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Persuasion, Autonomy, and Freedom of Expression

David A. Strauss

PERSUASION, AUTONOMY, AND FREEDOM OF EXPRESSION

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The government may not suppress speech on the ground that it is too persuasive. Except, perhaps, in extraordinary circumstances, the government may not restrict speech because it fears, however justifiably, that the speech will persuade those who hear it to do something of which the government disapproves. If speech brings about bad consequences through other means—by attracting crowds or causing litter, for example—those bad consequences can justify restrictions on the speech.[1] But bad consequences that come about hecause the speech persuades people to do certain things cannot justify suppression.

This principle has, I believe, been extremely important in the development of the law governing freedom of expression in the United States. Several of the most important and controversial first amendment issues of today turn on whether this principle is correct. My objective in this Article is to consider whether it is correct.

In Part I, I will define this principle, which I call the persuasion principle. The central idea is that the government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech. But "persuasion" denotes a rational process. That is, not every kind of inducement through speech should be considered persuasion. I will trace the pervasive influence of this principle in the American system of freedom of expression.

In Part II, I will address the argument, commonly used to defend the persuasion principle, that suppression is unnecessary because counter-persuasion—answering arguments—will cure any evils caused by persuasion. This defense of the persuasion principle is related to several prominent theories about freedom of expression, including the famous "marketplace of ideas" metaphor. I will argue that this attempted justification for the persuasion principle does not succeed.

In Part III, I will make what seems to me the best argument for the

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1. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981); Schneider v. State, 308 U.S. 147, 160–61 (1939).

persuasion principle. This argument rests on a conception of autonomy—a notoriously vague notion that I will try to define relatively clearly. Specifically, I will suggest that a violation of the persuasion principle is wrong for essentially the same reasons (although not to the same degree) that it is wrong deliberately to lie to a person.

In Part IV, I will suggest two important respects in which the persuasion principle must be qualified. One is that it can be overridden if the consequences of following it are too severe. The autonomy justification provides a way of determining when the consequences are too severe without engaging in open-ended balancing. The other qualification is that the persuasion principle has what might be called a libertarian bias: it is sensitive only to wrongs done by the government and systematically underemphasizes comparable wrongs done by private parties.

In Part V, I will suggest how this bias might be corrected. In particular, I will describe how government actions affecting expression should be evaluated to determine if they are consistent with the autonomy rationale that underlies the persuasion principle. In this connection, I will suggest that the persuasion principle is rooted in—and raises the same questions as—the central features of certain forms of liberalism.

I. THE PERSUASION PRINCIPLE AND ITS INFLUENCE

The persuasion principle, as I define it, holds that the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful. Put another way, harmful consequences resulting from the persuasive effects of speech may not be any part of the justification for restricting speech.

"Persuade," however, does not mean simply "induce." "Persuasion" denotes a process of appealing, in some sense, to reason. Speech persuades when it induces action through a process that a rational person would value.

The clearest example of speech that might induce action by nonrational means is a false statement of fact. A rational person never wants to act on the basis of false information.[2] When a false statement induces action, therefore, what is taking place is not the rational process of persuasion as I define it. Another candidate for exclusion from the persuasion principle is speech that seeks to precipitate an ill-considered reaction. Obviously this category is unclear and troublesome in many respects, for reasons I will discuss in Part IV. But provisionally, I will define the persuasion principle to exclude these two categories of speech that move people to action by means other than the rational

2. This statement should be qualified, but the qualifications do not affect my argument. See infra note 77 and accompanying text.

process of persuasion: false statements, and speech that seeks to elicit action before the hearer has thought about the speech and possible answering arguments.

In this Part, I will try to show that this principle, so defined, unifies much of first amendment law. In subsequent discussion I will consider whether the principle I have defined in this way can be justified.

A. *The Principle*

A famous passage in Justice Brandeis's concurring opinion in *Whitney v. California*[3] states the central idea of the persuasion principle:

> [T]he fitting remedy for evil counsels is good ones. . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[4]

Justice Brandeis's opinion is notable in many respects[5]—there are several ideas implicit even in this brief passage—but this passage does contain a clear statement of the persuasion principle. Justice Brandeis is, first, concerned with the evils that result from persuasion. He speaks of "evil counsels"—speech that threatens to bring about evil by counselling evil. He is not addressing government action that restricts speech for other reasons, such as because it is too noisy or even because the audience reacts with hostility to the speaker. Those are not restrictions aimed at "evil counsels."

In addition, Justice Brandeis describes one of the exceptions to the persuasion principle when he specifically withholds protection from speech that does not "counsel" but rather precipitates ill-considered action by bringing about its evil objective "imminent[ly] . . . before there is opportunity for full discussion." While Justice Brandeis does

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3. 274 U.S. 357 (1927).

4. Id. at 375–77 (Brandeis, J., concurring).

In the literature, the most prominent statement of a principle that resembles the persuasion principle is the "Millian principle" advanced by T.M. Scanlon in A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204 (1972) [hereinafter Freedom of Expression], but then repudiated by Scanlon in Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 530–35 (1979) [hereinafter Categories of Expression]. In note 62, infra, I discuss the relationship between the persuasion principle, as I define it, and the "Millian principle." Other discussions of similar principles (focusing on the Brandeis opinion) are found in Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 213 (1983); Wellington, On Freedom of Expression, 88 Yale L.J. 1105, 1135–36 (1979).

5. See Blasi, The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*, 29 Wm. & Mary L. Rev. 653 (1988), for an interesting discussion of the themes of this opinion.

not explicitly except false statements of fact from the principle,[6] such statements are, as I will explain, properly assimilated to (in fact, they are the clearest case of) statements that bring about ill-considered action.

Justice Brandeis's dictum states unequivocally that the government may not suppress evil counsels on the ground that they are too effective. That is the persuasion principle. But Justice Brandeis adds something to the persuasion principle by specifying the government's alternative remedy: it is to use "more speech" or "good counsels." This is an effort—unsuccessful, I will argue in Part II—to justify the persuasion principle on the ground that suppression is unnecessary because counter-persuasion is a better way to accomplish the same objectives.

B. *The Influence of the Persuasion Principle*

In several respects, the persuasion principle is central to the American system of freedom of expression. On a general level, the persuasion principle captures much of the essence of freedom of expression. More specifically, the persuasion principle unifies several important and apparently disparate areas of first amendment law. While it would be an oversimplification to suggest that the persuasion principle can explain every aspect of the American system of freedom of expression,[7] the explanatory power of the persuasion principle is very great.

1. *In General.* — On a general level, freedom of speech is valued precisely because speech has the capacity to persuade. When speech causes litter or traffic problems, or when it prompts a hostile audience to threaten the speaker with violence, those are undesirable by-products, even if they sometimes must be tolerated. They are not the reasons speech merits special protection. The reason we value speech—in large part, at least—is that it persuades people to do or believe things.

To put the point another way, tyrants suppress speech because they fear it will be persuasive. There would be little left of the first amendment, as we understand it, if the government could suppress speech whenever it plausibly believed that the speech might, at some point and in some way, persuade people to do things of which the government disapproved. As Holmes and Brandeis said in their famous opinions of the 1910s and 1920s, almost any dissident speech increases the likelihood that some people will be persuaded to break the law.[8]

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6. Indeed, Brandeis says that the "remedy" for "falsehood" is "more speech, not enforced silence," 274 U.S. at 377, but it seems more plausible to read that as referring to "false" ideas, rather than false statements of fact. See infra notes 76–78 and accompanying text.

7. See infra note 64 and accompanying text.

8. See, e.g., *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Consequently, if freedom of speech is to mean anything, it must mean that speech may not be restricted simply because it persuades people to engage in harmful actions.

Moreover, suppose, as a thought experiment, we could construct a device that would automatically enforce the persuasion principle—it would automatically preclude the government from ever considering consequences that are the result of persuasion. We might not need anything else to ensure freedom of expression as we understand it. The many other first amendment doctrines that have developed are, arguably, desigued to guard against the danger that the government is only pretending to be concerned about noise, litter, offensiveness, or a hostile audience reaction but in fact is reacting to the feared persuasiveness of the speech that it seeks to suppress. If the danger of violating the persuasion principle were eliminated, the political process alone might be sufficient to ensure that other kinds of restrictions on expression do not become unacceptable.

2. *Specific Doctrines*. — A wide range of first amendment doctrines can be understood as a reflection of the persuasion principle. The Supreme Court has not always been explicit in relying on some statement of the persuasion principle, but its decisions consistently vindicate that principle.

a. *The Prohibition Against Political Censorship*. — The government may not suppress speech on the ground that the speech will persuade people to cast a vote for a candidate or position of which the government disapproves. This fundamental principle is so well accepted that it is essentially never questioned; the government does not attempt to justify restrictions of speech on this ground.[9] Although this rule is consistent with many understandings of the first amendment, it can be seen as a straightforward application of the persuasion principle.

b. *Speech Advocating Unlawful Conduct*. — What Brandeis urged in *Whitney* has become the law today: speech advocating unlawful conduct may not be suppressed unless it creates a clear and present—by which Brandeis meant probable and imminent—danger of law violation.[10]

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9. Cf. H. Kalven, A Worthy Tradition 6–19 (1988) (discussing "The Consensus on Untouchable Content").

10. The current formulation is even more protective of speech than what Brandeis proposed:

> [T]he constitutional guarantees of free speech and free press do not permit 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 incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

Although this standard literally applies to all speech advocating unlawful action, in fact, it probably applies only to speech that has a political component. In all of the relevant cases—*Brandenburg* itself, other cases in which the Supreme Court has either invalidated restrictions on speech advocating unlawful conduct or has acknowledged that such restrictions present substantial first amendment questions, and the cases in which the separate Holmes and Brandeis opinions established the foundations of first

The persuasion principle, as I have defined it, directly justifies the requirement of imminence: the risk of law violation can justify suppression of speech only if the speech brings about the violation by bypassing the rational processes of deliberation. If people are truly *persuaded* to violate the law—in the sense in which I defined "persuasion" above—the government may not punish the speech that persuaded them.

c. *Defamation*. — The core of defamation doctrine was summarized in *Gertz v. Robert Welch, Inc.*:[11]

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[12]

The precept that pernicious opinions are to be corrected only by other ideas is a paraphrase of Brandeis's dictum in *Whitney* and directly reflects the persuasion principle: suppression is not an acceptable way to combat the persuasive effects of speech. The second part of the *Gertz* formulation is also consistent with the persuasion principle; it reflects the notion that because false statements of fact do not appeal to reason, their use does not constitute persuasion and they are therefore not protected by the persuasion principle.

When *Gertz* was decided, the Court's embrace of the persuasion principle in this context seemed uncontroversial; the Court characterized it as "common ground."[13] The controversy concerned how far the law would protect false statements of fact in order to avoid chilling true statements. But today there is renewed concern over two issues that directly implicate the application of the persuasion principle to what *Gertz* called "pernicious opinions": regulation of speech that incites ra-

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amendment doctrine—the speech in question not only advocated unlawful action but expressed a political view. Indeed, it is striking that the entire development of the doctrine took place in cases involving overtly political speech: Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); DeJonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Bond v. Floyd, 385 U.S. 116 (1966); Watts v. United States, 394 U.S. 705 (1969); Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); cf. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688–89 (1959) (artistic depiction of adultery).

The Supreme Court has never considered a first amendment challenge to laws forbidding garden-variety criminal solicitation, but it seems clear that such speech could be punished even if it did not meet the *Brandenburg* standard. See K. Greenawalt, Speech, Crime, and the Uses of Language 110–26 (1989). This apparent exception to the persuasion principle is probably best understood as an instance in which the harmful consequences of following the principle are sufficient to overcome the values it serves. See infra Part IV.A.

11. 418 U.S. 323 (1974).

12. Id. at 339–40 (citation omitted).

13. Id. at 339.

cial hatred, and suppression of non-"obscene" pornography. To the extent the government seeks to justify measures of this kind on the ground that the speech causes people to hold harmful attitudes toward women or minority groups, the persuasion principle, as captured in the *Gertz* formula, decisively forbids such measures: they constitute efforts to restrict speech on the ground that the speech will persuade people to adopt attitudes that the government considers undesirable.[14]

d. *The Regulation of Campaign Finance.* — The expenditure of money in connection with political campaigns may be regnlated to avoid corruption or the appearance of corruption. But it may not be regulated to reduce the effectiveness of the speech that is more effective because it is supported by larger expenditures. As the Supreme Court said in *Buckley v. Valeo*,[15] and has repeated many times since: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[16]

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14. On pornography, compare American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332–34 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) and Stone, Anti-Pornography Legislation as Viewpoint Discrimination, 9 Harv. J.L. & Pub. Pol'y 461 (1986) with C. Mackinnon, Feminism Unmodified, 127–213 (1988) and Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589. On racial hate literature, see, e.g., Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989). Compare Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) with infra notes 22–23 and accompanying text.

Beauharnais v. Illinois, 343 U.S. 250 (1952), seems to permit restrictions on racial hate speech on the ground that it may cause bad attitudes. If that is the rationale of *Beauharnais* (as opposed to a concern with the psychic impact of the speech on the defamed group), *Beauharnais* is inconsistent with the persuasion principle. See infra notes 22–23 and accompanying text. But it is doubtful that this aspect of *Beauharnais* remains good law. See Collin v. Smith, 578 F.2d 1197, 1204–05 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978).

Such restrictions on speech might be justified not just as efforts to prevent the speech from persuading people to adopt bad attitudes but also as efforts to prevent the speech from inflicting a certain kind of psychic wound on minority groups or women. See infra note 22 and accompanying text. The second justification is not precluded by the persuasion principle, and I do not address the question whether it is otherwise acceptable. If the government offers more than one justification, or if there is a risk that the government may be relying on an impermissible justification, doctrinal rules must take into account the danger that government action purporting to have a proper justification in fact violates the persuasion principle. I discuss this point in greater detail infra notes 18–19 and accompanying text.

15. 424 U.S. 1 (1976).

16. Id. at 48–49. The Court reiterated this point in Meyer v. Crant, 486 U.S. 414, 426 & n.7 (1988); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295 (1981); First Nat'l Bank v. Bellotti, 435 U.S. 765, 790–91 (1978).

In Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990), which upheld a state statute forbidding certain corporations from making expenditures in connection with political campaigns, the dissents attacked the Court for, in effect, violating the persuasion principle. See, e.g., id. at 1408 (Scalia, J., dissenting) ("the Court today endorses the principle that too much speech is an evil that the democratic majority can

The Court has not explained why this "concept" is so foreign to the first amendment. The persuasion principle provides an explanation: when the government restricts expenditures on campaigns because it fears that those with more money will have too much influence, its concern is with the persuasiveness of the speech. It is concerned that the people who spend more will circulate their ideas more widely and more effectively, and will thereby convince more voters. Under the persuasion principle, this justification for restricting expenditures is not legitimate.

e. *Offensive Speech.* — Although more than the persuasion principle is at work in this area,[17] established first amendment law governing offensive speech not only is fully consistent with the persuasion principle but also confirms its importance.

There are different ways in which speech might be offensive. Sometimes people are offended by speech because they believe it will persuade some of those who hear it to do bad things. The persuasion principle of course forbids the government from suppressing speech because it is offensive in this way.

But speech might also be "intrinsically" offensive, that is, offensive without regard to its persuasive effect on anyone. Such intrinsically offensive speech covers a spectrum from speech that is just distasteful (in the way that offensive sights, odors, or noises other than speech might be distasteful) to, at the other extreme, speech that is so offensive that it can be said to inflict a psychic wound on the listener. A common-law assault, although not ordinarily thought to present a first amendment issue, is an example of intrinsically offensive expression of this kind. Blasphemy, ethnic slurs, and profane language are other likely examples of intrinsically offensive speech: in general (although not always) people who object to such speech would find it offensive even if they

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proscribe"). While the basis of the Court's decision in *Austin* is not entirely clear, it seems best understood as resting not on this ground but on a different premise: that the capacity to organize in corporate form is a kind of subsidy that the government may choose not to confer on organizations that engage in political speech, at least when there are readily available alternative means through which those connected with the corporation may speak. See id. at 1397–98.

17. In particular, there is a significant theme in the history of the first amendment suggesting that the offensiveness of speech is not an undesirable by-product of the system of free expression but something affirmatively desirable. For an original and important statement of this view, see L. Bollinger, The Tolerant Society (1986). For a suggestion that even highly offensive speech is valuable because it signals the range of views held by members of society, see Farber, Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of *Cohen v. California*, 1980 Duke L.J. 283, 301.

For an argnment suggesting that regulating speech on the ground of offensiveness threatens the neutrality required by a system of "public discourse," see Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 603 (1990).

were convinced that the speech would have no persuasive effect on anyone.

The persuasion principle does not, of its own force, prohibit the government from restricting "intrinsically" offensive speech of this kind. If the government is truly concerned with speech because it is intrinsically offensive in one of these ways, the consequences at which the government is aiming are not caused by the persuasive effect of the speech.[18]

For two reasons, however, the persuasion principle requires that the government's power to act against intrinsically offensive speech be limited. First, of course, a government with unlimited latitude to suppress speech on grounds of intrinsic offensiveness could violate the persuasion principle by acting pretextually. The government might claim, for example, that it is restricting profane political criticism because the profanity is intrinsically offensive, while it is actually concerned that unsuppressed criticism of that form will rally those who agree with the substance of the criticism. Second, and more subtly, even if there were no danger of pretextual action by the government, these two kinds of concern—with intrinsic offensiveness and with persuasive effects—are not always easy to disentangle even as a psychological matter. Blasphemy and flag burning are examples; even the people who object to these forms of expression will often find it difficult to determine whether their objection is rooted in the intrinsic offensiveness of the speech or in the concern that the speech will undermine religious faith or patriotism.

Consequently, the persuasion principle calls for a general, but not unrelenting, hostility to measures that restrict speech on the ground of offensiveness.[19] The persuasion principle suggests that such measures are acceptable only when there is a low risk that the government's real concern is the persuasive effect of the speech.

That is roughly what the law is. In general, the government may not restrict speech simply because it is offensive.[20] The hostility to such restrictions is greatest when there is the greatest danger that the real objection is to the message and its possible persuasive effects—as in the case of political speech or proselytizing religious speech.[21]

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18. Here and elsewhere, when I refer to "the government's" concerns, objectives, or reasons for acting, I of course do not mean just the concerns and objectives of government officials. The government's actions will often reflect the desires and concerns of people in society. The persuasion principle is violated if *whoever* is controlling governmental power—officials, powerful private groups, or dominant opinion in society—seeks to restrict speech because of concern with its persuasive effects.

19. For a discussion of how existing doctrine, particularly the focus on "communicative impact," attempts to prevent pretextual actions, including pretextual violations of the persuasion principle, see Stone, supra note 4, at 207–17.

20. See, e.g., Texas v. Johnson, 109 S. Ct. 2533, 2544 (1989) (citing numerous cases).

21. On political speech, see id.; Hustler Magazine v. Falwell, 485 U.S. 46 (1988);

There are, however, a few instances in which it is clear that speech can be restricted because of the psychic wound it inflicts—so clear that such speech is often not even seen as raising a first amendment issue. Assaults, racial and sexual harassment, and fighting words are examples.[22]

The persuasion principle accounts for the disparate treatment of these kinds of expression. When wounding words are spoken directly to the victim, with little or no other audience, there is little chance that any persuasion is occurring. The government's well-established power to punish harassment, fighting words, and assaults—forms of expression that are directed at a victim who is face-to-face with the speaker—is therefore consistent with the persuasion principle. When speech is addressed to a larger audience, however, there is a greater danger that the government is actually concerned not with the wounds that the speech inflicts, but with the possibility that the speech will have a persuasive effect on the audience. This explains why the government's power to restrict group defamation or speech that induces a hostile audience reaction is so limited.

The law governing offensive speech is, therefore, roughly what a consistent commitment to the persuasion principle would require. There are a few, more controversial instances in which the Supreme Court has permitted speech to be restricted on grounds of offensiveness; but on each such occasion the Court has emphasized that the government's real concern was not with the persuasive effect of the speech.[23] The Court's assessment of the government's concern in these cases might have been wrong, but the fact that the Court considered it necessary to reach such a conclusion in each case reflects the importance of the persuasion principle.

f. *Commercial Speech.* — Some of the Supreme Court's strongest affirmations of the persuasion principle have occurred in cases concerning commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[24] and *Linmark Associates, Inc. v. Township of Willingboro*,[25] for example, the Court invalidated bans on certain forms of advertising, declaring unacceptable the government's argument that the advertising in question would cause people to take actions that the government considered harmful to society.[26]

Linmark, in particular, is a high-water mark for the persuasion prin-

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Cohen v. California, 403 U.S. 15 (1971). On religious proselytizing, see Cantwell v. Connecticut, 310 U.S. 296 (1940).

22. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (sexual harassment); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (fighting words). On assaults, see K. Greenawalt, supra note 10, at 90–91.

23. See, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–49 (1986); FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (plurality opinion); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63–64, 70 (1976) (plurality opinion).

24. 425 U.S. 748 (1976).

25. 431 U.S. 85 (1977).

26. Id. at 96–97; 425 U.S. at 771–73.

ciple. In that case a township that was trying to remain racially integrated sought to ban "sold" and "for sale" signs on front lawns, on the ground that such signs encouraged panic selling by whites who feared that their neighborhoods were about to become predominantly black. The Court unanimously disapproved this argnment, saying that it revealed a basic "constitutional defect" in the township's actions and quoting Justice Brandeis's langnage.[27]

Overall, however, the persuasion principle has had mixed fortunes in the area of commercial speech. In cases subsequent to *Linmark*, the Court questioned the persuasion principle explicitly,[28] and in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,*[29] the Court dealt the persuasion principle an unequivocal setback.[30] *Posadas* upheld a Puerto Rico statute that forbade gambling casinos from advertising in Puerto Rico on the ground that Puerto Rico has a legitimate interest in not encouraging its citizens to gamble. *Posadas* has been severely criticized precisely on the ground that it slights the persuasion principle.[31]

Here again, the persuasion principle is crucial to the resolution of

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27. 431 U.S. at 96–97 (quoting Brandeis's concurring opinion in *Whitney*).

28. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980).

29. 478 U.S. 328 (1986).

30. Even during the period when *Virginia State Board* and *Linmark* established strong protection for commercial speech on the basis of the persuasion principle, the Supreme Court endorsed, without seriously questioning, the rule that commercial speech proposing an illegal transaction can be suppressed. See, e.g., Brown v. Hartlage, 456 U.S. 45, 55 (1982); Village of Hoffman Estates v. Flipside, 455 U.S. 489, 496 (1982) (upholding ordinance conceruing, inter alia, proximity of drug paraphernalia and drug-related literature); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772–73 (discussion of illegal transactions in general); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (designating employment advertisement by sex).

At first glance it is difficult to square this rule with the persuasion principle: it seems that the reason for suppressing the advertisements is that they might encourage people to engage in the illegal activity. (These cases did not discuss the persuasion principle or address the tension with *Linmark* or the central holding of *Virginia State Board*.) But, arguably, speech proposing an illegal transaction is not protected under the persuasion principle because it is an inseparable part of the illegal activity, in the way that an agreement to fix prices is an illegal act consisting entirely of speech. See K. Greenawalt, supra note 10, at 271. That is why there is a difference between (suppressible) speech *proposing* an illegal transaction and (protected) speech *advocating* an illegal transaction, such as advocacy of drug use. See supra note 10.

Alternatively, as in the case of nonpolitical criminal solicitation, the potential harmful consequences of speech proposing an illegal transaction may warrant abrogating the persuasion principle. See infra Part IV.A.

31. See Kurland, *Posadas de Puerto Rico v. Tourism Company*: " 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 Sup. Ct. Rev. 1, 2–3. For a discussion of *Posadas* from a different angle, suggesting the possibility that the government's motives may not have been to reduce gambling by local citizens but something less admirable, such as inhibiting competition among casinos, possibly for racial reasons, see Strauss, Constitutional Protection for Commercial Speech: Some Lessons from the American Experience, 17 Can. Bus. L.J. 45, 46–48 (1990).

a current controversy: periodically, there are efforts to prohibit the advertising of tobacco or alcohol on the ground that the advertising will persuade people to do things that are harmful to their health.[32] If, notwithstanding *Posadas*, the persuasion principle continues to operate in the area of commercial speech, the resolution of this issue is straightforward: the government may not prohibit advertisements for this reason.

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Several features of the persuasion principle heighten its attractiveness as a governing principle in the first amendment area. Unlike many constitutional doctrines, it does not just call for amorphous balancing. It really decides actual hard cases—as the examples of pornography, racial hate literature, campaign finance, and tobacco advertising show. In addition, the persuasion principle, especially in the Brandeis formulation, expresses a vigorous, optimistic view that avoids defensiveness:[33] the government must allow even the most persuasive speech, confident in its ability to counter-persuade.

Some cases clearly inconsistent with the persuasion principle have been discredited.[34] In other areas, substantial argnment would be needed to defend the proposition that current law is consistent with the persuasion principle.[35] But outside the area of commercial advertising,

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32. See infra Part IV.A and accompanying text on the issues raised by restrictions on tobacco advertising.

33. This is a principal theme of Blasi, supra note 5, especially at 693–94.

34. See supra note 14 (discussing *Beauharnais v. Illinois*). Dennis v. United States, 341 U.S. 494 (1951), has not been expressly overruled and indeed was cited in *Brandenburg* as support for the test that the Court adopted in that case. But the approach taken by the plurality opinion in *Dennis* (which followed Judge Learned Hand's opinion for the Second Circuit) cannot be reconciled with *Brandenburg*, which requires the government to show both imminence of harm and the use of words of incitement before it may suppress advocacy of law violation. By contrast, *Dennis* required courts to balance the benefits of speech against the potential harm, discounted by the improbability of that harm. See id. at 510 (plurality opinion). Imminence and incitement might affect the discounted magnitude of harm, but under *Dennis* they are not necessary conditions without which speech may not be suppressed. In fact, it is not clear that this aspect of *Dennis* survived Yates v. United States, 354 U.S. 298, 320–24 (1957).

It may, of course, be just a fortuity that cases in which the Supreme Court would not apply the persuasion principle have not yet come before it. It is reasonably certain, for example, that the persuasion principle does not apply to garden-variety criminal solicitation, and it is a happenstance that such cases bave not come before the Court. See supra note 10. In Part IV, I will discuss some of these arguable exceptions and suggest that they may in fact be consistent with the persuasion principle, once the foundations of the principle are worked out.

35. The first amendment exception for obscenity presents a particularly difficult case. To some extent, obscenity may be regulated because of its intrinsic offensiveness. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973). That rationale does not implicate the persuasion principle. But there is also an element of the justification for regnlating obscenity that is based on the danger that obscenity will encourage the commission of crimes, see id. at 58, 60–63, and also a more general concern with the moral tone of society and the way in which society views sex. See, e.g., id. at 59, 63. This is

which is widely viewed as being at most of peripheral concern to freedom of expression,[36] it can fairly be argued that not a single Supreme Court decision now accepted as good law has violated the persuasion principle, as I have interpreted it.

The persuasion principle is an appealing, optimistic notion, cloaked with the authority of Brandeis's extraordinary opinion; it arguably expresses the central concern of the first amendment; it produces specific answers to hard problems; it defends an important liberty; it is the governing principle in several of the most important areas of first amendment law; and an advocate can assert that not a single Supreme Court decision worth bothering about is inconsistent with it. This combination of circumstances gives the persuasion principle extraordinary influence in the law and rhetoric of freedom of expression.

II. Consequentialist Justifications and Their Weaknesses

Is this exceptionally influential principle correct? In this Part, I will consider the argument, suggested by Brandeis's opinion in *Whitney* and much other literature on freedom of expression, that the persuasion principle can be justified on consequentialist grounds. These justifica-

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close to a concern that obscene speech will persuade people to act, or to alter their views, in an undesirable way.

Perhaps the best way to understand the prohibition against obscenity, however, is that it rests on the premise that sexually oriented speech is peculiarly likely to make a manipulative, nonrational appeal that cannot be resisted by answering speech. See id. at 67 ("Preventing unlimited display or distribution of obscene material . . . is distinct from a control of reason and the intellect."). See also Schauer, Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899, 910–19 (1979). It is not easy to explain exactly what idea this manipulative appeal seeks to advance; presumably it involves a suggestion that a certain attitude toward sex is appropriate, and it may also concern an attitude toward women (although that is more directly the basis for feminist proposals to regulate pornography) and perhaps toward deferred gratification and similar matters. See generally Grey, Eros, Civilization, and the Burger Court, 43 Law & Contemp. Probs. 83 (1980). Indeed, perhaps the very difficulty of articulating the message involved in obscenity supports the notion that the message is being conveyed in such a way that reason cannot address it.

If the basis for the regulation of obscenity is that sexually oriented speech is peculiarly likely to produce a nonrational response then the regulation of obscenity would fit within the exception to the persuasion principle for speech that precipitates an ill-considered reaction. See infra notes 77–78 and accompanying text.

36. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562–63 (1980) ("The Constitution . . . [provides] a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

I should note that the persuasion principle, at least as I have defined it so far, does not explain why commercial expression should be only of peripheral concern to freedom of expression. Parts IV and V, which discuss the possibility that private speech can create some of the same dangers that the persuasion principle is designed to avoid, may suggest a basis for concluding that commercial speech is peripheral to freedom of expression. But I do not argue in this Article that the persuasion principle necessarily dictates the peripheral status of commercial expression.

tions have in common the claim that following the persuasion principle will produce good consequences in the long run, even though the persuasion principle protects speech that produces bad consequences in the short run.

I will argue in this Part that this justification fails. In Part III, I will describe a justification, based on a Kantian notion of autonomy, that is more successful.

A. *The "Remedy" of "More Speech"*

I have stated the persuasion principle as a prohibition: the government may not invoke certain grounds for suppressing speech. The famous passage from Brandeis's opinion in *Whitney* is, conspicuously, much more affirmative. Brandeis's point is not just that the government's power is limited to providing answering speech; he also suggests that answering speech will be effective. "Good [counsels]" are a "remedy" for "evil counsels." The point of discussion is "to expose . . . the falsehoods and fallacies, to avert the evil." The suggestion is that "more speech" can accomplish practically everything that suppression could accomplish. There is no need to suppress persuasive speech because the government can simply counteract the effects of such speech with its own answering speech.[37]

If this were true, the persuasion principle would be easy to justify. If suppression and "more speech" are equally effective ways of averting evil consequences, then of course "more speech" is preferable.

But there will be many occasions on which this optimistic view is an illusion. The problem with the "more speech" approach is that it is not unusual for people to be persuaded to do bad things, and it will not always be possible to talk them out of it. At the very least, appeals to self-interest or base motives can persuade people to take antisocial actions. People can, for example, be persuaded to commit crimes. "Counterspeech" appealing to altruistic or socially conscious motives (or reminding people that they may be punished for bad acts) will not always talk them out of it.[38]

There are many possible examples: *Linmark Associates, Inc. v. Township of Willingboro*[39]—the case in which the Supreme Court, without dissent, invalidated a ban on "for sale" signs—is one. If the homeowners who see such signs are prompted to sell their own homes, it is wholly unrealistic to think that the township will be able to change their minds with "wise counsels" aimed at convincing the homeowners that they should sacrifice what they perceive—perhaps correctly—to be their

37. Although this seems to be a fair reading of Brandeis's *Whitney* opinion, it is not the only reading. See, e.g., Blasi, supra note 5, at 674–77 (urging that Brandeis himself did not hold this view).

38. See Posner, Free Speech in an Economic Perspective, 20 Suffolk U.L. Rev. 1, 33 (1986).

39. 431 U.S. 85 (1977).

economic interest.[40] If *Linmark* is correct, it must be because allowing the signs to stay serves some other value important enough to outweigh the harmful consequences that the Township feared the signs would cause. It is simply a mistake to believe that "more speech" will be sufficient to avert those consequences.

B. *The Consequentialist Justifications*

Perhaps it is unfair to attribute to Brandeis a position that seems so obviously incorrect.[41] But Brandeis's optimistic view—that "good [counsels]" and "more speech" are the "remedy" for "evil counsels" because they can "avert the evil"—has exerted a powerful hold on first amendment rhetoric.[42] It has exerted such a hold because there is a family of theories about freedom of expression, all of which suggest in some way that "more speech" will "remedy" the evils caused by persuasive speech. These theories are less determinate and less self-assured than the view I have attributed to Brandeis. They emphasize, for example, that while "more speech" might not fully remedy the evils of evil counsels, "more speech" is on balance, or in the long run, a better remedy than suppression. Some of these theories are important and instructive, but none provides a satisfactory basis for the persuasion principle.

1. *The Marketplace of Ideas.* — Justice Holmes's famous aphorism—"[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"[43]—would, if correct, justify the persuasion principle. So long as all ideas are available and in competition with each other, the good counsels will prevail. It follows that there is no warrant for restricting speech that might persuade people to

40. There are several reasons why seeing "for sale" signs might persuade other owners to sell their own homes. Some owners might not want to live in an integrated neighborhood under any circumstances. In their case, the "wise counsels" would take the form of urging the virtues of integration. Some owners might be willing to live in an integrated neighborhood but believe that others are not willing to do so; those owners would fear that the amount their property could command on the market would fall as integration progressed. Still others might not have either of these concerns but might fear that their neighbors have such concerns and are "panic selling" at low prices. In these latter two cases it is possible that the owners have correctly perceived the facts. "Wise counsels" would therefore have to persuade them to make a financial sacrifice. Finally, it is possible that the situation is solely a collective action problem: a sufficient number of the owners would be willing to stay if each was convinced that the others were willing to stay. The "wise counsels," which would attempt to overcome this failure of coordination, would have to urge each owner to risk a financial loss in the hope that sufficient others could be persuaded not to sell. In none of these cases are the "wise counsels" likely to be very effective.

41. See supra note 37.

42. The principal opinions in which the Brandeis dictum is cited are collected in Blasi, supra note 5, at 683 n.107.

43. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

do harmful things; it is only necessary to provide competing, good ideas.

The market metaphor is powerful and attractive because it is untroubled by self-interested action. In well-functioning economic markets, self-interested action produces an outcome that is in some sense good for society as a whole. The notion of a "marketplace of ideas" suggests that self-interested behavior in the realm of ideas—such as efforts to persuade people to do apparently harmful things by appealing to their self-interest—can similarly be turned into social benefit. Superficially the market metaphor is alluring; just as force and fraud are impermissible in economic markets, making a false statement of fact or coercing a person to adopt a view are impermissible in a well-functioning system of freedom of expression.

This metaphor has received its share of criticism, much of which emphasizes the "market failures" in the first amendment area.[44] But the real problem with the market metaphor is more fundamental. There is a theory about how economic markets lead to outcomes that are in some sense desirable: if certain conditions hold, then we know that the market will produce an efficient outcome. There is no such theory for the so-called marketplace of ideas.

We do not know what constitutes perfect competition or the equivalent of market power in the realm of ideas. No matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable outcomes. Is a well-functioning market one in which each idea is equally represented? What does it mean to say that ideas are "equally" represented? How does one even individuate ideas? And why is equal representation (whatever that is) desirable? Among the ideas that are underrepresented because no one seriously advocates them, some have been rightfully rejected and deserve to be underrepresented; others are wrongly ignored and should receive a stronger defense.

It is even misleading to speak of "market failures" in the marketplace of ideas. Since we do not have a theory of what a well-functioning first amendment "market" would look like, it gives false comfort to suggest that the problem is ascertainable "failures" that need only be eliminated in order to generate good outcomes. On the level of theory we do not know when the system of free expression will produce good outcomes.

2. *The Peculiar Dangers of Government Intervention.* — Another defense of Brandeis's "more speech" idea, common to many arguments for

44. See, e.g., Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641 (1967); Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1, 4–5. For an argument that the "market failure" criticism does not go far enough, see C.E. Baker, Human Liberty and Freedom of Speech 12–24 (1989).

constitutional protection of expression, is that while "more speech" may not literally remedy the ills caused by speech that induces harm, any other supposed remedy that the government attempts will be worse. The government's assessment of the dangers caused by speech is likely to be so systematically biased that it is better, on the whole, to place suppression off limits; however ineffective "more speech" is, it should be the only "remedy" open to the government.[45]

Whether the premise is true—that the dangers of government regulation of speech are in fact systematically greater than the dangers posed by unregulated private speech—is a difficult question, and I return to it below.[46] But even assuming that this premise is correct, it does not satisfactorily justify the persuasion principle because it does not explain why the consequences that are caused by *persuasion* should be treated differently from other consequences. Undoubtedly, government officials' assessments of the harmful consequences caused by speech will often be biased. Moreover, it seems likely that there will be systematic biases toward, for example, overestimating the harm caused by speech advocating unlawful conduct or politically unpopular points of view. But these biases will exist whether the harmful consequences result from persuasion or from some other property of the speech. Government officials are likely to overstate the dangers of hostile audience reactions, the propensity of proponents of certain speech to engage in violence, the likelihood that speech will interfere with the government's ability to carry out its various functions (ranging from foreign affairs to traffic control), and so on. Certain kinds of regulation—such as regulation directed at the content of speech—may be especially likely to present these dangers of government overreaction. But there is no reason to think that harmful consequences caused by persuasion are especially likely to be overestimated, compared with harmful consequences that have other causes.

3. *The Imperatives of Democratic Self-Government.* — This view, associated with Alexander Meiklejohn, holds that democracy requires that the people, and not the government, be allowed to decide which views about political issues will prevail.[47] If the government is allowed to suppress certain ideas, then the people are not free to choose how to govern themselves. Freedom of speech is therefore "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[48]

This theory certainly reflects a plausible understanding of the cen-

45. See, e.g., L. Bollinger, supra note 17, at 76–103; F. Schauer, Free Speech: A Philosophical Enquiry 81–82 (1982); Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521, 538–44.

46. See infra Part IV.B.2.

47. See, e.g., A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

48. Id. at 39.

tral meaning of democratic self-government. But even assuming that it is correct, it justifies the persuasion principle only in certain very limited respects; it does not explain why the persuasion principle should extend throughout first amendment law.

First, the Meiklejohn view would justify the persuasion principle only in the area of political speech. Of course, as Meiklejohn himself argued, political speech may be a much broader category than it appears to be at first.[49] But the persuasion principle applies to all speech. For the Meiklejohn view to justify the persuasion principle, therefore, one would have to make the argument that all speech is "political" in the relevant sense. As Meiklejohn's critics have pointed out, his thesis becomes much less plausible when it is broadened in this way.[50]

Second, and more important, even within the realm of political speech the Meiklejohn view does not justify all applications of the persuasion principle. In fact, it only justifies an entirely uncontroversial application of the persuasion principle—what I referred to earlier as the prohibition against political censorship.[51] The Meiklejohn theory does not absolutely prohibit all restrictions on political speech. It permits some time, place, and manner restrictions, for example. All Meikeljohn's theory absolutely forbids is restrictions that are premised on the government's conclusion that a certain outcome of an election, or other political controversy, would be the "wrong" outcome.

Thus the Meiklejohn view does not justify the application of the persuasion principle to invalidate, for example, restrictions on campaign financing. Those restrictions purport to be based not on the concern that the outcome of the election will be "wrong" (that is, an outcome that the government opposes) but on the concern that the process will not be fair, or truly democratic. Because the Meiklejohn view prohibits only government actions that attempt to preclude certain possible outcomes, it cannot prohibit—in fact, to some extent it must welcome—efforts to maintain the integrity of the democratic process.

The Meiklejohn view would limit the government's power to regnlate campaign financing if one believed that, in the guise of eliminating an unfair imbalance in campaign expenditures, the government would be too likely to attempt covertly to control the results of elections. But this argument against campaign finance laws no longer reflects the persuasion principle. It no longer explains why there is something special about the process of persuasion. In the area of campaign finance, this approach will lead to the same conclusion as the persuasion principle, but it will not explain why the persuasion principle is correct.

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49. Political speech might include art that is not overtly political, for example. See Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 256, 263.

50. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27 (1971); Chaffee, Book Review, 62 Harv. L. Rev. 891, 899–900 (1949); see also Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 15–16.

51. See supra note 9 and accompanying text.

There is a final way in which the Meiklejohn view provides only limited support for the persuasion principle. The Meiklejohn theory explicitly relies on the "basic American agreement" on popular sovereignty. Most of us would say, however, that freedom of expression is morally required even if, for some reason, democracy is not appropriate for a society. Or at least we would want to defend freedom of expression even to people who do not believe in democratic self-government. And we would want to say that punishing people for their speech is an additional wrong, distinct from (and probably worse than) the undemocratic nature of the government. In Part III, I will suggest a defense of the persuasion principle that, unlike the Meiklejohn view, does not presuppose acceptance of democracy.

4. *Theories of Deliberative Rationality*. — Other justifications for the persuasion principle rest on theories that hold that truth—political, moral, or scientific—can best be discovered through the free exchange of ideas. Although these theories take a variety of specific forms, the theme that free inquiry advances the search for truth (somehow defined) is common in liberal thought.[52]

These theories fall into two categories. One approach adopts an independent criterion of what constitutes truth (or some other desirable outcome) and asserts that the process of free inquiry leads to this desirable result. If truth is defined as correspondence to nature, for example, the theory would assert that free inquiry (perhaps called "scientific method") promotes trnth in this sense.[53] The second approach does not independently define a desirable outcome. Instead, it defines a process of free inquiry and asserts that the outcomes of that process are ipso facto desirable. By this view, truth can be defined only as what emerges from a certain process of free inquiry.[54]

The first category of theories is vulnerable to the same criticism I made of the "marketplace of ideas" metaphor. It is certainly plausible to say that, in general, truth is promoted by free inquiry; unquestionably there are instances in which the suppression of ideas has impeded the search for truth, however that term is defined. The problem arises

52. The classic statements are found in J. Milton, Areopagitica (J. Hales ed. 1944), and J.S. Mill, On Liberty (C. Shields ed. 1982). In the pragmatist tradition, see, e.g., J. Dewey, Freedom and Culture 128–29 (1939); R. Rorty, Philosophy and the Mirror of Nature 373–79 (1979); C.S. Peirce, The Scientific Attitude and Fallibilism, *in* Philosophical Writings 42–59 (Buchler ed. 1955). The (now out of fashion) scientistic liberalism of Popper is another example. See, e.g., 2 K. Popper, The Open Society and Its Enemies 200–11 (1945). Perhaps the best-known contemporary exponent of the view is Habermas. See, e.g., 1 J. Habermas, The Theory of Communicative Action (T. McCarthy trans. 1984). For a more recent statement, see P. Chevigny, More Speech (1988).

53. See, e.g., K. Popper, The Poverty of Historicism (1948); K. Popper, supra note 52.

54. See, e.g., J. Habermas, Communication and the Evolution of Society (1979); J. Habermas, Legitimation Crisis 107–08 (1973).

when one tries to move from these general statements to specifying precisely the conditions of "free inquiry" that will promote truth (or some other desirable outcome). We can specify precisely the conditions that will promote economic efficiency. But we simply do not know what specific institutional arrangements, what "market conditions," or what form of government "regulation," will best promote truth, or morality, or some other independently specified desirable outcome.

The second category of theories is not vulnerable to this criticism, because these theories *define* a desirable outcome as that which emerges from a certain process of free inquiry—for example, a process in which "no force except that of the better argument is exercised; and . . . all motives except that of the cooperative search for truth are excluded."[55] This second category of theories is, therefore, no longer consequentialist. Theories of this kind do not justify free expression by saying that a system of free expression will produce better consequences than a system in which restrictions are permitted. Instead, these theories try to justify a process on some other ground; the consequences produced by that justified process are then ipso facto good consequences. These theories assert that the process of free inquiry makes the outcomes desirable, not that the outcomes make the process of free inquiry desirable.

The problem with theories in this second category is to define, and to justify, the conditions that constitute the process of free inquiry that is said to be intrinsically desirable. Why should we accept the outcomes of *this* process—instead of some other process? The autonomy-based argument I make in Part III can be seen as a defense of one such process. In that sense, my approach is not at odds with—indeed, it reinforces—certain nonconsequentialist theories of deliberative rationality.

III. The Autonomy Justification of the Persuasion Principle

A. *Autonomy, Lying, and Manipulation*

Since speech will sometimes persuade people to do harmful things, isn't the persuasion principle simply irrational? Since it is chimerical to believe that "more speech" will always solve the problems created by "evil counsels," why shouldn't the government be allowed to suppress the evil counsels?

Brandeis's opinion in *Whitney*, in addition to suggesting a consequentialist argument, uses terms that we would today say reflect a conception of human autonomy: "the final end of the State" is to make people "free to develop their faculties," and liberty is valuable "both as an end and as a means."[56] Autonomy has been the basis of attempted

55. J. Habermas, Legitimation Crisis, supra note 54, at 108.

56. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

justifications of principles comparable to the persuasion principle.[57] But autonomy is a notoriously vague notion; there is a danger that any attempt to justify a principle in terms of autonomy will slip into question-begging assertions about the nature of truly free and rational human beings.

In this Part, I will argue that the persuasion principle can be defended on autonomy grounds in the following way: Violations of the persuasion principle are similar in kind (although not in degree) to lies that are told for the purpose of influencing behavior. Violating the persuasion principle is wrong for some of the reasons that lies of this kind are wrong: both involve a denial of autonomy in the sense that they interfere with a person's control over her own reasoning processes. This justification of the persuasion principle can be characterized as Kantian.

Consider the case in which *A* lies to *B* in order to get *B* to do what *A* wants her to do. Suppose, for example, that *A* induces *B* to do her a favor by saying that she is ill, when in fact she is just lazy.[58] This deception is morally wrong (unless there are unusual circumstances) in part because it is disrespectful to treat *B* in this way. *B* is entitled to feel that *A* treated her as something less than a person—as a mere instrument of *A*'s will. *A* has manipulated *B*; she has used *B* as a tool, instead of treating her as a person.[59]

A manipulative lie of this kind has something in common with coercion. Both are ways of exerting control over the victim. Both are deliberate efforts to make a person do not what that person wants but what another person—the liar or coercer—wants. This is the sense in which the victim's autonomy is at stake.

In fact, in one respect lying is worse than outright coercion, because it is more insidious: the victim does not even know that he or she has been taken over and is being manipulated. At least in cases of outright coercion, the victim's mind is free. The victim of a lie is denied that freedom. In making decisions, the victim is pursuing the liar's ends, not the victim's own. Lying creates a kind of mental slavery that is an offense against the victim's humanity for many of the reasons that physical slavery is. While it is hard to argue that lying is worse than physical slavery, lying has a peculiarly offensive quality because it denies the victim even the knowledge that he or she is being used by

57. See Scanlon, Freedom of Expression, supra note 4; see also infra note 62 (discussing Scanlon's "Millian principle").

58. I do not use Kant's example (obtaining money by promising to repay it, knowing that one will not be able to, see I. Kant, Foundations of the Metaphysics of Morals 40, 48 (L. Beck trans. 1959)) because it involves an element of breach of promise as well as falsehood.

59. In this discussion I am indebted to C. Korsgaard, The Right to Lie: Kant on Dealing with Evil, 15 Phil. & Pub. Aff. 325, 330–37 (1986).

another.[60]

This Kantian account gives relatively clear content to the notion that lying is wrong because it violates human autonomy. Lying forces the victim to pursue the speaker's objectives instead of the victim's own objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.

This account suggests that there is a difference between lies that are manipulative and false statements made for different reasons. False statements that are not manipulative lack the element of control and domination. An inadvertently false statement, for example, or a false statement made solely for the purpose of protecting a confidence, is less objectionable because it does not involve the same degree of manipulation as a false statement made for the purpose of influencing behavior or thought. This distinction parallels the difference between, on the one hand, coercing someone, and, on the other hand, acting in a way that is not designed to be coercive but happens to prevent a person from doing what she wants.

B. *Government Manipulation*

1. *Restrictions on Speech.* — The same autonomy-based argument justifies the persuasion principle. The persuasion principle singles out restrictions on speech that are manipulative; it does not speak to nonmanipulative restrictions on speech. It prohibits the government from deliberately denying information to people for the purpose of influencing their behavior.[61] Deliberately denying information for this

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60. The crucial passage in Kant is as follows:

> [H]e who intends a deceitful promise to others sees immediately that he intends to use another man merely as a means, without the latter containing the end in himself at the same time. For he whom I want to use for my own purposes by means of such a promise cannot possibly assent to my mode of acting against him and cannot contain the end of this action in himself. This conflict against the principle of other men is even clearer if we cite examples of attacks on their freedom and property. For then it is clear that he who transgresses the rights of men intends to make use of the persons of others merely as a means, without considering that, as rational beings, they must always be esteemed at the same time as ends, i.e., only as beings who must be able to contain in themselves the end of the very same action.

I. Kant, supra note 58, at 48 (citation omitted) (quoted in part in Korsgaard, supra note 59, at 331).

The view that the "mental slavery" brought about by lying is in some ways worse than physical slavery is related to the defense of the privilege against self-incrimination offered in Seidman, Rubishov's Question: Self-Incrimination and the Problem of Coerced Preferences, 2 Yale J.L. & Hum. 149 (1990). See especially id. at 167–68, suggesting that it is more dangerous to give the government the power to coerce (manifestations of) states of mind than to give it the power to coerce behavior.

61. As I noted earlier, when I refer to manipulation by "the government" to pro-

reason is not the same thing as lying, but it is a form of attempting to control the audience's mental processes.

Ordinarily, withholding information is not as effective as lying because a lie affirmatively throws the hearer off the track. When information is simply withheld, there is usually a greater chance that the victim will discover the information for herself. But the difference is only one of degree; both a manipulative denial of information and a manipulative lie invade the victim's autonomy.

Thus there is a clear sense in which violations of the persuasion principle infringe human autonomy: they manipulate people by, in part, taking over their thinking processes in somewhat the same way as (although to a lesser degree than) lying. When the government violates the persuasion principle, it has determined that people will, to a degree, pursue its—the government's—objectives, instead of their own.[62]

This Kantian justification provides a further defense of my provi-

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mote "the government's" objectives, I of course do not mean simply the objectives of government officials. See supra note 18.

62. The "Millian principle" advanced in Scanlon, Freedom of Expression, supra note 4, at 215–24, and subsequently repudiated in Scanlon, Categories of Expression, supra note 4, at 530–35, has some similarities to the persuasion principle. Both principles forbid the government from invoking certain categories of consequences caused by speech as a justification for restricting speech, and both rest on a notion of autonomy.

But Scanlon's approach differs from mine in hoth its prescriptions and its foundations, and the differences make my approach better able to survive the objections that caused Scanlon to alter his. First, the Millian principle, unlike the persuasion principle, is not limited to speech that achieves its result through a rational process of persuasion. The Millian principle prohibits the government from considering certain categories of bad consequences—false beliefs and harmful acts—whenever they are "a result of" expression. Scanlon, Freedom of Expression, supra note 4, at 213. Consequently, Scanlon's view has problems with prohibitions against false statements of fact, as Scanlon acknowledged in his repudiation. See Scanlon, Categories of Expression, supra note 4, at 532 (discussing deceptive advertising). Scanlon's theory also should have problems with defamation, cf. Scanlon, Freedom of Expression, supra note 4, at 211, hostile audience reactions, and perhaps even "harmful acts" like crowding the streets and littering.

Second, Scanlon's notion of autonomy is very different from mine. It is not linked to the wrongness of lying. Instead, it rests on a conception of the proper relationship between the government and the citizen; as Scanlon said, his view was a generalization of Meiklejohn's theory that a democratic government may not dictate to its citizens what they shall believe ahout politics. See id. at 221; Scanlon, Categories of Expression, supra note 4, at 530–31, 535. Under the Kantian conception of autonomy, by contrast, the evil to be avoided is the manipulation of the individual by any actor, private or governmental. This conception focuses on what is happening to the listener rather than on what the government is doing.

Scanlon abandoned his principle in substantial part because he concluded that private actions as well as government actions can endanger autonomy. See id. at 527, 533. Because his conception of autonomy focused on the limitations of the government's power over citizens, it had no way to accommodate private threats to autonomy. By contrast, the Kantian conception of autonomy—because it prohibits manipulation by any source—has no difficulty recognizing that private manipulation is threatening. In Part IV.B, I discuss how the persuasion principle should be qualified to take into account private threats to autonomy.

sional definition of the persuasion principle, under which I excluded false statements and statements that precipitate ill-considered action. The persuasion principle does not apply to government restrictions of false statements of fact because those restrictions do not manipulate or deny autonomy. No one wants to make decisions on the basis of false information. When the government prevents people from making decisions on the basis of false information, it does not manipulate their mental processes to serve the government's ends. Rather, it enables those processes to function as they should, to promote the ends of the listener.

Similarly, restricting speech in a way that effectively prevents a person from making ill-considered decisions does not deny her autonomy in the way that lying to her does.[63] It does not manipulate the person and cause her to pursue the government's ends instead of her own. She remains free to decide what she wants to do on the basis of reasoned discussion. Such a restriction on speech may deny listeners something they value—people may enjoy being moved to impulsive action—but it does not control the listeners by causing them to pursue the government's ends instead of their own.[64]

2. *Withholding Information.* — It might be objected that the persuasion principle cannot be justified in the way I have suggested—as a means of protecting individuals against government actions designed to manipulate them by denying them information—because the first amendment is not generally thought to forbid the government from manipulatively denying access to information in the government's own possession.[65] In fact, one might say that the government constantly denies people information by failing to take steps to make it available to

63. Of course, the assumption that a class of ill-considered decisions can be identified is both essential and controversial. See infra notes 77–78 and accompanying text.

64. At this point, other first amendment principles besides the persuasion principle may become important. In particular, limiting speech that precipitates ill-considered action, or even factually false speech, might infringe upon important interests of the speaker that deserve first amendment protection—including interests that are called autonomy interests, although they differ from the Kantian notion that I have described. See, e.g., C.E. Baker, supra note 44, at 58–59; D. Richards, Toleration and the Constitution 188–95 (1986). The essential idea behind this conception of autonomy is that there are "capacities central to human rationality" that an autonomous person must be free to exercise. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974).

I do not intend to suggest that such interests are not to be protected. As I said earlier, while the persuasion principle is centrally important to the American system of freedom of expression, it would oversimplify that system to suppose that no other principles bear upon it. My concern here is not to describe exhaustively what the first amendment protects, but to examine the extent to which the persuasion principle should be accepted as a reason to forbid restrictions on speech.

65. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 8–16 (1978) (media does not have first amendment right of access to state-run penal facilities); Pell v. Procunier, 417 U.S. 817, 829–35 (1974) (statutory limitation on contact between media and prison inmates does not violate first amendment).

them. Indeed, governments sometimes tell outright lies, and that is not thought to violate the first amendment—even though lying is the clearest example of the kind of manipulation that the autonomy rationale of the persuasion principle forbids.

Not all government lying, and certainly not all government refusals to release information, are manipulative. For example, the government may make false statements, or fail to disclose information, in order to protect an individual's privacy. The failure to disclose information will often reflect simply a desire to save resources. In addition, even if the government's action (or inaction) is manipulative, the object of the manipulation might be someone who cannot claim constitutional rights against the government, such as a foreign power. But when the government makes false statements or fails to disclose information for the purpose of manipulating its own citizens, its conduct is wrong (other things equal) for the same reasons that violations of the persuasion principle are wrong. If the persuasion principle were carried out to the limits of its logic, it would condemn this conduct.

The fact that the first amendment is not enforced in this way does not, however, substantially undermine my claim that the persuasion principle is central to our system of freedom of expression. Many theories of the first amendment are unable fully to explain why the government's false statements and failures to disclose information pose less of a threat to first amendment values than the government's suppression of private speech. For example, false statements by the government, or the government's refusal to disclose information in its possession, can seriously hamper the discussion necessary for democratic self-government that, according to the Meiklejohn theory, the first amendment was designed to protect.[66]

That an apparent weakness of the persuasion principle is shared by other justifications of freedom of expression suggests that some institutional factor—something about the way in which the theoretical concerns underlying the first amendment are translated into practice — may be at work. Specifically, prohibitions against government lying and manipulative government nondisclosure may be examples of a principle of free expression that is underenforced by the courts.[67] Although the principles underlying the first amendment (under either the persua-

66. See generally DuVal, The Occasions of Secrecy, 47 U. Pitt. L. Rev. 579, 587 (1986) (discussing "reasons for restricting the acquisition and dissemination of knowledge"). But see BeVier, An Informed Public, an Informing Press: The Search for a Constitutional Principle, 68 Calif. L. Rev. 482 (1980).

67. See, e.g., Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

It might be thought that the reason the courts do not enforce a prohibition against government lying is that the language of the first amendment does not authorize such a prohibition. But as a matter of language it is not implausible to say that the government "abridg[es] the freedom of speech" when it deliberately lies about a matter of great public concern for the purpose of preventing a full public debate.

sion principle or the Meiklejohn theory) should prohibit government action of this kind, that is not a limitation that the courts can implement.

For the courts to enforce a prohibition against government lying or nondisclosure, they would have to make a delicate and complex inquiry into precisely what information was in the government's possession. They would then have to determine the government's reasons for the nondisclosure or false statements. The great detail of the Freedom of Information Act[68]—which has numerous exceptions designed by Congress, many of which have given rise to complex judicial interpretations, and which do not even apply to the most difficult cases (such as false statements made to the public by high officials)—suggests that courts would find such a prohibition too difficult to enforce. Institutional concerns, therefore, rather than any theoretical weakness, explain why the autonomy justification for the persuasion principle has not given rise to a judicially enforced first amendment prohibition against false statements by the government or manipulative government failures to disclose information.

C. *Why the Greater Does Not Include the Lesser*

The autonomy justification answers one of the most superficially appealing argnments against the persuasion principle: if the Constitution does not forbid the government from prohibiting an action, it should not be interpreted to forbid the government from taking the "lesser" step of merely banning speech that might persuade people to engage in the action. If the action in question is constitutionally protected, of course, this argument does not apply. But this argnment would permit restrictions on speech in the wide range of cases in which the government could prohibit the action that the speech encourages.

This "greater includes the lesser" rationale persuaded the Supreme Court in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*,[69] the one case other than those that have been discredited in which the Court explicitly rejected the persuasion principle. *Posadas* upheld a ban on advertisements for casinos. The Constitution does not generally prohibit the government from paternalistic action; that is well settled.[70] Thus the government would be free to ban gambling even on strictly paternalistic grounds. How can it possibly be a greater invasion of human freedom for the government to ban only speech advocating gambling, when it leaves people free to gamble?

The autonomy justification provides an answer because it explains that a lie—and, by extension, a manipulative restriction on access to information—is a different kind of affront from outright coercion. One

68. 5 U.S.C. § 552 (1982).
69. 478 U.S. 328 (1986).
70. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n.15 (1973).

might dramatize the distinction by saying that outright coercion affects what people do, but restrictions on information affect what people are. For the government to frustrate the desire to gamble, for example, is different from the government manipulating the flow of information so that some people who would otherwise have developed that desire never do so.

Which imposition is worse may depend on the facts of the specific case. But the restriction on information imposes a different *kind* of control on people. That is enough to answer the "greater includes the lesser" argument. There is a value in being able to hold a belief or desire even if one cannot act on it. That is why "thought control" is such an odious notion. It is different from, and often worse than, behavior control. When the government violates the persuasion principle, it is engaged in a form of thought control. Even if the government can forbid people from acting in certain ways, it does not follow that it may try to prevent them from believing that such actions are proper, or from wanting to engage in those actions.[71]

Suppose that the government could manipulate people's minds directly, by irradiating them in a way that changed their desires. No one would say that the power to ban an activity automatically included the "lesser" power to irradiate people so that they no longer had the desire to engage in that activity. Violations of the persuasion principle, unless justified in some other way, are objectionable for the same reason (although, because they are less effective, not to the same degree) as such imaginary thought-expunging radiation.

IV. The Limits of the Persuasion Principle

This discussion shows that the persuasion principle can be securely justified and should play an important role in the system of freedom of expression. But I do not want to suggest that the current state of the law, in which the persuasion principle plays such a significant role, is fully satisfactory. On the contrary, the persuasion principle must be qualified in at least two ways.

A. *Averting Very Bad Consequences*

Even if violating the persuasion principle is as bad as manipulative lying, manipulative lying is not always wrong. If the consequences of not lying are very bad, it is acceptable, and sometimes morally obligatory, to lie. It follows that the persuasion principle can be overridden if the consequences of permitting the speech are sufficiently harmful.

This result is not surprising; few principles hold absolutely, regardless of consequences. But basing the persuasion principle on auton-

71. See Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control man's minds.").

omy gives some sense of how severe the consequences must be before they allow the principle to be overridden. Roughly, the question is whether the consequences are so severe that it would be acceptable to engage in manipulative lying or deception to prevent them.

Consider, for example, the debates over whether the Constitution would permit prohibitions against tobacco advertising, or against speech that might encourage discrimination against minorities. These debates tend to focus on one of the polar positions. Some say that such restrictions are utterly inconsistent with the first amendment because they constitute attempts by the government to manipulate behavior by controlling ideas. Others urge that such prohibitions are unproblematic because the greater power to ban the activity includes the lesser power to ban speech that encourages the activity.

But if the persuasion principle rests on an autonomy rationale—that violations of the persuasion principle are wrong for approximately the same reason that lying is wrong—then neither of these polar positions is correct. Instead, according to the autonomy rationale, the question is roughly whether it would be acceptable to engage in manipulative lying in order to prevent the conduct in question (discrimination or smoking). This does not decisively resolve the question, but it narrows and focuses the inquiry. One should not manipulatively deceive someone casually, but manipulative lying is certainly justified to prevent serious harms. It follows that a serious social problem could justify manipulation of the kind that the persuasion principle forbids.

B. *The Libertarian Bias of the Persuasion Principle*

The other limit on the persuasion principle is more complex and problematic. It derives from what might be called the libertarian bias of the persuasion principle. The persuasion principle focuses on the dangers that government action creates, without considering whether private action might present comparable dangers or whether the government might help overcome the dangers created by private action.[72] This bias does not undermine the persuasion principle, but it does require that the principle be qualified.

These qualifications are not easy to specify. As I will discuss in Part V, the question of how the government should be allowed to respond to private speech that threatens listeners' autonomy is exceptionally complex. It raises both empirical questions—When is there a problem of private autonomy-threatening speech? How likely is government action to correct the problem instead of making it worse?—

72. The argument that current first amendment doctrine does not give the government sufficient power to combat private threats to the values underlying free expression is increasingly common in the literature. See, e.g., Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1415 (1986); Schneider, Free Speech and Corporate Freedom: A Comment on *First National Bank of Boston v. Bellotti*, 59 S. Cal. L. Rev. 1227, 1287 (1986).

and theoretical questions about exactly what it means to say that private speech threatens listeners' autonomy. But before addressing these questions, I will defend the assertion that the persuasion principle reflects a libertarian bias; consider various arguments that suggest (with partial but not complete success) that the libertarian bias is justified; and describe some ways in which the persuasion principle, as I have stated it, already attempts to correct for the libertarian bias.

1. *Private Manipulation and the Libertarian Bias.* — Private speakers commonly try to manipulate their listeners. If they do so by making false statements of fact, the persuasion principle permits their speech to be restricted. But the manipulation might take the form of withholding opposing arguments, or distorting the truth in ways that do not amount to outright falsehoods, or appealing to the listener in a subliminal way.

Private manipulation of this kind is endemic. It occurs not only in obvious places like advertising but in virtually all forms of private discourse. Every speaker who tries to gain an advantage by using his or her superior resources (including intellectual and rhetorical abilities as well as material resources), instead of just offering the arguments for what they are worth on the merits, is engaged in a form of manipulation of the kind I described in justifying the persuasion principle.[73] Such a speaker is trying to take over the mind of the listener, to make her pursue the speaker's ends instead of her own. In every such case, the private speaker is doing something that is akin to coercion.

But the persuasion principle forbids the government from restricting private speech on the ground that the speech is manipulative; such a government restriction would be directed at consequences resulting from the persuasiveness of the speech. Manipulation is one of the many harmful consequences that, under the persuasion principle, the government may not take into account.[74] For example, the persuasion principle would forbid the government from restricting racial hate propaganda even if it could be demonstrated that the propaganda, by skillfully presenting evocative images and one-sided data, manipulated people into thinking that certain groups were intrinsically inferior.

Thus the persuasion principle seems to leave the government helpless against endemic private autonomy-invading manipulation. The paradoxical effect of the persuasion principle is that the autonomy of the listener—precisely what the persuasion principle is supposed to protect—will be invaded, but by private speakers. The persuasion prin-

73. See 1 J. Habermas, supra note 52, at 85–95, 285–88 (contrasting "communicative action," which is "oriented to reaching understanding," with uses of speech oriented to achieving the speaker's objectives, including "strategic" and "dramaturgical" (or "[t]he manipulative production of false impressions")).

74. I leave aside for now the exceptions for false statements of fact and speech that attempts to precipitate an ill-considered reaction. As I will explain, see infra notes 76–77 and accompanying text, those exceptions are rudimentary efforts to address the problem of private manipulation.

ciple will, in this instance, detract from autonomy rather than enhance it. The source of the problem is that the persuasion principle is blind to private manipulation and bars only government manipulation.

2. *Can the Libertarian Bias Be Justified?* — Although private manipulative speech is ubiquitous, this problem is not as severe at it might seem at first. Several factors mitigate the problem and partially justify the libertarian bias of the persuasion principle. These factors do not, however, eliminate the problem of private manipulation or justify the libertarian bias completely.

First, manipulative private speech on one side of an issue may counteract manipulative speech on the other side. Private speakers will sometimes have an incentive, financial or otherwise, to supply the arguments, facts, or perspectives omitted by others. Competitors and consumer groups try to correct the distortions they see in advertising. Political factions answer one another. The net effect on the audience may be the same as if there had been no manipulation at all.

If manipulative private speech were always available to correct other manipulative private speech, the libertarian bias of the persuasion principle would be justified. It makes sense for the persuasion principle to forbid the government from engaging in manipulative suppression—since suppression prevents any private speech from counteracting the government's manipulation—while leaving private parties free to engage in manipulative speech, since counteracting private speech will be available.

But there is, of course, no reason to think that an unregulated system of private expression will be self-correcting in this way. The content and quantity of speech in circulation depends on the inclinations and resources of potential speakers. So far as the promotion of truth is concerned, these are arbitrary factors. There is no reason to think that they will generate a self-correcting system. Certain points of view may be underrepresented or wholly unrepresented. It follows that sometimes private speech can threaten—and government restrictions can therefore serve—the values that the persuasion principle is intended to protect.

Second, sometimes the listener will know that the speaker is attempting to manipulate her and will make the necessary adjustments. The listener will seek out opposing points of view or will correct for the distortion in her own thinking. This will also mitigate the problem of private manipulative speech and partially justify the libertarian bias of the persuasion principle. A listener will ordinarily be less able to overcome the effects of government restrictions because those restrictions prevent her from even encountering speech that might enable her to make the necessary adjustments. A listener will usually be more able to overcome private distortions.

But the listener's ability to adjust can be a complete solution only in a world of unlimited, or at least very great, resources. In such a

world, before making any decisions people could uncover all possible counter-arguments, including those not already in circulation, and fully consider every argument and counter-argument. But in a world in which people have only limited resources (especially time) to devote to each of the many decisions they must make, people will be vulnerable to manipulation. They will be unable to consider every way in which the information and arguments presented to them might be distorted.

Third, the government really can "remedy" the manipulative character of private speech by providing "more speech." If private speakers attempt to manipulate people by omitting information or counter-arguments, the government can supply what is missing.[75] Even after the government supplies what is missing, the speech may still persuade people to do bad things, as I argued in Part III. But autonomy-invading manipulative distortions can be corrected by "more speech" supplied by the government. Again, this is a partial solution to the problem, and it suggests that the libertarian bias of the persuasion principle is defensible.

Again, however, this "more speech" remedy will not be a complete solution in a world of limited resources. Correcting manipulative private speech by supplying "more speech"—for example, by providing public funding for political campaigus—is costly. Correcting manipulative private speech by suppressing it, on the other hand, will be nearly cost-free to society in monetary terms, assuming—obviously a big assumption—that the government restrictions do no more than correct for private distortions.

It is tempting to say that if society is not willing to pay the costs of more speech, then the threat that the private speech poses to autonomy cannot be serious. But the fact that people consider other needs to be more pressing does not mean that the private speech that happens to be in circulation is free of serious, manipulative distortions. Unless some other argument can show why government suppression is undesirable, the assertion that "more speech" can remedy manipulative private speech, even if accurate, does not require that the government must choose that remedy instead of suppression.

Finally, the libertarian bias of the persuasion principle might be justified on the ground that even if private speakers are manipulating their audiences, government restrictions of the private speech will do more harm than good. The government itself has biases; in the guise of correcting private manipulation, the government may distort the debate in a way that manipulatively serves its own purposes.

This danger is most apparent when distinctively governmental in-

75. See Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting) (citing evidence that before cigarette advertising was banned from television and radio, FCC "fairness doctrine" that mandated antismoking advertising effectively decreased number of smokers), aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972).

terests are affected, for example when the restricted speech criticizes government officials or threatens to unseat incumbents from office. But it can also happen in other cases, when no distinctively governmental interests are at stake, such as in cases of commercial speech or speech that incites hatred toward a particular group in society. In such cases, private parties might use the government not just to correct for the distortions and manipulation of their opponents but manipulatively to restrict speech in order to serve their own purposes.

This danger is certainly important, and again it mitigates the problem of the libertarian bias in the persuasion principle: it suggests that the bias does not wholly undermine the soundness and usefulness of the persuasion principle. But this argument, like the other limitations, does not completely solve the problem of the libertarian bias.

Sometimes government intervention will do more harm than good. But there is no reason to think that that will always be true, or that government intervention is so harmful so often that the best course is to bar it entirely. There may be occasions when the danger of continuing to allow private manipulation is greater than the danger of allowing the government to restrict the manipulative private speech. Whether this is true will depend on several complex empirical and theoretical issues, some of which I will address below. But there is simply no basis for saying that there is no definable category of cases in which government intervention will, on balance, improve protection for autonomy. The persuasion principle, with its libertarian bias, implicitly makes this statement.

3. *False Statements and Statements Prompting Ill-Considered Action*. — As I have defined the persuasion principle, it does not protect false statements of fact or statements that seek to precipitate ill-considered action. When the government restricts such statements in order to prevent the bad consequences that they induce, it does not violate the persuasion principle.

There were many reasons for defining the persuasion principle in this way. These built-in exceptions are not ad hoc but rather cohere with the idea tbat the government may not interfere with a rational process of persuasion. Without these exceptions, the persuasion principle would not fit first amendment doctrine. Indeed, Justice Brandeis's *Whitney* concurrence is itself the source of the exception for speech that induces ill-considered action; Justice Brandeis suggested that the government may restrict speech when there has been no "opportunity for full discussion." And the autonomy justification for the persuasion principle seems to validate these exceptions; there is a clear sense in which the government does not infringe on autonomy when it restricts these kinds of speech.

Most important, this aspect of the persuasion principle—the exceptions for false statements of fact and statements that seek to precipitate ill-considered reactions—addresses the problem of private

manipulation. That is, these exceptions partially overcome the libertarian bias. The exceptions permit the government to intervene in certain circumstances when private speakers are attempting to manipulate their audience.

This point is made most clearly in connection with false statements of fact. Lying is the clearest case of the coercion-like, autonomy-invading manipulation that the persuasion principle is intended to prevent. When a speaker tells a lie in order to influence the listener's behavior, the metaphor of commandeering the listener's mind, and making it serve the speaker's ends instead of the listener's, seems especially appropriate. The speaker really does inject her own false information into the thought processes of the listener for the purpose of making those processes produce the outcome that the speaker desires.

Consequently, false statements of fact seem to present an especially clear instance in which the libertarian bias is unjustified; it seems more likely here than anywhere else that allowing the government to restrict false statements of fact by private speakers, while it does present some risks of government abuse, will do more good than harm. If the category of false statements of fact is not defined very narrowly, it can, of course, become highly problematic.[76] But there is a core area in which the harm of private manipulation seems great enough to justify government restrictions on speech.

Speech that seeks to induce ill-considered action—assuming for the moment that such a category can be defined—presents similar dangers to autonomy. This speech manipulates listeners by causing them to act in ways that the speakers want them to act, before they have a chance to consider whether the action will advance their own ends. In that sense, speech that induces ill-considered action is a violation of autonomy, akin to coercion, in the way I discussed in Part III. As in the case of false statements, government suppression of private speech can protect the listeners' autonomy.

Speech that induces ill-considered action is different from false speech, however, in one significant respect. It is a fair generalization that no rational person ever wants to act on the basis of a false statement of fact.[77] But there are occasions when a rational person would

76. For example, many statements made in political debate—about candidates' records, the economy, the progress that can be made in solving problems over the next few years—are literally false statements of fact.

77. There are instances in which a rational person might want to be lied to. In such cases, a manipulative falsehood does not invade the listener's autonomy. I leave these instances aside because they seem too unusual and peripheral to implicate the basic institutional structure governing freedom of expression.

One reason that a rational person might choose to be lied to is that we cannot always control what we think, and hearing certain statements might involuntarily stimulate unpleasant thoughts. A person might prefer the risk of being lied to, to the risk of having a true statement force an unpleasant thought before her mind. Thus, for exam-

want to be moved to spontaneous or impulsive action.[78] If, in such cases, the government restricts speech because the speech will bring about an ill-considered reaction, the government deprives the listeners of something they value—the capacity to be moved to spontaneous action.

But such a restriction is not a deprivation of the kind of autonomy that underlies the persuasion principle. Depriving a person of the capacity for spontaneous action does not constitute manipulation; the government is not causing the listener to pursue its aims instead of the listener's own aims. It is inflicting a different kind of harm on the listener.

The true problem with allowing the government to restrict speech that precipitates an ill-considered reaction is a deeper one. It is that *every* action is to some degree ill-considered. Because resources are scarce, people seldom, if ever, consider every possible counter-argument and ramification before they act. At some point they must make a decision even though their information is incomplete. There is virtually never an opportunity for truly "full discussion" (to use Brandeis's phrase). Thus whenever a speaker tries to manipulate her audience—by providing a tendentious or distorted view, or even by not fully presenting counter-arguments—the speech might be said to be attempting to induce ill-considered action.

That is why this category is so ill-defined—because potentially it includes all manipulative private speech, a very broad category indeed. Brandeis's qualification for "full discussion" attempts to correct for the libertarian bias by allowing the government to suppress manipulative private speech. But manipulative private speech is endemic. Brandeis's qualification identifies the problem, rather than solving it.

The problem is: how far should the government be allowed to go in restricting private speech because it is manipulative? False statements of fact, at least if the category is narrowly defined, present a relatively easy case for government intervention. And the mitigating factors previously discussed suggest that denying the government the authority to restrict manipulative private speech is not quite as serious a problem as it might initially seem. But because manipulative private

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ple, it can be rational for a person to prefer to be told that she does not have an untreatable and deadly disease, even if that statement is false.

A person who makes such a choice pays a price in uncertainty. In the example given, the listener will not know whether the good news she is certain to receive—the statement that she does not have the disease—is true or false. But it is not necessarily irrational to prefer that uncertainty to the unpleasant thoughts that will be involuntarily induced by bad news.

78. Two disparate examples are a response to a *true* cry of fire in a theater, and a response to a charismatic religious (or other) figure. In the first instance the weighing of pros and cons, while it would be desirable if possible, is too costly. In the second instance, the weighing of pros and cons is intrinsically undesirable because it detracts from the quality of the experience.

speech is so prevalent, a serious problem remains, and beyond the category of false statements of fact it is unclear what the answer to that problem might be. In the next Part, I offer some thoughts on this issue.

V. AUTONOMY AND LIBERALISM

A. *Eliminating the Libertarian Bias*

Any effort wholly to eliminate the libertarian bias of the persuasion principle will raise questions of extraordinary difficulty. Suppose the government were to restrict private speech of a certain kind—say, speech that made derogatory assertions about particular groups in society, or advertising for certain products, or large expenditures in connection with political campaigns—on the ground that the speech was too one-sided and manipulative. The argument would be that although this government restriction is superficially inconsistent with the persuasion principle, it actually furthers the objectives of the persuasion principle because it averts a threat to the autonomy of those who might be influenced by this private speech.

In order to evaluate this argument, it would not be enough to conclude that some private speakers were engaged in manipulative or distorting arguments. One would have to consider: whether other private speech corrected those distortions; whether the listeners themselves could correct for the distortions; and if not, whether the government action really corrected them or instead merely imported distortions favorable to the government.

These inquiries raise difficult, but perhaps manageable, empirical questions; the aspects of first amendment doctrine that do not fit the persuasion principle may even reflect a rough effort to come to grips with these empirical issues.[79] But there is a more fundamental prob-

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79. See supra notes 28–36 and accompanying text (aspects of first amendment doctrine that seem not to fit the persuasion principle).

There are some circumstances—what might he called "laboratory conditions"—in which it is easier to assess precisely what speech is in circulation on different sides of an issue. In these cases, there is a greater chance that government action will not overreach but will simply correct for imbalances (and that any government overreaching can be set aside). Criminal solicitation, see supra note 10, at least in private, may be an example. The notion of "laboratory conditions" (used in a different but related way) is part of the justification that the Supreme Court gives for its approach in cases involving speech in connection with representation elections under the National Labor Relations Act, in which the usual first amendment principles are essentially suspended. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 616 (1969).

Another example is the restrictions imposed on speech by advocates in a trial. Certain statements may not be made in arguing to a jury precisely because they are too likely to persuade the jury by means that are thought to be manipulative. See generally the discussion in L. Bollinger, supra note 17, at 56. This is perhaps the best example of a situation in which both the speech in circulation and the effects of the government's restrictions on speech can be so carefully monitored that government overreaching becomes less of a concern than private manipulation.

lem. How would we know when we had a system of expression free of manipulation? As I said earlier, there is no theory of what a well-functioning speech "market" consists of. There is no theory that tells us what mixture of speech and restrictions is optimal, at least in the short run. Without such a theory, it will be very difficult to specify how the persuasion principle should be qualified to eliminate the libertarian bias.

I cannot offer either a complete theory or concrete prescriptions for specific cases. But it may be helpful at least to identify the point of view from which the problem should be considered. In moral philosophy, if not in law, this is often all that can be accomplished. To show that an issue should be addressed from a particular point of view—for example, that of a utilitarian ideal observer who seeks to maximize the sum of utility in society,[80] or that of an individual who does not know her particular circumstances but must design rules to govern a society[81]—advances the discussion, even if one cannot say specifically what such a hypothetical individual would do in concrete situations.

My suggestion is that in trying to decide how far the government can go in restricting private speech on the ground that it is manipulative, we should adopt the point of view of a (hypothetical) individual who has no interests or desires other than to reach the best decision about the subject under discussion. Perhaps the best way to understand this construct is to draw an analogy to a judge or any other impartial arbiter. Ideally, a judge should have no desire other than to decide cases correctly.

The best way to understand the persuasion principle is by analogy to the ideal judge. The autonomy rationale underlying the persuasion principle requires government actions affecting speech to be assessed from the point of view of an individual who is self-interested, but whose only operative desire is to reach the correct decision about what she should do or believe. For example, suppose one were trying to determine whether unquestionably manipulative advertising for a certain product should be forbidden. In making this determination, one would try to adopt the point of view of an individual whose only interest is in reaching a correct decision, and ask: does the information currently available—taking into account both the manipulative advertising and all other relevant speech—deviate substantially from what that hypothetical individual would desire? If so, could that individual, operating under normal conditions of scarcity, compensate for the deficiency herself? If not, does the proposed government restriction make it more

80. The classic utilitarian impartial observer theories are D. Hume, Treatise of Human Nature Book II, Pt. I, Sec. XI; Book III, Pt. I, Secs. 1 and VI; 316–20, 575–60, 582–84, 618– 19 (Selby-Bigge ed. 1888); D. Hume, An Enquiry Concerning the Principles of Morals, 218–32, 268–78 (Selby-Bigge ed. 1975); A. Smith, The Theory of Moral Sentiments (D. Raphael & A. Macfie eds. 1976).

81. See J. Rawls, A Theory of Justice 17 (1971).

likely, from the point of view of that individual, that she will be able to reach the correct decision, or does it simply substitute the government's manipulation for that of the private parties? These questions are, of course, highly abstract, far removed from specific doctrines that might resolve specific cases. But they provide a framework for considering the issues.

B. *Liberalism and the Persuasion Principle*

Focusing the question in this way also reveals the liberal theoretical roots of the persuasion principle in the American system of freedom of expression. The ideal observer position that I described reflects certain classic liberal virtues. It is abstracted from any particular desires, attachments, or ways of life. In that sense it is an impartial or neutral point of view. It is also, like certain forms of liberalism, highly rationalistic; from the point of view I have described, speech is valuable only to the extent that it furthers *rational* decision making.

It is not part of my argument that these aspects of liberalism—its abstraction from particular desires and its rationalism—are correct. My suggestion is only that a central principle in the American system of freedom of expression is distinctively liberal at its core. Indeed, the liberal ideal observer construct I have described may not even be coherent. Real individuals have more than a bare desire to decide correctly what candidates they should vote for, or what views to hold about others in society, or what occupation they should pursue, or what products they should buy. They have concrete desires and views about products and candidates and occupations. It is possible that unless one knows what those concrete desires are, one cannot make sense of the question: what information would this person want in circulation? The bare desire to reach a correct decision may leave that question unanswerable in principle.

This objection echoes a common objection to liberalism: liberalism mistakenly attempts to deduce moral principles from too "thin" or "unsituated" a conception of human nature, a conception that views people simply as rational beings without particular attachments.[82] If this objection to liberalism is correct, it follows from the argument I

82. This is today perhaps the most common criticism of (certain forms of) liberalism. For representative examples, see M. Sandel, Liberalism and the Limits of Justice 59 (1982); Galston, Defending Liberalism, 76 Am. Pol. Sci. Rev. 621 (1982); Sen, Justice: Means versus Freedoms, 19 Phil. & Pub. Aff. 111 (1990).

This problem is parallel to the question whether liberalism can support a coherent theory of education. See Gutmann, What's the Use of Going to School?, *in* Utilitarianism and Beyond 261 (A. Sen & B. Williams eds. 1982). A "thin" theory of human nature like the one described in text suggests that people should be educated simply to use their rational faculties. (I understand the effort in A. Gutmann, Democratic Education (1987) to be along these lines.) That may be insufficient to generate any useful account of what an education should consist of. But any more complete conception threatens to mold people too much, in a way that endangers their autonomy.

have made here that the theory of freedom of expression reflected in the first amendment is fundamentally flawed. My argument has been that that theory incorporates a principle—the persuasion principle—that is derived from a Kantian notion of autonomy, according to which the autonomous individual is an unmanipulated individual. If one cannot make sense of the idea of an individual whose only desire is to decide correctly, then perhaps one cannot make sense of the idea of an unmanipulated individual. In that case, this component of the first amendment theory of freedom of expression collapses. But even if that happens, it is useful to understand the connection between a concrete legal principle and the deeper presuppositions of liberalism. As long as we must enforce the first amendment—within a liberal system—the approach I have outlined may be the best we can do.

CONCLUSION

I have suggested that a single theoretical premise—that freedom of expression is desigued to protect the autonomy of potential listeners, with autonomy defined in Kantian terms—generates a doctrinal principle that unifies much of current first amendment law and that helps resolve specific current controversies. I have also argued that when considered in light of its justification, that doctrinal principle, which I have called the persuasion principle, must be qualified in two significant ways.

First, the persuasion principle does not hold when the consequences of following it are too severe. The connection between the persuasion principle and the prohibition against lying gives some sense of how severe the consequences must be in order to override the principle. Second, the persuasion principle is insensitive to the danger that private parties, and not just the government, infringe autonomy. I have tried to specify a point of view from which institutions should be evaluated to determine if they are consistent with the autonomy rationale that underlies the persuasion principle.

There is a serious question whether that point of view is too disembodied and rationalistic, too abstracted from specific desires and attachments. If it is, however, that reflects the connection between the persuasion principle, and, therefore, the American system of freedom of expression, and a common form of liberalism. The strengths and weaknesses of the persuasion principle are the strengths and weaknesses of the system of freedom of expression, and of the political culture that gives freedom of expression its prominent place.