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Episode 22, Corey Brettschneider on Hate Speech

Released Nov. 25, 2012

MATT PETERSON: This is Public Ethics Radio. I'm Matt Peterson.

How should states deal with hate speech? In the U.S., the prevailing attitude is that hate speech should be protected. Any effort to ban even the most vile speech is seen as a deep affront to liberty. In other liberal democracies, hate speech is more restricted. Allowing unconstrained hate speech is seen as a failure to respect the groups it target.

Corey Brettschneider, a professor of political science at Brown University, has a new take on these questions. The state shouldn't ban hate speech, he says, but that doesn't mean it should be silent on it either. He believes that the state should speak out against hate speech.

Take the Westboro Baptist Church, an American group that protests military funerals, thinking they're a sign of God's punishment of gay rights. Brettschneider would let the church's protests happen but revoke its status as a nonprofit organization. That, he thinks, would help express the state's long-term interest in liberal-democratic values.

Brettschneider's new book is *When the State Speaks, What Should it Say? How Democracies Can Protect Expression and Promote Equality*.

He spoke to Christian Barry from Providence, Rhode Island.

CHRISTIAN BARRY: Corey, welcome to Public Ethics Radio.

COREY BRETTSCHEIDER: Thanks Christian for having me.

CHRISTIAN BARRY: One of the threats that is often seen in liberal democratic societies is that the types of rights that it affords its citizens may be its own undoing. That is, that certain people and groups may employ these very rights to undermine the status of these rights.

If you look around at liberal democracies around the world, you see two quite different approaches to how to address this problem. One is to basically remain with your hands off and say that that's simply a price you have to pay when it comes to liberal democracy, that we should conceive of these rights as, if not trumps, something close to it. And that we shouldn't try to intervene to protect even these rights from their potential undermining from within.

And another approach, which is that, no, when it comes to those sorts of speech and exercise of these rights that would undermine the very rights themselves, that the state should be using

all of its means, including its coercive power, to try to prevent this. Do you find either of these two types of approach a plausible approach? And if neither is plausible, what type of alternative might be worth exploring?

COREY BRETTSCHEIDER: The first thing to say is that I do think that both those who would rightly be characterized as free speech purists, who would protect all forms of speech including hate speech, as well as those who would ban it, outright, the view of militant democrats in most liberal democracies—that both sides are fundamentally onto something and that they both have concerns that—that are correct.

On the free speech side, I think there is something to be said about the worry about coercion in a state that's willing to ban speech. And I also think it's right, on the militant democrat side who would simply ban hate speech, that there's a real concern about the content of that speech.

So what I've endeavored to do in the book is to develop and defend a third view that combines traits and the value of both. My framework, which I call value democracy, suggests that when it comes to coercion, we should protect all viewpoints. Not threats, but the expression of all ideas including those that are heinous and offensive to liberal democracy itself.

But I add to that, a spin. I say there is also an obligation of those countries that are going to have this view, have this rule of viewpoint neutrality, to articulate and defend the egalitarian reasons that underlie the rule in the first place. The state has the obligation to express the values of equality that underlie that free speech protection itself.

And my aim, by distinguishing between the coercive and expressive capacities of the state, is to both protect and also to criticize those groups.

CHRISTIAN BARRY: So maybe you can give an example. So suppose that you imagine a nontargeted expression of hate speech by the Ku Klux Klan, and the different types of approaches might be, one might be, of course, just to sort of prevent them from speaking. It's clear you wouldn't advocate that.—But what exactly would be sort of the limits and extent of this idea of these attempts at democratic persuasion by the state?

COREY BRETTSCHEIDER: Yeah. One thing I think is to look at existing practices and to tie them to the, to explicitly the criticism of these sorts of groups. So the Klan, as well as the American Nazi Party, they're not only famously anti-Semitic but many of them are interested in denying the reality of the Holocaust. So when we put up a Holocaust memorial in tribute to the fact that the Holocaust happened, and also a condemnation of those who perpetrated it, those are ways, I think in the most simple way, of protecting but also criticizing those groups.

But more robustly, I also argue that when it comes to funding, these groups should be criticized by withdrawing funding to them. So take the Westboro Baptist Church. There's a famous case about whether they have the right to protest as they do at military funerals. They do this, strangely, to protest what they regard as America's wrongful protection of gay rights. And they think these funerals are an example of God condemning America for its complicity in gay rights.

I think, as I said, that those protests, when they're especially held, as they often are, away from the view of the families, do get free speech protection. But oddly, the Westboro Baptist Church, like all churches in America, gets nonprofit status and the subsidies that are associated with that status. So if I give money to Westboro Baptist Church, I get a tax deduction. And that I think is a kind of indirect subsidy to the Westboro Baptist Church.

And on my view that I defend in the book, groups like that, although they get free speech protection, one of the ways that we should condemn them is by revoking their nonprofit status and certainly revoking any subsidies that are available to them.

CHRISTIAN BARRY: The motivating idea behind sort of the free speech fundamentalists and the jurisprudence in the United States—all the arguments that they have—it's not that such people generally think that no harm can come from speech, but rather that there are various reasons why we should support free speech both in the degree to which it contributes to public knowledge, the way it—going back to Millian arguments about how it makes the freedoms that we have things that we've won and deserved and have to defend and so forth.

So I imagine they would say that there's some real problems with your enabling the state to speak, especially since we know that, you know, there's always the risk that the state will not limit itself to speaking just about this narrow set of democratic values but will be starting to impose its viewpoint about many things.

And on the other hand, I can imagine people who are much less shy about using the coercive capacities of the state to say, “Well, look, I mean, if you acknowledge that the types of harms that come about through the exercise of speech which is classified as hate speech, is worth regulating, then why be so reticent to use coercion when coercion is the most effective way of trying to, to limits these harms?”

COREY BRETTSCHEIDER: Right, I think that really sums up—I mean in some way I think it's a virtue of the view that it gets it from both sides, so to speak. To the people who invoke Mill—you know, the idea in Mill, in *On Liberty*, is that free speech ideally protects a robust civil society that gives rise to criticism of views that are wrong and that results ultimately in the, in Mill's terms, the truth winning out.

But that doesn't just happen, I think, naturally. You need to have a way in which that good kind of discussion is triggered. And so in my view the role of the state is both to allow for the most robust and free discussion possible, but also to jumpstart it. And to take a stand too in—in not just leaving untouched these, what I call “hateful” viewpoints or viewpoints that deny the equal standing under law of ethnic or racial minorities, or people based on sexual orientation.

CHRISTIAN BARRY: One thing about your argument is that you want to say, though, that you want what the state can speak on to be fairly tightly constrained, right? So it's not simply that the state can be actively promoting, both through its decisions about discretionary expenditure and also in its sort of, acting in its official capacity, about everything that it conceives to be just or right.

COREY BRETTSCHEIDER: Right, yeah, it's not a concern for truth generally, I think that's right. It's a concern for a more limited sense of the right values in a liberal democracy. So in particular the idea of equality under the law and the idea that the ideal of autonomy,

that we're free to make up our own minds, extends equally to people in society—those are what I call the political values that limit.

And I'm drawing, I think, on the distinction between political and comprehensive conceptions that you find in the work of people like John Rawls. I'm concerned about values like equality under law, and the recognition that the capacity in a democracy of people to make up their own minds should extend to everyone, regardless of race, gender, and sexual orientation. So the scope of what the state should say isn't that it should speak on every philosophical issue. It's rather that it should defend these core values that are central to a liberal democracy.

CHRISTIAN BARRY: So I could imagine a sort of free speech fundamentalist being concerned about this view.

COREY BRETTSCHEIDER: Uh huh.

CHRISTIAN BARRY: Precisely because some of the motivation is not just about the value of speech but also concern about overreach by the state. So the idea is that what we need is really bright-line rules that require the state to refrain from interference with speech on the basis of its content—

COREY BRETTSCHEIDER: Right

CHRISTIAN BARRY: —and from not exerting itself in the public domain in this way, because, as a matter of fact, the way states will tend to operate will actually be coercive. They're probably going to not speak when they should and they'll speak when they shouldn't.

COREY BRETTSCHEIDER: Right, right. I think those are great concerns, I mean, I have a couple of responses. One is, I think that in traditional free speech discussions, that the fear of extension has a lot to do with the worry about coercion. That making a mistake when you're putting people in jail is a very, very big deal, so you want to be very, very cautious. When it comes to the state saying the wrong thing, or when it comes to the use of the subsidy power, the concern I think isn't quite as great because the stakes are lower. So that's kind of one way of addressing it.

But I think the other more important issue is that there really is no default of not speaking. I mean, I think that's just a misnomer that's been problematic in the history of political thought. There is such a thing as the state not putting people in jail, but when it comes to the state not expressing itself at all, I'm just not sure that that's an option.

So take state spending, which is one of the places where the state should be free to promote its own values. And to criticize, by defunding organizations that violate those values. But the idea that the state's simply going to spend no money; I mean, I guess that's a position that might be held by some libertarians, but short of that, the state is using its spending power all the time, and so at least implicitly, even if it hasn't acknowledged this, it is speaking. And this is true of lots of statements of public officials, or the use of public holidays.

So I think when it comes to the role of philosophers and political theorists that the real obligation is to come up with a theory of how it should speak, given that, that it is speaking. And the idea that a lot of people on the free speech side sometimes seem to suggest—that one

option would be for the state to say nothing—I think that's just not right. I don't think it is a real option at all.

CHRISTIAN BARRY: We're going to take a quick break and then be back with more with Corey Brettschneider.

MATT PETERSON: You're listening to Public Ethics Radio. We're talking to Corey Brettschneider about his book *When the State Speaks, What Should It Say?*

CHRISTIAN BARRY: Okay, so far we've been discussing certain challenges of a view which allows the state to intervene to protect people who are under threat by speech in a way that questions their status in democratic society.

What about the opposite concern, namely, that, you know, there are certain forms of speech—there are certain forms of expression are harmful, right. It's not about the intent of the speech, it's about the effect in, sort of, lowering the public status of people who are talked about this way, and that when it comes to that there are all sorts of risks that accompany that lowering in status. And those are precisely the sorts of risks that the state can legitimately respond to with coercion.

COREY BRETTSCHEIDER: Right. Yeah, so I have a few responses to that side, which in the book I refer to as the side of militant democracy. There is a theory of free speech which says, look, yes, extend free speech, but when it comes to the most robust critics of democratic values, there's a limit.

And so when it comes to hate speech, for instance, and people who are really advocating viewpoints that are just completely at odds with the values of liberal democracy, we should limit their speech. And that's certainly true of groups like the American Nazi Party or the Ku Klux Klan or people who deny the Holocaust. They are saying things that, I think, are in the long term a very serious concern for those who want to defend an account of liberal democracy. So the first thing I think I want to do in response to those critics is just acknowledge that the long-term concerns are real.

Another thing—and this is just a caveat—is to define precisely the kind of hate speech that we're talking about, that should be protected and criticized. So for instance in the book I talk about a case called *Virginia v. Black*, where there's really two broad sets of facts that are discussed. One involves the burning of a cross on the lawn of a family, aimed at that family in retaliation for an earlier altercation in the day. And that kind of hate speech, I want to call that “hateful threat.” And because of the immediacy of the threat, the communication, which, in that case seems to be, “Look, we're going to come get you,” that, I think, can be banned.

But in the same case, the court also looked at a rally on a field by the Ku Klux Klan where they were espousing the kind of viewpoints that we're talking about. The Klan is opposed to the idea of equal protection under law for African Americans, for instance. And there I think there is this sort of long-term threat. It's not immediate in the way that the field case is, and I think, as I said, it—it is a real concern. But now the question is: what's the best way to address it?

And it's often assumed—I think you even said in your question—that, given that coercion is the most effective way to deal with these viewpoints, maybe that's what we should do. But I

don't know empirically, actually, if that's right. My approach hasn't been tried, I think, by countries like Germany and by others on the European continent that have legislation banning hate speech. But I wonder if we drew these views in the open, the way that I'm suggesting, and then had a robust means, both for the state and civil society to reply to it, if that wouldn't be perhaps as effective or even a little less effective but still effective way of responding.

So take Holocaust denial. I mean, banning it often might drive it underground, for instance, or fetishize it, or risk that it's perpetuated in a underground sort of way. But protecting it from being the subject of criminal prosecution and yet having a robust system, not just of education in schools, but of public education about the fact that the Holocaust did happen, I think that offers a Millian—and also a potentially robust—way of responding. It's not the view that we should just leave it alone and let civil society handle it. But that kind of effect, combined with the robust state role, it might be as effective.

And as I've been giving this I've been challenging my audiences to really think about the assumption that coercion is always the best policy. You know even if it's not exactly as effective, or if it's less effective, if it's somewhat effective, and it also comes with the benefit of not adding to the number of people that are in prison and adding to our list of things that are criminalized, especially in the United States given our huge system of incarceration—that's an additional benefit that comes on the free speech side—that you get the cake of free speech and allowing all viewpoints to be expressed and the freedom that comes with that—and also the good effect that would come from state, as well as citizen, criticism of hateful viewpoints. That's the kind of double whammy that I'm looking for.

CHRISTIAN BARRY: I could imagine a couple of concerns that one might have about this. So one is of course wanting coercion to be available as a means of protecting people who in some way or another are not directly under threat but are—that certain increased risk of certain harms to them, for example, are created by permitting such speech. That even if it's not the most, always the most effective. And the question is whether or not it should be an available means or where there should simply be a bright-line rule against this sort of coercive intervention.

So that would be one concern, is, if it can be effective in particular contexts in particular ways, then why not use all the tools available?

COREY BRETTSCHEIDER: Yeah.

CHRISTIAN BARRY: A second question would be, well, sometimes things are just so hateful that we shouldn't really be thinking about them purely in terms of their overall general consequences, but because of the expressive power actually of criminalization, that is, that one way in which the state can speak is by saying that something is so wrong that we're going to criminalize it. And that could be a very powerful form of expression.

COREY BRETTSCHEIDER: Yeah.

CHRISTIAN BARRY: So, do you have views on those types of justifications?

COREY BRETTSCHEIDER: Yeah. I mean I think these are all important points. I think criminalization, it can be expressive and it is expressive. But it's a very blunt kind of

expression. And I think that what my view is able to do is to give a more subtle, but also a kind of expression that's more true to the role of ideas in liberal democracy.

And these are—I agree in the long-term, if they were successful—very dangerous ideas. They would lead to the collapse of liberal democracy. But they are ideas that we are talking about, as opposed to immediate threats, so think of the ideology, for instance, of the American Nazi Party, laid out in what they must see as their primary text of *Mein Kampf*. These are heinous views, but they are viewpoints, with factual and moral claims, I think, that are there. And just banning them, I think, sends a message that certainly that they're wrong and that they're prohibited, but I think it fails to acknowledge the other message that needs to be sent in a liberal democracy, which is that people should really be free to make up their minds about what the right ideas are. And they shouldn't do so under threat of force.

So in the book I give this example of a town meeting, that's proposed by the great free speech theorist Alexander Meiklejohn. And let me just play on that theme, to just illustrate the idea. Imagine that there's a town meeting in New England, a form of direct democracy, and we're trying to decide whether to build a bridge on the north side of town or the south side of town.

And now imagine that there are just no good arguments for the south side of town, too. That would be a terrible place to build the bridge. But now imagine that the moderator started just banning people who had the stupid idea of arguing for the south side of town and only allowed the north side of town people to speak. Intuitively, even though by stipulation the south side is the worst place to build the bridge, there's just something wrong, I think, from our—our intuitions about democracy, about the outright ban of that view.

Yes, it might make sense, I think, if you're in the meeting, to criticize it. But just disallowing it, I think, does send a message, but it does so at the expense, I think, of the freedom to make up our own minds about how to decide. And there are lots of views that we intuitively do protect in liberal democracy that are really heinous and wrong but yet... So think of, I'll just give my own philosophical bias here—of *The Fountainhead* or any work by Ayn Rand that advocates of the virtue of selfishness, to use one of her phrases. That seems to me to be a political philosophy that is just way off.

But the idea that we would express the criticism of it by simply banning it also seems to send the wrong message. I mean, I think people really have to be free to hear even ideas that are way off and that are wrong. Part of it is about the ability to speak, but it's also about the ability for people to decide for themselves to reject or accept these ideas. And even views as heinous as those of the American Nazi Party—I think we have to be free to look at their website and to accept them, or, well, what we should do is to reject them.

The state has a role to play here, I think, too—it should speak to what's wrong with these views. But I'm Millian in the sense that I think we gain something from that process of being allowed to decide rather than having that decision taken from us. And the ban on this kind of speech—I mean this is important—it doesn't just affect the speaker. It affects the listener's ability to hear the ideas and to reject them.

So yes, it does send an expressive message, like the one that I want to send, namely that the views are wrong. But it does that at the expense of a democratic value in a way that I think is too great.

CHRISTIAN BARRY: So one feature of your approach is that you want to make a strong distinction between how the state can respond coercively to speech, and how it can respond noncoercively through persuasion. But, of course, persuasion, you understand in a broad way—

COREY BRETTSCHEIDER: Right.

CHRISTIAN BARRY: —to include cases of expenditure and that sort of thing.

Another worry I could imagine, sort of, the free speech advocate having would be that it's really hard to draw a really clear and principled line between the coercive activity of the state and the persuasive activity.

If you're imagining governments taking the sort of stand and sort of policies that might be needed for them to actually be speaking effectively and having a real effect on it, wouldn't that be, wouldn't that risk shading into a type of coercion? That if they'd be denying them all sorts of opportunities, effectively, for the promulgation of their ideas. They'd effectively be defunding them. There's a sense in which this would sort of look like these groups are being given a coercive offer. They're being coerced.

COREY BRETTSCHEIDER: Right. Make them an offer they can't refuse.

CHRISTIAN BARRY: Yeah.

COREY BRETTSCHEIDER: Well, I guess I want to begin by acknowledging that there might be some issues of funding that do go over that line, especially when there are no real alternatives for the group besides the funding.

And, you know, there are cases like that. In the 1970s, for instance, people thought that if you couldn't get on television, that even though that was a resource that was being denied to you, that it was effectively coercing you when it came to speech. And so that sort of logically leads to groups like the Ku Klux Klan having access to public access TV shows.

They have some in the U.S. that I've watched. They're actually terrible, you know, of course, and reveal the Klan in all of its—the poverty of its ideas. But the thought is, look, denying them the resource would really be denying them the right.

That's less true—I mean we're now doing a show that's going to be distributed, hopefully to lots of people, over the Internet. And TV isn't the resource that it used to be. There are alternative channels that are available. So I'm not sure how well that specific argument works.

But in general I just reject the idea that the use of funds, denial or nondenial, is the same as coercion. I agree it's not, as you say and as I say in the book, it's not pure persuasion, it's not just an argument. It affect your interests in a different way. The key for me, what I say in the book, is giving a grant or not giving a grant still leaves in place the idea that people can continue to exist in an organization and say what they want even without the funding.

So if we take a couple of cases, I think this is clearer. The Bob Jones case, for instance, is a case in the 1970s. Bob Jones University is a university that allows blacks on campus and into

its university, but it denies them the right to date to, to interracial dating. It also threatens to throw them out of they join the NAACP or advocate for the right of interracial marriage.

And the Nixon administration's IRS denies them nonprofit status. And denies them the tax subsidies that come with nonprofit status in the United States, 501(C)(3) status specifically. In the U.S., if you give a contribution to a nonprofit, 501(C)(3), your contribution is deductible. So it's kind of an indirect subsidy.

And the court there says, quite rightly, look, the subsidy is not the same as the right. And it upholds the denial of nonprofit status to Bob Jones University.

Guess what? They still exist. For a long time, they continued to have these policies. They didn't, in their terms, cave in to the IRS. And that's fine. They're an organization that's been able to, you know, seemingly thrive without the subsidies that come with 501(C)(3) status and the tax deduction that that accords to donors. So, you know, it is possible to deny a subsidy and to still exercise the right, and that's what my approach allows.

CHRISTIAN BARRY: Corey Brettschneider, thanks for joining us on Public Ethics Radio.

COREY BRETTSCHEIDER: Thank you Christian for having me, I really enjoyed the conversation.

MATT PETERSON: Thanks for listening to Public Ethics Radio. The show is produced by me, Matt Peterson, with help from Stephanie Collins. Christian Barry is our host. The show is supported by the Centre for Moral, Social, and Political Theory at the Australian National University and the Carnegie Council for Ethics in International Affairs.

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