that are culturally competent and supportive to LGBTQ individuals, as well as straight identified people who care about diversity, equality and inclusion."<sup>1048</sup> In order to achieve these goals, the Gay Alliance offers customizable SafeZone Training for those interested in

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<sup>1047</sup> For a representative example of a university safe zone program, see North Dakota State University, "Safe Zone Training: 2010," Equity Diversity Global Outreach. Available at: [http://www.fs.fed.us/cr/Safe\\_Zone\\_Training\\_PacketUpdated.pdf](http://www.fs.fed.us/cr/Safe_Zone_Training_PacketUpdated.pdf).

<sup>1048</sup> Gay Alliance, "SafeZone Training Programs." Available at: <http://www.gayalliance.org/safezonet.html>.

bringing these safe spaces to their communities. While this training might be somewhat minimal—ideally, taking the form a two to four hour workshop, which discusses “inclusive language, the process of coming out, the power of the straight ally, understanding sexual identity, how to respond to homophobic/transphobic incidents, where to go for help”—it is meant to ensure that the resulting safe spaces be in keeping with liberal values and that they maintain norms of equal respect and inclusion.<sup>1049</sup> According to the Gay Alliance website, training is meant to “give participants the skills they need to provide support and to create environments that are safe, welcoming and inclusive.”<sup>1050</sup> Divisive speech, while tolerated, is discouraged.

Similarly, the Safe Zone Project offers colleges and universities across the United States a free two-hour online curriculum for running their own workshops on how to build safe spaces and train facilitators. These Safe Zone workshop are “meant to educate individuals about LGBTQ issues and help members of college communities (students, professors, administrators, and staff) become better allies to LGBTQ students and more aware of gender and sexuality issues.”<sup>1051</sup> According to the website, the program stresses three essential elements for creating a successful Safe Zone.<sup>1052</sup> First, a safe space must be a place free of judgment, where people are at ease and willing to honestly communicate with one another. Second, community members must be committed to educating one another, whether that be through sharing personal narratives or contributing thoughtful reflections on the group’s position in society. Finally, the Safe Zone Project’s safe spaces must maintain an atmosphere that encourages individuals to ask any and all questions they might have.

Among these safe zone programs, there is some variation in the details of what constitutes an ideal safe space (e.g. some programs suggest designating certain physical spaces

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<sup>1049</sup> Ibid.

<sup>1050</sup> Ibid.

<sup>1051</sup> Safe Zone Project, “What are Safe Zones?” Available at: <http://thesafezoneproject.com/what-are-safe-zones/>

<sup>1052</sup> Safe Zone Project, “Philosophies of Safe Zone Workshops.” Available at: <http://thesafezoneproject.com/about/philosophies-of-safe-zone-workshops/>.

as safe zone and others emphasize a mobile, fluid community); however, for the most part, all such programs abide by three governing principles, similar to those espoused by the Safe Zone project. First, programs generally agree that safe spaces ought to focus on discussion and interpersonal activities in order to educate and facilitate discussion. Second, while certain safe zone programs encourage the use of a group leader (others, by contrast, are entirely peer run), none of them tend to be overly hierarchical. Everyone is encouraged to participate, and questions need not be directed at any one individual. Third, safe zone programs are grounded in the belief that their discussion groups ought to make people think. An explicit pillar of the Safe Zone Project, for example, is to “make participants uncomfortable.”<sup>1053</sup> Group members are supposed to push themselves to question the world around them and evaluate the social positioning of marginalized groups.

In sum, safe zone programs aim to contribute to the establishment of safe spaces that teach good democratic citizenship traits (e.g. courage and confidence), enable members of subjugated groups to practice at civic participation and lead to the development of new ideologies – all of the characteristics that define positive safe space social speech. As such, these programs ought to be encouraged and expanded. Organizations that provide schools and workplaces with the tools and frameworks for instituting ideal safe spaces should receive public recognition and support for the work that they do. Likewise, private and public institutions ought to be emboldened to experiment with various methods for establishing and managing ideal safe spaces.

Given the relatively low cost of bringing well-structured safe spaces to a variety of settings—in many cases, materials are free, staff is redundant and there is no need for a set physical location—these measures should not pose an undue burden on America’s limited store of educational funding. As school and workplace officials come to recognize the advancements

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<sup>1053</sup> Ibid.

in equality and inclusiveness that result from artificial safe space programs, they will conceivably be willing to fund these programs on their own. To the extent that the costs associated with the implementation of artificial safe spaces are too high for certain organizations, they could be subsidized through private grants from equal rights groups and minimal government assistance. (Schools that voluntarily institute safe space programs, for instance, might find themselves the recipients of various grants aimed at increasing educational equality.) While such measures, which are inherently exclusionary, may initially appear politically controversial, there is also clearly a public interest in the liberal democratic values that safe spaces aim to promote. To the extent that these values can be shown to have actually been furthered through artificial safe space programs, such minimally intrusive programs merit official support.

### III. Hate speech:

Unlike both Internet speak and safe space speech, hate speech has only a limited potential to positively affect liberal democratic goals and political outcomes. As I described in Chapter Six, hate speech is used as a tool for denigrating individuals and for forging social divisions. It is the very essence of hate speech not only to distinguish “others,” but also to make them feel inferior. “The wrong of this dignitary affront,” Richard Delgado explains, “consists of the expression of a judgment that the victim of the racial slur is entitled to less than that which all other citizens are entitled.”<sup>1054</sup> By expressing the message to both victims and non-victims that members of targeted groups are unworthy of equal dignity and respect, I argue that hate speech—especially when it takes place in the social sphere—contributes negatively to democratic citizenship and political outcomes in two ways: 1) it promotes to development of poor democratic characters; and 2) it encourages the division and polarization of social groups.

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<sup>1054</sup> Richard Delgado, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling,” in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw (eds.) (Boulder, CO: Westview Press, Inc., 1993), pp. 94.

First, an environment that condones hate speech leads individual targets to develop weak democratic citizenship characteristics. Especially when it is a part of the social milieu, hate speech contributes negatively to the socialization of its targets, resulting in the promotion of certain character traits that are likely to make democratic participation more challenging. Specifically, rather than develop into the kind of confident, powerful, engaged citizen that is required by liberal democratic states, an individual who is victimized by hate speech in the social sphere is likely to grow into a dejected adult, who is skeptical of her personal autonomy and political efficacy. Such an individual is less likely to opt to expend the energy necessary to participate in democratic self-governance, and is also less likely to perform successfully if she ever does engage in the political process.

Second, by belittling victims as a group, based on shared ascriptive characteristics, social hate speech solidifies (and then reinforces) any preexisting boundaries between in-groups and out-groups. As victims of hate speech are exposed to negative messaging, they may respond by isolating themselves socially and politically. Where the majority community accepts the existence of hate speech, many of its victims are likely to feel betrayed by their peers and unwelcome in society. Thus, instead of participating in wider public affairs, they may choose to retreat into their own communities. The division between in-groups and out-groups may be further exacerbated to the extent that targets of hate speech come to absorb and reproduce the negative messaging about them. Over time, exposure to such behavior patterns may lead even those members of the majority community who do not condone the ideas being espoused through hate speech to begin to separate themselves. Thus hate speech comes to reproduce its underlying ideologies over time. Not only is this morally problematic, but the resulting weak social trust makes political cooperation more challenging for both sides of the divide.

The dual harms that social hate speech inflicts upon liberal democratic citizenship and political outcomes—the development of weak democratic citizenship traits and the reinforcement of divisions between in-groups and out-groups—are nothing to be trifled with. Social hate speech

compromises the ability of its victims to participate freely and effectively in democratic politics. This means that there is a national interest in preventing (or, at least, limiting the scope of) such speech. As described in Chapter Six, much of the liberal, democratic West has already acknowledged the potential of social hate speech to produce such widespread negative effects, and has utilized legal and constitutional measures to curtail its influence. In the United States, however, while the personal and public harms of hate speech are widely conceded in theory, in practice, these risks are not generally considered substantial enough to justify curbing the deeply cherished First Amendment freedom of speech (and the liberal tradition of individual rights from which it stems).<sup>1055</sup> It is only when hate speech can be demonstrated to have served as a direct incitement to violence that it may be legally curtailed.

In these sections, I review several possible approaches for combatting the negative effects of social hate speech in the United States. I begin by addressing the legal option, ultimately concluding that the legal censorship hate speech legislation is an undesirable option. However, while the harms associated with inviting the law into the homes, schools and workplaces of everyday citizens in order to regulate the content of their speech generally outweigh the benefits incurred by censoring social hate speech, that does not mean that there is *no* appropriate role for the state to play. In the second section, I explain how the state may rightfully combat hate speech in several ways: 1) by establishing clear, uniform standards for what constitutes hate speech; 2) by promoting anti-discriminatory ideologies; and 3) remedying the social imbalances that contribute to in-group/out-group hatred. However, I argue that these efforts, alone, will be not sufficient to eliminate social hate speech – ultimately, it must be left up to private citizens to police themselves.

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<sup>1055</sup> As described in Chapter Six, even within the United States, there is some historical precedent for the regulation and prevention of hate speech as a matter of group libel. See *Beauharnais v. Illinois*, 343 US 250 (1952).



But first, it is important to note that these findings are only applicable in the American context. I agree with Michel Rosenfeld, who, while he worries that “the trend toward globalization and the instant transnational reach of the Internet” may undermine the call for a purely contextual approach towards hate speech legislation, also concedes that an individual nation state’s particular historical context may present a stronger or weaker case for the institution of official, legal hate speech regulations.<sup>1056</sup> Similarly, where formal hate speech regulations are deemed appropriate, I believe that the form that such policies should take ought to be born out of each individual nation’s historical traditions.<sup>1057</sup> In the United States, a free speech tradition that stems from individualism, libertarianism and a belief in Lockean rights does not present a powerful case for the introduction of hate speech legislation.<sup>1058</sup> This is not necessarily true for the rest of the world, however. In Germany, for example, when understood “from the particular perspective of a rejection of the Nazi experience and an attempt to prevent its resurgence, the suppression of hate speech seems both obvious and commendable.”<sup>1059</sup> So, while I argue that, given its own history and philosophical traditions, the United States may be less capable of utilizing the public values of dignity and equality to justify legal bans on social hate speech, other western, liberal nations may be able to present a better case for such censorship.

*A. An analysis of legal proposals for censoring hate speech*

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<sup>1056</sup> Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 243.

<sup>1057</sup> For example, in Ethiopia, given the nation’s past experiences of ethnic conflict, hate speech legislation is designed to prohibit only speech that targets ethnic and national minority groups that have traditionally been excluded from mainstream political life. See Yared Legesse Mengistu, “Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws,” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 345.

<sup>1058</sup> See Rosenfeld, “Hate Speech in Constitutional Jurisprudence,” pp. 247.

<sup>1059</sup> *Ibid.*, pp. 244.

Because it holds the potential to inflict severe and permanent harms upon liberal democratic societies and their citizens, hate speech ought to be avoided and discouraged. This is true regardless of where such communication takes place. The more challenging question is whether it should be restrained through social pressures and moral approbation alone, or whether hate speech ought to be actively prohibited by law as well. As discussed in the previous chapter, American public opinion has tended to prefer the former option, believing that the risks associated with hate speech are not significant enough to merit infringements upon the First Amendment freedom of expression. Certainly, these risks are almost never understood as justifying any legal infringement on *social* hate speech.<sup>1060</sup> Nevertheless, there are many American legal and political theorists that do support government censorship and regulations limiting hate speech, even when it takes place in the social sphere. Members of this ideological camp believe the harms of hate speech to be adequately deep and meaningful to justify challenging the liberties of those who wish to share hateful ideologies. These theorists also argue that the only way to effectively prevent such harms is to utilize the authority of the state to offset the power imbalances that lay at the heart of social hate speech.

In this section, I address arguments both for and against legal bans on hate speech. I begin by briefly reviewing what the proponents of anti-hate speech legislation consider to be its major social harms. I then explain why proponents of anti-hate speech legislation believe that the state is the only actor with adequate force to neutralize these harms. Finally, I present eight key

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<sup>1060</sup> To the extent that the United States government has acted in ways conducive toward hate speech legislation, it has generally focused on more public, political forms of expression. For example, when, in 1992, the National Telecommunications and Information Administration (NTIA) reported to Congress about their findings regarding the potentially harmful effects of hate speech on public order, they focused entirely on highly public, widely distributed expressions of hate speech. (No equivalent study was requested by Congress to examine the effects of more informal, casual hate speech.) While the study ultimately concluded that public hate speech may lead to harmful outcomes—thus potentially paving the way for anti-public hate speech regulations—the authors also contended that hate speech, as a relatively rare occurrence in mainstream media, did not pose a significant public threat. See the United States Department of Commerce, National Telecommunications and Information Administration, “Report to Congress: The Role of Telecommunications in Hate Crimes” (December 1993). Available at: <http://www.ntia.doc.gov/legacy/reports/1993/TelecomHateCrimes1993.pdf>.

arguments against legal hate speech bans. Ultimately, while I agree that some form of state action may be required in order to fully address the harms of social hate speech, I also conclude that the benefits of legal prohibitions against social hate speech do not outweigh their costs. (In the following section, I suggest several alternative approaches that the state may take in order to more effectively and constitutionally minimize social hate speech.)

However, before I may expound upon the disadvantages of the legal censorship of social hate speech, I must first explain why many theorists consider it to be a viable policy option. As stated above, proponents of anti-hate speech legislation tend to focus on the significant harms associated with such expression. Apart from the two harms that I discussed at length in Chapter Six (and summarize in the previous section)—the development of character traits that are not conducive to democratic citizenship and solidifying boundaries between in-groups and out-groups—the harms posed by hate speech tend to fall into three general categories: psychological, physiological and symbolic. First, proponents of anti-hate speech laws often point to the extreme psychological distress and emotional scarring caused by hate speech, which may lead to long-term feelings of anxiety and fear. It may also lead victims to turn to anti-social behaviors, such as alcohol and drug abuse. Second, many members of this school of thought look to the ways by which such psychological harms may translate into physiological symptoms, such as gastrointestinal distress, high blood pressure, shortness of breath, stress disorders and hypertension. Some have even suggested that these physiological symptoms may shorten the life spans of hate speech victims. Finally and most importantly, it is common for political and legal theorists who support anti-hate speech legislation to emphasize the symbolic attack that hate speech represents. Hate speech diminishes the very human dignity of its targets—both in their own eyes and also in those of mainstream society—thereby limiting their potential for full social integration and political success.

As discussed in Chapter Six, all three types of harms—psychological, physiological and symbolic—are especially likely to occur when hate speech takes place in the social sphere.

While there are clear harms associated with official, state-sanctioned hate speech, social hate speech owes its special negative influence to its personal nature and inescapability. The very intimate, directed nature of social hate speech means that it is often felt more deeply than broader, public expressions of hate speech. Furthermore, where social hate speech is allowed to exist, it tends to permeate all social interactions, and, as a result, it is impossible to hide from or ignore.

In other words, one may think of social hate speech as an ideological lens that colors the ways in which victims, perpetrators and bystanders view the world. Over time, those who live in an environment that condones social hate speech may forget that the lens exists, believing their slanted vision of the world to be all that there is. Similarly, in *The Harm in Hate Speech*, Jeremy Waldron describes how hate speech comes to function like a background noise, informing everything else in society.<sup>1061</sup> Much in the way that pornography is “imagery whose highly visible, more or less permanent, and apparently, ineradicable presence makes a massive difference to the environment in which women have to lead their lives,” he writes, racist or religious defamation “can become a world-defining activity.”<sup>1062</sup> It is in this subtle and, yet, highly influential way that social hate speech manages to do so much damage.

All of this suggests that something must be done to minimize the negative effects of social hate speech if liberal democratic communities are to uphold their self-proclaimed values of equality and inclusiveness.<sup>1063</sup> The majority of Americans believe that this goal may be best

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<sup>1061</sup> See Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012). Note that Waldron confines his study of hate speech to “attacks that are printed published, pasted up, or posted on the Internet—expressions that become a permanent or semi-permanent part of the visible environment in which our lives, and the lives of vulnerable minorities, have to be lived” (Ibid., pp. 37). While he excludes the kind of social hate speech discussed here, the arguments he uses to justify his position are still applicable, especially inasmuch as social hate speech creates lasting, visible scars on the targeted community.

<sup>1062</sup> Ibid., pp. 74.

<sup>1063</sup> Some may argue that nothing should be done to eliminate hate speech. After all, in order for liberalism to function adequately, it may be important that all citizens develop a thick skin. However, it matters that these costs are being born disproportionately. Regardless of the

achieved through a laissez-faire policy of introducing more speech.<sup>1064</sup> The key to eliminating social hate speech, they argue, is to welcome such ideologies into the public forum, where they can be openly debated and (ideally) refuted. Proponents of anti-hate speech legislation, however, claim that a hands-off approach is simply not enough to get at the underlying causes of social hate speech. As the only body with adequate force and authority to counteract the power imbalances that lie at the heart of social hate speech, the state must take on a prohibiting position.

In this assertion, proponents of anti-hate speech legislation appear to have the upper hand. By definition, social hate speech does not exist in a power vacuum. It is never an interaction between equals. A statement constitutes social hate speech *precisely because* it is born from and reinforces a political system that systematically favors some and discriminates against others. In fact, many argue that hate speech, as a term, can only rightfully be used to describe disparaging and harmful remarks aimed at a group that has a history of marginalization and objectification by the dominant community. For members of these stigmatized groups, many of whom may still suffer the effects of previous state-sanctioned discrimination, both the reputational injury and the negative socialization resulting from social hate speech can be particularly powerful.

As Waldron explains, the equal social and political standing of minority groups in the United States “is not something that anyone can take for granted.”<sup>1065</sup> In the court of public

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advantages of living in an environment where uninhibited, robust and open debate are possible, such a public good ought not to be achieved entirely at the expense of the least advantaged citizens.

<sup>1064</sup> A 2013 Rasmussen Reports survey finds that 72 percent of American adults believe that “allowing free speech without government interference” is a better option than “letting government decide what types of hate speech should be banned.” Only 12 percent of those polled state that they prefer government-regulated speech. See Rasmussen Reports, “31% Favor Ban on Hate Speech,” in *Politics* (June 6, 2013). Available at: [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/june\\_2013/31\\_favor\\_ban\\_on\\_hate\\_speech](http://www.rasmussenreports.com/public_content/politics/general_politics/june_2013/31_favor_ban_on_hate_speech).

<sup>1065</sup> Waldron, *The Harm in Hate Speech*, pp. 31.

opinion, it may be one thing to be a public figure (and representative of the state), who has “taken the burden of office” and whose actions are subject to open questioning, and other to be an ordinary citizen, who may have assumed she “had a right to be protected from scattershot allegations.”<sup>1066</sup> It is still another thing, according to Waldron, to be a private individual who is part of a precariously placed social group. In this case, targets may not be “strong enough, thick-skinned enough, well-enough armed, or sufficiently insinuated into every aspect of public life” to be able to combat libelous claims on their own.<sup>1067</sup> Given the preexisting biases against them, any additional defamation is likely to be greeted with unreflective acceptance, resulting in increasingly diminished social standing and respect. As Bhikhu Parekh explains, “[w]hen racist, anti-Semitic, and xenophobic beliefs are an integral part of a society’s culture, they appear self-evident, commonsensical, and obvious, and therefore enjoy a built-in advantage over their opposites.”<sup>1068</sup> This bias is true among the wider community, as well the members of marginalized groups, themselves, who are likely to lack the confidence and self worth to question the messages being aimed at them.

To the extent that they do openly reject these notions, the already diminished social status of certain minority groups means that their words do not carry the same weight as the arguments that they are trying to confront. Furthermore, preconceived notions about members of marginalized groups often mean that, when they do respond to hate speech, they are often condemned regardless of which tactics they choose – whether they utilize anger, rational argument or silence, minority individuals are likely to find themselves scrutinized. Patricia J. Williams describes how, “if we respond to or open discussion about belligerent or offensive

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<sup>1066</sup> Ibid., pp. 28-29. See also Justice Arthur Goldberg’s concurrence to *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which he argues that it does not follow from the ruling “that the Constitution protects defamatory statements against the private conduct of a public official or private citizen.”

<sup>1067</sup> Waldron, *The Harm in Hate Speech*, pp. 31.

<sup>1068</sup> Bhikhu Parekh, “Is There a Case for Banning Hate Speech?” In *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 48.

remarks—that is, if we pursue the much-touted path of responding to hate speech with ‘more speech’—we are called ‘PC’ and accused of forcing our opinions down the throats of others.”<sup>1069</sup> On the other hand, “[i]f we respond with no matter what degree of clear, dignified control, we become militant ‘terrorists’ of the meek and moderate middle.”<sup>1070</sup> Finally, “[i]f we follow the also-prevalent advice to ‘just ignore it,’ then we are perceived as weak, humiliated, ineffectual doormats who ought to have told off our harassers on the spot.”<sup>1071</sup> Members of historically marginalized groups simply have more limited means at their disposal to defend themselves against hate speech.

Beginning from such unequal starting points, it is difficult to see how the problem of social hate speech could be solved through an economics-style, noninterventionist policy of more speech. The social forces behind hate speech are simply too much for an individual (or even a disempowered group) to be expected to combat on her own. In these cases, where power is so asymmetrically distributed, it seems reasonable that the state might be called upon to exert its influence and guidance in support of those groups that share a history of systematic discrimination – a history that government played no small part in forging. What many proponents of anti-hate speech legislation hope, is that the state will utilize hate speech bans in order to achieve a more balanced social order.

This approach does not necessarily equate to a rejection of the marketplace analogy for regulating speech, however. Many proponents of anti-hate speech legislation argue that speech ought to be understood as existing in a marketplace, but that that market cannot represent negative liberties alone – governments must make positive efforts to facilitate more equal participation and dissemination of knowledge. In other words, the unequal power relations within the marketplace of ideas must be accounted for by state actors, much in the way that such bodies

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<sup>1069</sup> Patricia J. Williams, *The Rooster's Egg: On the Persistence of Prejudice* (Cambridge: Harvard University Press, 1997), pp. 39-40.

<sup>1070</sup> *Ibid.*, pp. 40.

<sup>1071</sup> *Ibid.*

intervene to remedy more traditional market inequalities. This means breaking up monopolies of information, introducing new avenues for participation and fostering social arrangements that promote equality.

In their paper, “Nationalism and the Marketplace of Ideas,” Jack Snyder and Karen Ballentine represent this viewpoint, arguing that the marketplace of ideas directly parallels economic markets.<sup>1072</sup> The authors’ thesis is that, as with traditional markets, marketplaces of ideas can only produce positive, socially advantageous goals if they are regulated and stable: “Just as economic competition produces socially beneficial results only in a well-institutionalized marketplace, where monopolies and false advertising are counteracted, so too increased debate in the political marketplace leads to better outcomes only when there are mechanisms to correct market imperfections.”<sup>1073</sup> Marketplaces in ideas are inherently unequal, the authors explain. Not all potential contributors are able to express their ideas with the same force—or, through the complicated and expensive mechanisms of mass media—resulting in a monopoly of speech, controlled by the privileged. Furthermore, even those who gain access do not always have a fair chance to compete, given the vast inequalities between individuals’ skills and means. When only a select group of people is able to contribute ideas to the marketplace—or, when a select few has vastly disproportionate influence—the marketplace is defective. And in order for society to reap the benefits of freedom of speech, marketplaces must be regulated in order to account for its compromised competition.

Although, in this paper, the authors specifically concern themselves with free speech and the effects of the mass media on newly democratizing societies, the implications of their analysis can be extended more generally to the issue of social hate speech in advanced free speech markets. Yared Legesse Mengistu, for example, applies this market perspective to hate speech

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<sup>1072</sup> See Jack Snyder and Karen Ballentine, “Nationalism and the Marketplace of Ideas,” in *International Security*, Vol. 21, No. 2 (Autumn, 1996), pp. 5-40.

<sup>1073</sup> *Ibid.*, pp. 6.



in his paper, “Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws.” Because hate speech necessarily comes from the powerful and takes aim at the powerless, he argues, victims require the force of the state to protect them and provide a counterbalance to the voices of the more influential, privileged segments of society. Mengistu claims that any American “calls for state ‘neutrality’ in the marketplace of ideas is tantamount to a myopic neglect of the fundamental reality of unequal distribution of power.”<sup>1074</sup> Hate speech regulation, he argues, should not be seen as an undue infringement upon the freedom of speech of those who wish to express discriminatory viewpoints; rather, anti-hate speech laws must be understood as a way of acknowledging a history of social and political inequalities, while harnessing the power of the state to redefine these social relations. If anything, such regulations would result in a more equal marketplace of ideas than that, which currently exists. “The prohibition of hate speech is the equivalent of an antitrust law that removes from the marketplace a cartel and the resulting abuse of monopoly that squelches competition,” Mengistu writes.<sup>1075</sup> Once the monopoly is broken up, free speech can finally thrive in earnest.

While Snyder, Ballentine and Mengistu are certainly correct that the state is in a formidable position to “even out the playing field” between those who espouse social hate speech and those who are victimized by it, they are incorrect in their prescription. There are a number of ways in which government can justly exert its influence to minimize social hate (discussed below); however, an approach that includes legal censorship of hate speech is inherently problematic. As stated above, any government restriction of social speech on the basis of content should be immediately suspect, as a potential violation of the constitutional right to freedom of speech. However, beyond that general complaint, there are a host of more specific concerns that cast doubt upon the prudence of anti-hate speech legislation in the United States. For the remainder of this section, I explore the major concerns regarding hate speech bans. I first review the six

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<sup>1074</sup> Mengistu, “Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws,” pp. 358.

<sup>1075</sup> Ibid.

arguments against anti-hate speech legislation that are presented by C. Edwin Baker, in his essay, "Hate Speech." While these critiques represent a fairly comprehensive list of the theoretical arguments against hate speech censorship, they are neither equally compelling nor exhaustive. Thus, to Baker's list, I suggest two additional contentions of my own. Taken together, these eight arguments explain why legal censorship is neither a desirable nor an effective option for remedying social hate speech in the American context.

First, Baker presents the claim that banning the expression of hate speech may actually weaken preexisting social enforcement mechanisms against hateful ideologies. One of the strongest tools for fighting against hate speech, Baker argues, is the natural reaction of its opponents to its open expression: "In any minimally decent society that legally *permits* hate speech, such expression of hate reflexively creates, for those who object to racism, a platform to explain and justify their objections."<sup>1076</sup> On the other hand, "legal repression [of hate speech] creates a platform for racists to claim victimhood and to appeal to the many who value liberty to oppose the suppression of their freedom, shearing off the energy of a significant group from the chorus that condemns the racist views."<sup>1077</sup> In other words, by silencing hate speech, the law is actually robbing the wider community of the opportunity to rise up against hateful ideologies and spread a countervailing message.<sup>1078</sup> At the same time, because anti-hate speech legislation requires censorship on the basis of content, those who wish to express hateful ideas can find

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<sup>1076</sup> C. Edwin Baker, "Hate Speech," in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 73.

<sup>1077</sup> *Ibid.*

<sup>1078</sup> For an example of the argument that hate speech can only be fought with more speech, see Justice Louis D. Brandeis's concurring opinion in *Whitney v. California*, 274 U.S. 357, 376 (1927): "But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones." See also Justice Learned Hand: "[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked our all on it" (*Associated Press v. United States*, 326 U.S. 1 (1945)).

natural allies among the majority community. Even among those who may not share the opinions conveyed through hate speech, there are still plenty who are willing to fight against censorship. By focusing on the infringement of their First Amendment freedoms, hate speech proponents are able to shift the debate away from the content of their communications while simultaneously attracting a large, diverse group of supporters.

Second, Baker worries that, even if hate speech legislation did manage to silence hateful viewpoints, far from eliminating these beliefs, it would merely drive them underground, where they will be more difficult to address. When ideas are not allowed free and open expression, it is impossible to accurately judge “the extent of the problem and the location or the human or social carriers of the problem.”<sup>1079</sup> By transforming hate from a visible obstacle to an invisible one, anti-hate speech regulations may obscure the extent to which racism, sexism, etc. actually exists within the community. This diminished understanding of the scope of the problem reduces the perceived need to combat hateful opinions. And as Baker adds, it also compromises the effectiveness of any attempts at opposition. Where hate speech bans are in effect, those who wish to fight against hateful ideologies miss out on “the advantage of “knowing the enemy,”” and are therefore less able to craft “meaningful rhetorical, strategic, political and legal responses” to hate speech.<sup>1080</sup>

Third, it is likely that programs meant to silence only certain opinions, based on their content, will result in feelings of oppression and victimhood among those who hold hateful viewpoints. Baker suggests that this may ultimately “increase their rage and belief that they must act” upon their ideologies.<sup>1081</sup> Knowing that their perspectives are unwelcome, those who wish to practice hate speech may feel a moral obligation to martyr themselves in service of their principles – if only to ensure that their message is heard. While he concedes that it is an

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<sup>1079</sup> Baker, “Hate Speech,” pp. 73.

<sup>1080</sup> *Ibid.*

<sup>1081</sup> *Ibid.*

empirical matter whether forcing hate speech underground actually serves to diminish hateful ideas or whether it reinforces them, Baker does speculate that the latter option is more probable. He believes that the experience of being persecuted and denied fundamental liberties will put hate speakers at odds with the majority, which may be viewed as condoning discriminatory legal tactics. Thus, these true believers may grow alienated from the legal order, which has singled them out and may appear to be “unequally coddling those whom they decide.”<sup>1082</sup> This sense of estrangement is likely to lead to radicalization among hate speakers.

Fourth, Baker worries that anti-hate speech legislation delegitimizes the liberal democratic state by diminishing the role that politics and political discourse play in resolving conflict. “[P]rohibiting the *expression* of any values – even the most offensive views such as expression that denies democratic values or calls for violent or illegal actions – in the context of discourses where verbal responses are possible,” Baker explains, “is likely to reduce the democratic cultural self-understanding that conflicts are to be dealt as a political rather than a violent struggle.”<sup>1083</sup> If it chooses to forestall conversation about certain viewpoints, the state would be implicitly expressing a lack of faith in the power of political discussion. As a result, citizens may come feel that their only option for addressing such controversial issues is a violent struggle.<sup>1084</sup>

Anti-hate speech legislation may delegitimize the liberal democratic state in another sense, as well. Ronald Dworkin argues that, while laws that protect vulnerable minorities from discrimination, unfairness and inequality are certainly desirable, they can only rightfully be enacted through a fair democratic process. This means that all eligible citizens must have the right to vote, and matters of public concern will be decided by majority rule. But as Dworkin explains, “a majority decision is not fair unless everyone has had a fair opportunity to express his

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<sup>1082</sup> *Ibid.*

<sup>1083</sup> *Ibid.*, pp. 74.

<sup>1084</sup> See Ralf Dahrendorf, *Class and Class Conflict in Industrial Society* (Stanford, CA: Stanford University Press, 1959).

or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others... but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.”<sup>1085</sup> In other words, all sides to an argument must be allowed expression before a truly democratic decision can be made.<sup>1086</sup> In the case of antidiscrimination laws, the opposition must be given the same opportunity to freely contribute their perspectives to the public debate as those in favor. If not, any legislation that is enacted against the preferences of the former must be considered unfair and illegitimate. Dworkin worries that, by limiting the ability of opponents to antidiscrimination laws to voice their opinions, anti-hate speech laws take away from the validity of any resulting legislation.

Fifth, Baker claims that a focus on hate speech legislation may detract from efforts to combat the underlying causes of racism and discrimination.<sup>1087</sup> He suggest three “obvious and arguably more valuable places” where energy could be better spent: 1) improving the material conditions of members of marginalized groups, who are targeted by hate speech; 2) putting forth public rejections of hate (i.e. “the more speech solution”); and 3) instituting modifications to the societal conditions that encourage hateful ideas among certain segments of society.<sup>1088</sup> However, while Baker is certainly correct that any efforts to eliminate hate speech ought to address these three areas, it is unclear from this paper why he does not think such efforts could go hand-in-hand with formal, legal prohibitions of hate speech.

Finally, Baker presents the familiar “slippery slope” argument, which is divided into two parts.<sup>1089</sup> First, there is the concern that anti-hate speech laws are likely to be abused to suit the needs of those in power. In her article, “Hate Speech and Pornography: Do We Have to Choose

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<sup>1085</sup> Ronald Dworkin, “Foreword,” in *Extreme Speech and Democracy*, Ivan Hare and James Weinstein (eds.) (New York: Oxford University Press, 2010), pp. vii.

<sup>1086</sup> “The majority has no right to impose its will on someone who is forbidden to raise a voice in protest... before the decision is taken” (Ibid.).

<sup>1087</sup> Baker, “Hate Speech,” pp. 75.

<sup>1088</sup> Ibid.

<sup>1089</sup> For a more thorough analysis of slippery slope arguments, see Frederick Schauer, “Slippery Slopes,” in *Harvard Law Review*, Vol. 99, No. 361 (1985).

Between Freedom of Speech and Equality?” Nadine Strossen explains how, even when hate speech regulations are explicitly drafted to protect a minority group, they are often coopted and used to defend dominant groups instead. This results in outcomes contrary to the purpose of anti-hate speech legislation, including the persecution of minority group members and the suppression of their speech.<sup>1090</sup>

It is easy enough to imagine practical instances in which state actors might be able to frame the speech of their political opponents as hate speech. Baker offers several examples of potential justifications: “that labor agitation ferment class hatred and, potentially, class violence; lesbians ferment hatred of and violence against men; black nationalists make racist attacks on whites; Algerians insult the French... [and] many radical Muslims who, if not terrorists themselves, seem to be nurturing the hate that leads to terrorism.”<sup>1091</sup> And, in fact, this has been the experience of many nations after instituting hate speech bans. As discussed in Chapter Six, one of most significant challenges faced by England, after the adoption of Section 6 of the Race Relations Act in 1965, was biased enforcement. While the new hate speech statute led a number of convictions, many of them were obtained against leaders of the Black Liberation Movement, rather than the white racists that the law was designed to address.

Second, Baker applies the slippery slope problem to the use of the harm justification. “Any principle that allows restrictions on speech that preaches hate will be hard to contain,” he worries. “Suppression of other ‘harmful’ speech to deal with other nasty problems will seem similar.”<sup>1092</sup> Thus, opening up the door to censorship of hate speech, on the basis of the harm it produces, may inadvertently lead to the censorship of legitimate, worthwhile political and artistic expression. And whereas anti-hate speech legislation is designed to protect the worse off in

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<sup>1090</sup> See Nadine Strossen, “Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?” in *Case Western Reserve Law Review*, Vol. 46, No. 449 (Winter 1996), pp. 465-470.

<sup>1091</sup> Baker, “Hate Speech,” pp. 76.

<sup>1092</sup> *Ibid.*, pp. 76-77.

society, one danger of this approach is that it will lead to other forms of censorship and repression that result in “the net effect of further subordinating the disempowered.”<sup>1093</sup> Even Waldron worries about this problem, warning that “campaigns against free speech tend to be motivated by public hysteria, and there is no telling what outbreaks of public hysteria would lead to if they had hate speech codes as one of the channels for their expression.”<sup>1094</sup>

These two slippery slope concerns might be overstated, however. In his paper, “Does International Law Provide for Consistent Rules on Hate speech?” Toby Mendel shows that there are no real world examples of well-written hate speech laws slowly leading to greater restrictions on free speech. “Democracies around the world have been applying hate speech laws for decades,” he writes, “and, while the rate of persecutions may fluctuate in different countries and at different times, there has been no general trend toward greater and broader application of these laws.”<sup>1095</sup> As for the accusation that anti-hate speech laws are likely to be abused, Mendel argues that, to the extent that this poses a real threat, the solution should not be to eliminate such legislation: “The proper response to abuse of laws restricting freedom of expression, which address a legitimate social goal, is to address the cause of that abuse, not to remove protection for that social goal.”<sup>1096</sup> If anti-hate speech legislation is written too vaguely to be applied in a consistent, productive manner, it should be rewritten to express a more focused goal. Indeed, in the United States, individuals accept bans on various kinds of speech (e.g. defamation against individuals, obscenity) without too much reason to fear that such bans will necessarily grow to encompass everything.

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<sup>1093</sup> Ibid., pp. 77.

<sup>1094</sup> Waldron, *The Harm in Hate Speech*, pp. 32. However, Waldron goes on to write that “it seems off to concentrate only on this sort of manifestation of public hysteria... as opposed to the other ways in which waves of public hysteria can threaten freedom in this society” (Ibid.).

<sup>1095</sup> Toby Mendel, “Does International Law Provide for Consistent Rules on Hate Speech?” in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Michael Herz and Peter Molnar (eds.) (New York: Cambridge University Press, 2012), pp. 425.

<sup>1096</sup> Ibid.

Despite my objections to Baker's fifth and sixth arguments against anti-hate speech legislation, the first four concerns that he raises (as well as the addendum from Dworkin) do cast severe doubt on the desirability and effectiveness of legal hate speech bans. Far from eradicating social hate speech, state censorship seems to only split it in two. Those who do not subscribe to discriminatory beliefs are free to exist apart from the nagging influence of hate speech. And many of those who might have been only moderate sexists, racists, etc. may decide to remove themselves from discriminatory communities as well. Many others, however—as well as the “true believers”—may prefer to move underground. I agree that, not only does this division shut down conversation about important political issues, but once hate speech proponents are hidden from view and begin to see themselves as a persecuted minority, they are likely to become increasingly radicalized. To the extent that they see themselves as outside of the state (especially a state that has already delegitimized itself), they are more prone to engaging in violent tactics in order to get their message across. All of this presents a compelling case against legal hate speech bans. There are, however, at least two additional arguments that could be used to further strengthen Baker's case against legal bans on hate speech: one theoretical and one practical.

One of the most common philosophical concerns regarding legal hate speech bans is that they are overly paternalistic and, therefore, have no place in a liberal democratic society that claims to treat all its adult members as responsible moral agents. As Dworkin explains in *Freedom's Law: The Moral Reading of the American Constitution*, this requirement has two dimensions.<sup>1097</sup> First, when the state presupposes that its citizens cannot be trusted to hear “dangerous or offensive convictions,” for fear that they might adopt these attitudes, it does them a grave personal insult. Government must expect that “morally responsible people” will insist upon determining for themselves “what is good or bad in life or in politics, or what is true and false in

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<sup>1097</sup> See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996).



matters of justice or faith.”<sup>1098</sup> Censorship, by assuming otherwise, offends the very dignity and autonomy of the citizenry. Second, Dworkin argues that, as a morally responsible individual, each citizen has “a responsibility not only to form convictions of one’s own, but to express these to others.”<sup>1099</sup> This duty comes, not only out of respect for others, but also out of the natural human instinct to discover truth, seek justice served and secure the good for all. When government prohibits certain individuals from exercising these responsibilities, based on the content of their beliefs, it also “frustrates and denies that aspect of moral personality.”<sup>1100</sup>

Thus, the paternalism argument against hate speech censorship suggests that all individuals, as free and equal beings, ought to be able to explore and express any and all discriminatory perspectives. This liberty is no less important an aspect of human dignity and autonomy than the freedom to exist in society without fear of verbal harassment. Nevertheless, the objection could be raised that individuals are *not* actually perfectly autonomous, but are highly influenced by the conditions of their social development. And if individuals are not truly autonomous, it might be reasonable for the state to adopt a more paternalistic role towards them, especially regarding the aftermath of systematic, state-sponsored discrimination. Although I have argued throughout this project concerning the socially constructed nature of human development, I do not agree that the kind of paternalism inherent in hate speech bans is an appropriate response. While the state can and should work to modify the social arrangements that lead to hate speech, it must do so in ways short of telling its citizens that they cannot be trusted to hear or express views that it deems offensive or hazardous.

A more practical concern with anti-hate speech legislation is that it is neither the most effective nor the most direct method of limiting social hate speech. The racist, sexist and classist attitudes that foment social hate speech are everywhere. For a state-sponsored censorial

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<sup>1098</sup> *Ibid.*, pp. 200.

<sup>1099</sup> *Ibid.*

<sup>1100</sup> *Ibid.*

machinery to address all of these mindsets, it would have to be everywhere as well. That is neither desirable nor feasible. Social pressures, on the other hand, are well placed to influence the behaviors and, more importantly, the belief systems of all community members. They can go where the state cannot.<sup>1101</sup> And, as discussed throughout this chapter, they can also affect core values more deeply and to greater effect than nearly any other form of coercion. If, after all, the purpose of making hate speech illegal is not simply to enhance the voices of victims and punish offenders, but to *push the community norms and beliefs that inform hate speech in a more tolerant*, I argue that it would be more productive to address public opinion directly.<sup>1102</sup> It is this approach that I will emphasize in the following section.

#### *B. Proposals for managing hate speech*

There is only one way to *completely eradicate* social hate speech, and that is to censor it before the fact. “Just as the only way to keep your fist from breaking my nose is to restrain your fist,” Andrew Koppelman writes, “the only way to prevent this speech from wounding its victims is to restrain it.”<sup>1103</sup> Once the words have been uttered, there is no taking them back. However, as I describe in the previous section, any legal system that attempts to censor speech *a priori* and absolutely is both unrealistic and undesirable in the United States. Instead, in this section, I propose several alternative policy options designed to rein in social hate speech and diminish its potency wherever it does remain.

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<sup>1101</sup> As discussed in Chapter Six, discrimination is only unconstitutional when it is either the result of state action, or takes place in a public space (including public accommodations, such as hotels and restaurants). Discrimination that occurs in purely private spaces, however, is protected under the First Amendment freedom of speech.

<sup>1102</sup> The state begins by establishes laws, and then hopes that attitudes will fall in line: “Legislation aims first at controlling only the acts that express undesired attitudes. But ‘when expression changes, thoughts too in the long run are likely to fall into line’” (Delgado, “Words That Wound,” pp. 96).

<sup>1103</sup> Andrew Koppelman, *Antidiscrimination Law & Social Equity* (New Haven: Yale University Press, 1996), pp. 243.

I begin by building upon the previous discussion of anti-hate speech legislation by suggesting three potential avenues by which the state could rightfully aid in limiting social hate speech without unduly infringing upon individual liberties: 1) establishing official, uniform standards for what constitutes hate speech; 2) promoting an egalitarian agenda; and 3) rectifying the inequalities at the heart of intergroup hatred. These three actions, while falling far short of legal censorship, enable government to play an active role—symbolically and practically—in the defeat of social hate speech. However, beyond these steps, law should only be used as a last resort, applicable in just the most unambiguous and egregious cases of hate speech resulting in measurable harm. Ultimately, as in the cases of cyberbullying and negative safe space speech, I argue that social hate speech is best managed through moral approbation and social pressures.

To begin, while social hate speech may not merit legal censorship, there are certain steps that the American government should take to minimize its negative influence on democratic citizenship and political outcomes. The law, after all, serves as an important tool for determining the social norms and principles that make hate speech more or less acceptable. “Being a collective and public statement of the community’s moral identity and guiding values,” Parekh explains, “the law affirms and enforces these values, has a symbolic and educational significance, and helps shape the collective ethos.”<sup>1104</sup> In other words, the law not only expresses community ethics (by punishing those who offend them), but it also plays a major role in shaping the form of those “norms of civility” in the first place. Through its enforcement, language and agenda-setting powers, the law establishes expectations regarding what are and are not acceptable ways for community members to treat one another.

In the case of social hate speech, it is possible for the state to simultaneously utilize its influence to condemn discriminatory practices and beliefs while also protecting freedom of

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<sup>1104</sup> Parekh, “Is There a Case for Banning Hate Speech?” pp. 46.

speech.<sup>1105</sup> One relatively low-cost policy option would be for Congress to finally provide an unambiguous, authoritative definition of what constitutes hate speech, while still stopping short of making such expression illegal. While the exact contours are better left to be decided by elected officials, I would argue that any productive characterization of hate speech must contain the following three elements.

First, any definitive statements regarding hate speech must recognize it as something beyond mere “fighting words.” As discussed in Chapter Six, hate speech is more than an expression of simple meanness or disrespect; it implies actual hatred of a marginalized group (based on ascriptive characteristics), with a wish to destroy. This aspect of hate speech helps to distinguish it from other, feebler forms of criticism and harassment. Second, hate speech should include only that harassment, which both leads to deep social divisions, and is also significant enough to compromise the ability of its targets to freely and equally participate in political life. By highlighting the threat that hate speech poses to the liberal democratic values of equality and inclusiveness, the state would be able to frame the problem in such a way that it applies to all members of the community. Finally, any authoritative definition must recognize that hate speech is not just a problem when it takes place in the public sphere – social hate speech poses significant community risks as well. Throughout this project, I have sought to expand the definition of meaningful political speech to include those communications that have traditionally been considered too private or social to be of public value. This includes hate speech. The fact that a given instance of hate speech is not nationally broadcasted or promoted by public persons, but instead, takes place in a private residence or place of business, does not mean that it is any

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<sup>1105</sup> See Corey Brettschneider, “When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion,” in *Perspectives on Politics*, Vol. 8, No. 4. As Corey Brettschneider explains, we must “distinguish between a state’s coercive power or its ability to place legal limits on hate speech, and its expressive power or its ability to influence beliefs and behavior by ‘speaking’ to hate groups and the larger society. On my view, the state should simultaneously protect hateful viewpoints in its coercive capacity and criticize them in its expressive capacity” (Ibid., pp. 1006). In other words, it is possible and desirable for the state to simultaneously use its coercive capacity to protect hateful viewpoints and criticize those same attitudes in its expressive capacity.

less likely to incite violence, provoke psychological distress or contribute to lower levels of political participation and cooperation. In fact, because of its personal nature, social hate speech is likely to be more harmful than impersonal, public attacks on marginalized groups.<sup>1106</sup>

An authoritative, clear definition for hate speech—one that incorporates these three elements—would not only support and validate the experiences of target groups, but it would also set a higher standard for all American citizens, letting them know that, while they may have a constitutionally protected right to freedom of speech, social hate speech is both insupportable and morally repugnant. A second option that would allow the United States to take a symbolic stance against social hate speech, while still protecting a broad understanding of the First Amendment, would be for the state to endorse an egalitarian agenda through its public policy choices. Rather than attacking hate speech directly, government should focus its efforts on promoting policies that address the discriminatory attitudes that inform such speech.

For example, state governments could provide curricula and funding for educational/professional programs that teach the values of equality and respect for difference. The state could also work with anti-discrimination organizations to develop a public service campaign aimed at educating the community regarding the potential harms of hate speech and encouraging private individuals to take responsibility for their social spaces. As discussed in the section on cyberbullying, government actors have a history of teaming up with private citizens and nonprofit organizations in order to send a unified message denigrating hateful speech. There is reason to think that a similar campaign, aimed at eradicating social hate speech, might be equally successful.

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<sup>1106</sup> Fortunately, there is already some precedent for this approach in the United States legal tradition: Under Title VII of the Civil Rights Act of 1964, employers may be prosecuted for tolerating hate speech by their employees, if that speech contributes to a broader pattern of harassment, which results in a “hostile or offensive working environment.” See Charles R. III Lawrence, “If He Hollers Let Him Go: Regulating Racist Speech on Campus,” in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw (eds.) (Boulder, CO: Westview Press, Inc., 1993), pp. 53-88.

While these suggestions may be somewhat politically controversial, they are not unusual in the American context. The United States government may have shied away from legislating hate speech, but it has also been more than willing to address the attitudes that undergird such statements—especially in the case of race—and to try to transform them in ways that it deems appropriate.<sup>1107</sup> This can take the form of non-action (e.g. when the judiciary “resists political demands for laws that disadvantage blacks”) or action (e.g. when the judiciary “refuses to enforce racially restrictive covenants, or when it registers interracial marriages”).<sup>1108</sup> In either case, while the state may not be explicitly legislating on racial attitudes, it is sending a clear message as to its position on the subject. And this messaging is hardly meant to be innocuous. As stated above, the laws and institutional structures of a given community inherently influence the development of its social values and norms. By choosing to put forth policies that promote equality and inclusiveness, the American state has already chosen to play a proactive role in the process of creating good democratic citizens.

But there is still more that government can do to attack the root causes of those discriminatory ideologies that fuel hate speech. In addition to issuing an official condemnation and promoting anti-discriminatory policies, the state must continue working to remedy the vast socioeconomic inequalities that lead to feelings of hatred in the first place. By ensuring that targeted groups receive adequate access to employment and education, I argue that the American government will do more to eliminate hate speech than censorship ever could.

In Baker’s critique of anti-hate speech legislation (discussed above), he makes the compelling claim that the kind of aggressive racism, which fuels hate speech, is frequently born out of conditions of poverty. He explains how “often purveyors of racism have themselves experienced forms of social or material discrimination (or deprivation) – and sometimes they even

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<sup>1107</sup> Although this approach may or may not line up with the direction of public opinion, it does tend to have a progressive bend that favors greater equality and civil rights. See Koppelman, *Antidiscrimination Law & Social Equity*, pp. 4.

<sup>1108</sup> *Ibid.*

list their depressed conditions as evidence justifying disparaging racist views.”<sup>1109</sup> Many Americans from impoverished backgrounds respond to their circumstances by taking their frustrations out upon members of already stigmatized groups. By improving the material conditions of those who are likely to adopt discriminatory ideologies, the state decreases the odds that these individuals will come blame minority groups for their troubles.

Baker adds that it is equally important for the state to institute policy measures that are aimed at “integrating into the culture and economy typical target of racist oppression.”<sup>1110</sup> Historical legacies of state-sponsored discrimination and oppression have contributed to the ongoing socioeconomic vulnerability of minorities in the United States. As each subsequent generation has inherited the disadvantages of its ancestors, over time, poverty has tended to become part of the popular characterization of those subjugated minority groups. The classification of certain groups as poor—on top of whatever other negative signifiers they have already acquired—both contributes to their internal feelings of alienation, and also fuels external prejudice and discrimination on the basis of their economic status. Thus, intergenerational conditions of poverty doubly hinder the social standing of traditionally marginalized groups, which clears the way for hate speech.

Changes to the material conditions of these groups could significantly improve their social standing and diminish intergroup hatred, however. While such policy recommendations are outside the scope of this project, like Baker, I agree that government efforts to eliminate hate speech must include the establishment (and “effective enforcement”) of anti-discrimination laws, aimed specifically at two areas: employment and education.<sup>1111</sup> First, minority individuals must be

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<sup>1109</sup> Baker, “Hate Speech,” pp. 75.

<sup>1110</sup> *Ibid.*

<sup>1111</sup> Baker also suggests that the state must incorporate “affirmative recruitment or subsidy of typical targets of racism, [which] could help change the material conditions that create oppression” (*ibid.*).

given fair opportunities to work in order to achieve financial success and self-sufficiency.<sup>1112</sup>

Second, the educational system must be restructured so that all Americans receive a higher standard of education, regardless of their backgrounds – education not only “promotes toleration,” but it also “constitutes a pillar by which people can pull themselves out of poverty.”<sup>1113</sup> Thus, eliminating discrimination in employment and education should help to alleviate the socioeconomic imbalances that create a fertile breeding ground for hate speech.

However, regardless of how effective the state may be at reducing socioeconomic inequalities, it will fail at its goal of eliminating social hate speech if individual citizens do not cooperate. Like Mill, I have argued throughout this chapter that social censorship is not only the least constitutionally problematic, but also the most effective method of combatting social hate speech. Of course, this is neither to say that informal social pressures offer a perfect solution to the problem of social hate speech, nor that the legal option lacks significant advantages; rather the two must be combined, with the state making symbolic and practical strides against discriminatory ideologies, and the people fortifying and enforcing positive community values. Ultimately, even with the support of the state, it is still up to each and every citizen to create a community that is inhospitable to hate speech.

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<sup>1112</sup> See United Nations, Committee on Economic, Social And Cultural Rights, “The Right to Work: General comment no. 18,” Thirty-fifth session, Item 3 of the provisional agenda, Article 6 of the International Covenant on Economic, Social and Cultural Rights (November 24, 2005). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/403/13/PDF/G0640313.pdf?OpenElement>: Access to employment “constitutes an opportunity for economic self-reliance and in many cases a means to escape poverty” (Ibid., pp. 5).

<sup>1113</sup> United Nations, General Assembly, “Contemporary forms of racism, racial discrimination, xenophobia and related intolerances: Notes by the Secretary-General,” Sixty-eighth session, Item 67 (b) of the provisional agenda, Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action (August 19, 2013). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/431/33/PDF/N1343133.pdf?OpenElement>. Pp. 5. See also United Nations, General Assembly “Universal Declaration of Human Rights,” Art. 26 (December 10, 1948), available at: <http://www.un.org/en/documents/udhr/>; United Nations, General Assembly, “International Covenant on Economic, Social and Cultural Rights,” Art. 13 (January 3, 1976), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.



Fortunately, the majority of Americans appear to agree – not only can informal, social pressures be expected to diminish social hate speech *in theory*, but many citizens have already shown themselves capable of maintaining robust social norms rejecting prejudiced ideologies *in practice*. Thus, as Lee C. Bollinger explains, spectators to the ongoing battle over anti-hate speech regulations in the United States witness a wide discrepancy between the degree of support for anti-hate speech legislation and the actual use of moral disapprobation to punish those who express hateful viewpoints.<sup>1114</sup> In other words, while Americans may be conflicted about how to approach hate speech as a legal matter, they are generally convinced of their own responsibility to condemn such speech when it takes place within their communities. “If a person expresses some view we find deeply offensive,” Bollinger writes, “we will probably insist on censure of some kind and feel guilty if none occurs. To implement our unofficial decree, we may draw on a myriad of coercive responses typically at our disposal: We may respond with ridicule or humiliation; we may practice any number of forms of social shunning; or we may withhold various practical benefits, like employment opportunities.”<sup>1115</sup> These are natural reactions to hate speech, he argues.<sup>1116</sup> And they are highly effective strategies for suppressing such hateful ideologies as well.

#### IV. Looking forward:

While this project has been a study of speech, it has not been a study of *free speech* in the traditional sense. My goal, in writing this, has not simply been to expand freedom of speech

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<sup>1114</sup> See Lee C. Bollinger and Geoffrey R. Stone, “Dialogue,” in *Eternally Vigilant: Free Speech in the Modern Era* (Lee C. Bollinger and Geoffrey R. Stone, eds.) (Chicago: The University of Chicago Press, 2002): “When we compare our reluctance to impose legal restraints against speech with our readiness to employ a host of informal, or nonlegal, forms of coercion against speech behavior, the paradox is striking” (ibid., pp. 12).

<sup>1115</sup> Ibid.

<sup>1116</sup> Bollinger claims that, if the state were to tell individuals that they ought to abstain from “coercing or penalizing any person for what that person says [it] would strike us not only as bizarre but as plainly wrong” (ibid.).

protections to a new sphere of communication. Rather, I have aimed to develop a political theory of speech, which can identify and explain the political impact of casual, everyday interactions. Throughout this project, I have tried to show that all communication—from the formal political debates that take place within the Capitol, to the informal conversations that take place around the kitchen table—can have important implications, not only for the kinds of people (and citizens) that the participants become, but also for the kinds of political communities that they come to inhabit. And I believe that, by gaining understanding into the ways that social speech, in particular, creates, encourages and binds political communities—in both positive and negative ways—liberal democracies will be able to devise techniques to both foster good citizenship at an authentic, grassroots level, and also discourage speech practices that compromise republican virtues such as selflessness and a desire to participate in self-governance.

As I have suggested in this chapter, the tools necessary to achieve these goals may be varied. In many cases, public opinion can be changed on its own or, at least, without the long arm of the state pushing it along. This is especially true in the case of social speech, which is naturally informal and subject to self-regulation. There are also instances, however, when social norms and customs are so entrenched that efforts to self-reform would be insufficient. For example, in the United States, this has often been the case when discrimination (whether formal or informal) against groups on the basis of ascriptive characteristics (e.g. race, sex, class, etc.) is at stake. In these cases, often, the only way for attitudes and behaviors to change in a timely manner is for the state to take an authoritative stance. And in order to do so effectively, government actors must understand the processes that take place when citizens engage in informal, social speech.

Thus, I believe it is essential that we all begin to think in terms of the political potential of everyday, social interactions. And I would argue that this is especially important at this particular point in history, when the formal, political boundaries of the nation state are being challenged.

Political problems have grown increasingly global in scale. The negative environmental effects of mass industrialization, for example, cannot be confined to any one nation; rather, they are felt throughout the world. The same is true for terrorism, oil drilling, overfishing, drug enforcement, health care initiatives, government bailouts and any number of other public policy matters. Not only do these issues ultimately impact a wide range of political communities, but they can also only be remedied through the cooperation of multiple actors.

In recent decades, transnational political organizations and international social movements have arisen (and become entrenched) as a response to this increasingly interconnected vision of global politics. But before individuals can be expected to willingly support efforts that impose sacrifices on them for the sake of some distant other, they must build a wider sense of solidarity and community than that, which has prevailed under the model of the nation state. In other words, for transnational endeavors to succeed, individuals must come to believe that they share in the same fate as those with whom they do not share national borders. The idea of who constitutes the “us,” worthy of consideration, must expand.<sup>1117</sup>

This is where the study of social speech may be especially helpful. The advancement of modern transportation, information and communication technologies has made social speech, across political borders, easier and more accessible than ever before. These developments have thereby opened up the potential to create new, super- and supranational political identities and communities. And once political actors understand how best to parlay social speech into good democratic citizenship and positive political outcomes, they can begin to guide that process along in the best way possible.

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<sup>1117</sup> See Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 2008), pp. 191.

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