ID: International Dialogue, A Multidisciplinary Journal of World Affairs 8 2018

Review

Hate Speech Law: A Philosophical Examination

Alexander Brown. New York and London, Routledge, 2015. 362pp.

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Alexander Brown writes as an inter-disciplinary scholar at the intersections of law, ethics, philosophy, and politics. With *Hate Speech Law: A Philosophical Examination* he justly claims to have explored "numerous principled arguments for and against hate speech law by articulating a collection of key normative principles" (316). This ambitious book identifies and organizes conflicting values within the hate speech controversies. It aims to synthesize deeper questions about core concepts of liberalism, democracy, personhood, dignity, and tolerance with policy concerns about pragmatics and effectiveness. The most seasoned free speech scholars will find points and angles they had not previously considered.

The book begins with an overview of basic concepts (ch. 2), a helpful exercise since everyday usage of terms like 'defamation', 'incitement' and the like often depart from their legal counterparts. Brown then explores moral (ch. 3), psychological (ch. 4), civic (ch. 5), cultural (ch. 6), political (ch. 7), prudential (ch. 8), and jurisprudential (ch. 9) dimensions of hate speech. Why such a vigorous effort to encompass the range of perspectives shaping the hate speech debates? Brown wants to synthesize them through a

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method of "principled compromise" (ch. 10). A full and fair examination of each of those domains would demand a wide-ranging examination grounded in a vast literature. For purposes of this brief review, I shall instead focus on that proposal for a solution grounded in compromise. I have no quarrel that Brown would punish forms of individually targeted harassment uttered outside any discernible sphere of public discourse and commonly known as "fighting words." I shall instead challenge Brown's thesis that "principled compromise" provides a justification for legal penalties imposed solely upon dangerous or provocative worldviews uttered within that sphere.

I. "COMPROMISE" VERSUS "BALANCE"

Brown casts "compromise" not as akin to the kinds of balancing processes ordinarily associated with rights jurisprudence but as their opposite. Deeming the conflicting values in free speech cases to be "incommensurable" (230–35), Brown urges "a precautionary approach" that would admit hate speech bans "in the face of uncertainty about how to reduce hate speech/the evils of hate speech" (247). Does he convincingly draw that distinction between "compromising" values and "balancing" them? More importantly, even if we assume it, does it support Brown's defense of hate speech bans?

Processes of compromise have long been acknowledged within legislatures and political parties, the natural homes of winks and nods, handshakes and horse-trading. Traditionally, however, the idea of compromise does not sit comfortably with formal adjudication—a problem for free speech, which, as a higher-order constitutional, human, or civil right, ends up as an object of crucial judicial interpretation in most democracies. Certainly, after a century of legal realism, few can doubt that controversial cases do at times smack of compromise. But that impression is more likely to be perceived as a crisis than an asset. Recall U.S. Supreme Court Justice Antonin Scalia chiding his brethren for applying the *"truly novel principle" of "*call[ing] the contending sides of a national controversy to end their national division" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 958 [1992]), a role that courts, in his view, have neither authority nor competence to assume.

Courts are ordinarily expected to decide cases not by compromise, not by bargaining and splitting the difference—tactics more suited to legislatures and to non-judicial negotiation and out-of-court settlement—but through ascertainable rules and principles. Those rules and principles, moreover, are open to no real compromise in the

overwhelming majority of ordinary, less high-profile cases. To claim that courts strike compromises, let alone urging them to do so, recalls the old accusation that judges are "really just doing politics." That suspicion may well seem justified in small numbers of controversial outcomes handed down by high courts; but most of the humdrum of law does not proceed through headline-grabbing cases. To assume "compromise" as a constitutive judicial function risks simplifying a more nuanced picture of law's operations and dynamics.

Of course, Brown envisages nothing as crude as coin tosses, dice rolls, or splitting the difference. His aim is to resolve free speech debates through "principled" compromises, which, he believes, ultimately underpin rights adjudication. We must examine more closely, then, Brown's distinction between "compromise" and "balance." The theory and practice of rights have certainly always assumed that they must be balanced against any harms that their exercise might cause. Rights catalogues have long been written and interpreted in that vein. The First Amendment to the U.S. Constitution (1791) sets forth no limits on the right of free speech, yet countless limits have in fact been admitted in law, often with little dispute.

Free speech provisions in more recent documents such as the European Convention on Human Rights (ECHR [1950]) or the International Convention on Civil and Political Rights (ICCPR [1966]), as well as many national rights instruments, typically introduce an initial provision announcing the right, followed by a limitations clause setting forth lawful restrictions upon it. According to ECHR art. 10, para. 1,

> everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.…

The provision has long faced criticism, however, for the breadth of interests, enumerated in its second paragraph, to be balanced against the right:

> The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are . . . necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for

maintaining the authority and impartiality of the judiciary.

The practice of weighing rights against restrictions emerges not only in standard legal texts and their judicial interpretations, but also in classical theories, as in Kant's *Metaphysics of Morals*. Weighing and balancing famously determines the extent of free speech in chapter 2 of John Stuart Mill's *On Liberty*, where speech may be limited if it threatens a sufficient level of harm, such as immediate violence: the freedom is to be balanced against the harm in each case in order to assess the legitimacy of a limitation on expression.

Brown, however, proposes the notion of compromise to challenge that longstanding assumption that rights must be balanced against limits. What difference is there, then, between "balancing" and "compromising"? Citing Learned Hand (281), Brown maintains that rival values are generally "incommensurable" (230–35). Talk of balancing is, in his view, "meaningless" (235). When we place free expression in one dish and anti-racism, anti-sexism, or anti-homophobia in the other, the scale will not reliably tilt to one or the other side. For Brown, then, compromise consists in the frank acknowledgment that ultimately incommensurable values cannot be balanced. The legislator or judge must instead strike a "compromise" by choosing the value best suited for a given problem.

II. EVIDENCE: IT CANNOT BE SAID THAT THERE IS NOT?

Let's take a closer look. How does "compromise" apply to hateful expression? "[C]learly," Brown argues, "it cannot be said that there is no evidence that laws/regulations/codes are effective in curbing hate speech" (247). He urges a "precautionary approach" given "uncertainty" about how to prevent both hate speech itself and any harms it may cause (id.). Before returning to that claim let us recall a clarification. Aside from the most ardent libertarians, serious opponents of hate speech bans voice no objection to penalties imposed on so-called fighting words (63–64), that is, aggressive speech targeting identifiable individuals, as in private stalking and harassment situations, bus-stop insults, or bar-room brawls. Free speech advocates like Robert Post and James Weinstein have no objection to penalties imposed upon that kind of person-to-person invective on the age-old rationale that such situations can quickly escalate into violence without the state having ample opportunity to protect life and limb. What Post, Weinstein and others reject, and I join them on this point, is censorship motivated solely by the putatively dangerous or provocative character of ideas uttered within general public discourse.

Hate speech bans may certainly serve as necessary evils under specifically turbulent circumstances, such as formally declared and independently reviewable states of national emergency, where government has no other means of protecting vulnerable groups or individuals. The bans may at best, then, serve a full-blown security interest. In that respect such bans resemble government spying or computer hacking: they are outright incursions into democratic life for the sake of security, justified, if at all, as last resorts. We know all too well the risks of bogus security rationales; in un-democratic states hate speech bans are routinely invoked to suppress criticism of powerful majorities by disempowered groups. Hate speech bans are commonly peddled in Orwellian balancing terms as, so to speak, a bit less democracy for some in order to ensure more and better democracy for others.

That kind of claim is always suspect. Like government spying or hacking, impeding public discourse may at times be justified as a retraction of democracy on security grounds, but it never promotes democracy and serves no specifically democratizing function. Security measures, if justified, safeguard states *as states* and not in any distinct way *as democracies*. Any abridgment of public discourse based solely on the provocative or dangerous views of the speaker serves only to diminish democracy, however justified such a measure may be solely on a security rationale. Throughout history speech has indeed been mobilized to cause harm through any number of atrocities including several twentieth century genocides. However, as I have suggested in *Hate Speech and Democratic Citizenship* (2016) (hereafter *HSDC*), within sufficiently longstanding, stable, and prosperous democracies (LSPDs), there just as clearly has been *no* statistical evidence of causation from hate speech within general public discourse to ascertainable patterns of violence or discrimination. In that assessment I cite, for example, Ulrich Preuß's analysis of the comprehensively different forms of socialization, social organization, and political authority that emerge within the LSPD to prevent such slides from hateful speech to hateful action. The genocides of Nazi Germany, the former Yugoslavia, or Rwanda resulted not from speech as such, but from prospects of large-scale mobilization that have witnessed no counterpart within LSPDs despite arguably comparable if not far greater volumes of hate speech.

Throughout countless publications supporting bans within various LSPDs over many years, none have cited statistical evidence of provocative speech within general

public discourse leading to any such patterns of violence or discrimination, despite statistical evidence being the norm in countless other areas of social concern. France and Germany have continued to widen bans whilst the U.S. has struck them down; and yet the overall trans-Atlantic trends in hate crime and discrimination over decades remain largely comparable—adjusting for inevitable local differences, notably the massive proliferation of firearms in the U.S., which turn a sneer into a murder.

Scholarly and expert advocates of bans within LSPDs have at most cited evidence only (a) from non-LSPDs; (b) of the type of emotional disturbance that any provocative expression might cause, such as violent films or music, which Brown apparently would not censor; or (c) of the effects of fighting words outside public discourse, the regulation of which is, again, rarely disputed. I use the phrase "rhetorical consequentialism" in *HSDC* precisely to describe these types of claims, which presuppose empirical causation ("Extreme speech must be stopped lest it lead to harm") without supplying empirical evidence, a tactic present in virtually all advocacy of hate speech bans within LSPDs. Indeed, much evidence suggests not simply that hate speech bans are ineffective in LSPDs, but that they actively "tutor" hate speakers to endlessly mutate their messages, always one step ahead of the law, such that tracking and collecting evidence on them can actually become more difficult for law enforcement agencies.

MONSIM AND PLURALISM

Opponents of bans such as Post and Weinstein do indeed aim to overcome outright balancing of values in the area of free speech. Is Brown, then, on the right path? Both writers endorse democratic principles that would preclude censorship within public discourse based solely on the dangerous or provocative views of the speaker. They follow in the footsteps of U.S. Supreme Court Justice Hugo Black, who dissents in *Konigsberg v. State Bar of California*, declaring that "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field" (366 U.S. 36, 61 [1961]). Black's point is not that all laws limiting speech are unconstitutional, right down to bans on false advertising or courtroom perjury. By the 1960s, U.S. law included endless speech regulations to which Black never objected. However, democracy loses constitutive legitimacy when it prescribes the worldviews that may or may not be brought into that sphere of public discourse which furnishes the necessary condition for the possibility of any democratic constitution.

Brown fairly enough calls such an approach "monist," that is, non-pluralist and therefore immune to balancing. Any such monism scarcely amounts, however, to an overall jurisprudence of individual rights. Beyond the admittedly vital yet doctrinally very specific problem of viewpoint-selective censorship within public discourse, Post and Weinstein by no means take monist approaches to free speech, let alone to the rest of rights jurisprudence, constitutional law, or law overall. As to limits on speech *not* expressly imposed on grounds of any dangerous or provocative worldview—such as penalties imposed on false advertising, commercial fraud, disclosure of confidential legal or medical information, or defacing private property—Post and Weinstein, like most other experts, clearly do recognize a necessary pluralism of values. Those penalties balance free expression against government's rival interests in protecting consumers, businesses, legal and medical clients, and property holders. It remains questionable how far the enquiry advances by calling those choices products of "compromise" rather than "balance."

By analogy, I may well be a monist in adopting "principled" opposition to organized crime and deciding that I shall "under no circumstances" allow illegal drug taking within my home. That hardly makes me an ethical monist in any broader sense. I may, and indeed surely would, resolve other ethical questions differently. Notice, moreover, how even that limited monism can break down: I certainly would admit, for example, the competing value of saving life in the extreme situation where someone dying under my roof could survive only by ingesting an outlawed substance. Similarly, Post and Weinstein might well admit hate speech bans under drastic changes of circumstances, such as a raging civil conflict in which life and limb face immediate jeopardy, wherein a society's LSPD quality has in effect broken down. Unsurprisingly, however, they spill little ink to push that point, just as Rawls or Dworkin spend little time pondering unforeseeable extremes. Post's and Weinstein's debates are conducted with colleagues advocating bans under current circumstances and not under radically altered circumstances.

Brown may well believe that the age-old "rhetoric" (231) of balancing incommensurables really just masks outright compromises, yet he just as plausibly persuades us of the opposite: any such rhetoric of "compromise" seems merely to mask age-old processes of balancing incommensurables. What matters most is not whether we are more persuaded by a "balancing" or a "compromise" account, but rather the specific grounds on which free speech is found to prevail over a rival interest in one case while

succumbing to it in another. It is entirely correct to assume that democratic procedure supplies one necessary condition (among others) for a legislative or judicial compromise (or balance) to become legitimate. It is very different to suggest, as Brown does, that democratic procedure supplies a sufficient condition, such that a compromise (or balance) becomes legitimate as long as democratic procedure is followed.

Why? Because democracy can render legislative and judicial processes legitimate only insofar as it already exists—certainly conceptually, if not temporally—prior to those processes. If political legitimacy is not to collapse into sheer majoritarianism, or into an infinite regress of either balances *or* compromises, then some crucial, more than just procedural democratic values must exist conceptually prior to any balancing processes. Compromises may well satisfy government policy on, say, taxation or infrastructure development, but by no means suit compromising-away participation in that sphere of public discourse which provides a necessary condition for the possibility of legitimate democratic process.

It is for that reason that I have focused only on certain strands of Brown's multi-faceted analysis. If the topic were one of comparable ethical complexity but otherwise appropriately subject to routine legislative and judicial criteria—as we find in ethical scholarship on issues such as drug consumption or inner-city poverty—then the richness and range of factors Brown identifies would come fully into play. If it is true, however, that the conditions of expression within public discourse signally define the legitimacy foundational in the first instance *for all* such legislative and judicial processes, then many questions about the ethics of hate speech, although certainly relevant to important moral debates, cannot be usefully pursued until those questions of fundamental democratic legitimacy have first been resolved. Indeed, a problem with Brown's various arguments favoring bans is that they point either to no clear stopping point at all, or to limits decided entirely by straightforward majoritarian criteria—again, no problem for routine regulatory questions within an already-constituted democratic arena, but far more problematical as to public discourse, which itself constitutes that arena, and where suppression of unpopular viewpoints poses a direct problem of democratic legitimacy.

People may reasonably differ on what "core" democratic values include. Surely, however, they must include the very possibility of forming and maintaining democracy itself through citizen participation within public discourse. As leading opponents of bans have made clear, that is not a doctrine of "free speech absolutism." Instead, I have called

it "viewpoint absolutism within public discourse," which is a far more focused interest. In a world more globalized and technologically complex than ever before, governments can and do "compromise" virtually any democratic value on grounds of "precaution." They eagerly limit democratic norms on grounds that "it can*not* be said that there is *no* evidence" that a rollback of one or another democratic principle might be "effective in curbing" any number of evils. I join Post and Weinstein, however, in arguing that democratic legitimacy bars government from excluding speech from public discourse solely on grounds of its undesirable philosophy or worldview. As opponents of bans have frequently observed, democracies dispose not merely of more democratically legitimate ways of combatting violence and discrimination, but of more pragmatically effective ways to do so.