

Militant Intolerant People: A Challenge to John Rawls' Political Liberalism

Vicente Medina

Seton Hall University

In this article, it is argued that a significant internal tension exists in John Rawls' political liberalism. He holds the following positions that might plausibly be considered incongruous: (1) a commitment to tolerating a broad right of freedom of political speech, including a right of subversive advocacy; (2) a commitment to restricting this broad right if it is intended to incite and likely to bring about imminent violence; and (3) a commitment to curbing this broad right only if there is a constitutional crisis. By supporting a broad right of freedom of political speech in *Political Liberalism*, he allows militant intolerant people such as Jihadists, White Supremacists and Neo-Nazis to advocate publicly their dangerously intolerant beliefs. Public advocacy of dangerously intolerant beliefs can be construed as subversive advocacy. As demonstrated by the historical examples of the Weimar Republic and the Second Spanish Republic, militant intolerant groups could use a right of subversive advocacy to threaten the stability of liberal democracies. Hence, by allowing them to exercise a broad right of freedom of political speech, Rawls could jeopardize that which he intends to defend, namely the actual political stability of a liberal democratic order. Lastly, Rawls' conception of ideal constitutional interpretation, which privileges a broad right of freedom of political speech, might be insufficient to deal effectively with the threat posed by militant intolerant groups. Yet a tradition of American constitutional interpretation that balances freedom of speech with other important constitutional and/or political values has overcome a civil war, two world wars, the Cold War and the 9/11 terrorist attacks without abandoning democracy or permanently renouncing those values. Still, Rawls' ideal approach to constitutional interpretation might, in hindsight, help us to understand some of the excesses and deficiencies of American jurisprudence in times of emergency.

My argument in this article is divided into three parts. In the first part, I explain the notion of militant intolerant people and how they can be viewed as holding politically unreasonable beliefs. By virtue of holding these beliefs, they might challenge the stability of John Rawls' political liberalism, which depends on three commitments that might plausibly be considered incongruous: a commitment to tolerating a broad right of freedom of political speech, including a right of subversive advocacy; a commitment to restricting this right if it is intended to incite and is likely to bring about imminent violence; and a commitment to curbing this right only if there is a constitutional crisis. In the second part, I contend that while he argues for a broad right of freedom of political speech, he also allows for restricting it when its exercise is intended to incite and likely to bring about imminent violence. By allowing such restriction, he could be seen as intolerant, and hence, in the eyes of militant intolerant people, his toleration could be seen as a sham. But that need not be so. His intolerance can be seen as politically reasonable because he argues for the stability of a political order that in principle could protect the security of all citizens – tolerant and intolerant alike.

Still, in the third and last part, I argue that his view of ideal constitutional interpretation, which privileges a broad right of freedom of political speech that can be curbed only if

there is a constitutional crisis, might clash with a tradition of American constitutional interpretation that balances freedom of speech with other important constitutional and/or political values as established by US Supreme Court decisions in *Whitney*, and *Brandenburg*. In addition, Rawls' conception of ideal constitutional interpretation might be ineffective in dealing with the threat posed by militant intolerant groups which could simply abuse a broad right of freedom of political speech by exploiting the nuances of First Amendment jurisprudence. Unlike Rawls' newly proposed view of ideal constitutional interpretation, American constitutional interpretation has been rigorously tested by dire historical events and has successfully passed each of those tests without abandoning democracy, permanently narrowing the scope of the right of freedom of political speech or abrogating this right altogether.

Militant Intolerant People

Some might wonder what relationship if any could exist between Rawls' ideal conception of liberalism as expounded in *A Theory of Justice* (Rawls, 1999a, henceforth TJ) and in *Political Liberalism* (Rawls, 1996, henceforth PL), and the presence of militant intolerant people found in existing political societies such as Jihadist, White Supremacist and Neo-Nazi groups which challenge the stability of liberal democracies.¹ As a committed liberal, Rawls must grapple with the following issue: how to reconcile his belief in a broad right of freedom of political speech, including a right of subversive advocacy, with his commitment to preserving the actual political stability of well-ordered constitutional democracies. The militant intolerant can manipulate such a broad right to undermine an existing political order regardless of its legitimacy.

The burgeoning of Jihadist, White Supremacist and Neo-Nazi groups offers a substantive threat to liberal democracies, including well-ordered constitutional democracies or deliberative democracies, which, according to Rawls, designate equivalent political orders (Rawls, 1999b, p. 579). Yet some might object to the lumping together of these diverse groups. They could contend that Jihadists or militant Islamists have a long historical pedigree and elaborate theological justifications for their conduct, while White Supremacists and Neo-Nazis appeal to racial, ethnic or nationalist ideas that are rather far-fetched. So they could argue that the analogy between the hate speech advocated by the latter groups and the belligerent message advocated by militant Islamists is rather weak. There is, they might contend, no equivalent risk of harm between the fear and emotional pain caused by hate speech to its victims, and militant Islamists' advocacy inciting jihad or holy war against Western democracies and their allies (Posner, 2006, p. 120). The present threat posed by Jihadists or militant Islamists, it might be argued, is far greater than the one posed by White Supremacists and Neo-Nazi groups, especially after their successful attacks on 11 September 2001 in New York City and Washington DC, the 11 March 2004 attacks in Madrid and the 7 July 2005 attacks in London where hundreds of innocent people were intentionally killed. This point is well taken. But this is a contingent issue since the level of threat posed by different militant intolerant groups could change at any given time.

The threat posed by the above-mentioned groups varies depending on the nature of their grievances, the popular support they can generate, the level of sophistication and resources

available to them and the extent of their belligerence. Still, their intolerant agendas remain conspicuously similar. That is so even with European populist parties on the right such as the British National party, Germany's National Democratic party, France's National Front and Austria's Freedom party, to mention only a few. Whether these parties should be described as militant intolerant organizations is a controversial issue beyond the scope of the present article. However, what seems evident is their common support for xenophobic agendas (McKinnon, 2006, pp. 4–5), which tend to galvanize extremists into acting at times violently against immigrants and other ethnic groups. Thus embracing oppressive policies based on a myth of racial purity, racial solidarity or nationalist homogeneity is equivalent to targeting others in the name of sharia or Islamic law that discriminates against women, sanctions draconian lapidarian punishment and encourages jihad or holy war against those who are identified as infidels.² Oppressing and hence harming those who can be reasonably identified as innocent is unjustified. Regardless of the contestability of the term 'innocent', one could argue that the innocent are those who intend to harm no-one in particular by commission or by omission. They are presumed guiltless unless shown otherwise. Therefore, targeting them would be morally impermissible.

Militant intolerant people are intransigent. They are politically unreasonable in a Rawlsian sense because their conception of politics is based on exclusion rather than inclusion. They hold dangerously intolerant beliefs such as racist or chauvinist ones aimed at targeting those whom they have identified as their enemies.³ Therefore they refuse to propose and abide by fair terms of cooperation with them. In their eyes, those who are so identified should be excluded from their intolerant conception of society. Hence their intolerance threatens the stability of liberal democracies, which are based on toleration and consensus among politically reasonable people who have tacitly agreed to settle their disputes peacefully.

While Rawls does not address the issue of how existing liberal societies can effectively deal with the militant intolerant, he nonetheless in TJ defends the following conception of toleration. That is, forbearance of those whose views one disagrees with and, while having the possibility to suppress them, choosing not to do so provided that their threat to other people's security and liberty is insignificant. For example, he argues that the freedom of an intolerant sect 'should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institution of liberty are in danger' (Rawls, 1999a, p. 193). In PL, he focuses on a policy of containment: 'a society may also contain unreasonable and irrational, and even mad, comprehensive doctrines. In their case, the problem is to contain them so that they do not undermine the unity and justice of society' (Rawls, 1996, pp. xviii–xix). Yet he seems committed to the view that if any comprehensive doctrine were to undermine 'the unity and justice of society', then it might be suppressed because 'no society can include within itself all forms of life' (Rawls, 1996, p. 197). A common goal in TJ and PL, however, is to try to preserve the stability of justice as fairness embedded in a well-ordered constitutional democracy.

Still, if one is truly committed to tolerating a broad right of freedom of political speech, a vital issue is the extent to which one should allow intolerant groups to use such a right to challenge the stability of liberal democracies. In PL, Rawls distinguishes between protected and unprotected political speech by arguing against the Supreme Court decision in *Gitlow*,

which draws the line at subversive advocacy (*Gitlow v. United States*, 268 US 652, 1925, p. 669). But he seems to embrace two positions that might plausibly be considered incongruous. He favors *Brandenburg*, which sets the limit of tolerance at subversive advocacy if it is intended to incite and likely to bring about imminent violence (Rawls, 1996, p. 348). Yet he wants to move beyond *Brandenburg* when he insists that a necessary condition for restricting the exercise of free political speech, including subversive advocacy, requires a 'constitutional crisis in which free political institutions cannot effectively operate or take the required measures to preserve themselves' (Rawls, 1996, p. 354). His arguing so might allow militant intolerant people to advocate their dangerously intolerant beliefs as subversive advocacy prior to a constitutional crisis regardless of its imminence. For example, radical Islamic religious leaders living in a liberal democracy could call for a jihad or holy war against the representatives of such a political order, they could declare a fatwa to punish some of their leaders or they could praise martyrdom, thereby indirectly approving suicide terrorism. Their advocacy could incite criminal actions that might not be imminent but that could in the long run threaten the actual stability of a well-ordered constitutional democracy.

According to Rawls, a well-ordered constitutional democracy has the following vital components: an idea of public reason, a constitutional framework that sets the limits for democratic deliberations and a disposition on the part of citizens to follow public reason in their legal and political deliberations (Rawls, 1999b, pp. 579–81). Public reason is a disposition by free and equal citizens to justify to one another their views on political justice and constitutional essentials that affect them as citizens rather than as private individuals, assuming that all act likewise (Rawls, 1996, pp. 213–20; see also Rawls, 1999b, pp. 574–88). Rawls' conception of political reasonableness is based on his idea of public reason. For him, people are politically reasonable if 'they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so' (Rawls, 1996, p. 49). In contrast, politically unreasonable people are those who intentionally and willingly promote their self-interest at the expense of others, insist on the truth of their comprehensive doctrines and/or settle disputes in society using violence. Since militant intolerant people insist on the truth of their comprehensive doctrines and they willingly incite violence against their enemies, they are politically unreasonable.

Rawls' conception of a well-ordered constitutional democracy depends upon his particular conception of a well-ordered society conceived of as justice as fairness. Unlike a general conception of a well-ordered society that is effectively regulated by some public (political) conception of justice, 'whatever that conception may be', a particular well-ordered society is regulated by a specific political conception of justice such as 'a particular natural rights doctrine, or a form of utilitarianism, or justice as fairness' (Rawls, 2001, pp. 8–9). His conception of a well-ordered constitutional democracy designates a liberal representative democracy that values and hence protects basic liberties such as freedom of speech, freedom of the press and freedom of association (Rawls, 1996, pp. 156–7, p. 335).

Militant intolerant people, however, would reject his specific conception of democracy. He argues that 'those who reject constitutional democracy with its criterion of reciprocity will

of course reject the very idea of public reason ... Political liberalism does not engage those who think this way' (Rawls, 1999b, p. 574). In so doing, he risks reducing his political liberalism to an abstract rather than to a practical political concept. He concedes this criticism, but he is unapologetic about it (Rawls, 1996, p. lxii).

Toleration

Rawls contends that broadly reasonable people affirm reasonable comprehensive views. They willingly recognize what he refers to as the 'burdens of judgement'. Three main features or criteria constitute a reasonable comprehensive view: (1) it is theoretically coherent; (2) it is practically coherent; and (3) it has withstood the test of time (Rawls, 1996, p. 59). As a result, Rawls accepts many religious, philosophical and moral views as broadly reasonable. Still, those sympathetic to his political liberalism might reject them. According to him, any view that rejects 'the essentials of a liberal democratic regime' must be considered politically unreasonable, although not broadly unreasonable (Rawls, 1999c, p. 87). Since militant intolerant people defend and foment non-liberal views, they are politically unreasonable in a Rawlsian sense.

Being politically unreasonable in a Rawlsian sense, militant intolerant people are non-ideal Rawlsian citizens. They refuse to act according to the ideal of public reason, which recommends that they should think of themselves 'as if they were legislators' trying to determine the most reasonable statute for all citizens compatibly with the criterion of reciprocity (Rawls, 1999b, pp. 576–7, emphasis in original). They argue against the legitimacy of Rawls' conception of liberal democracy based on his idea of public reason and criterion of reciprocity because they are disadvantaged in such a tolerant political order. In principle, they could not act *as if* they were legislators in such a tolerant environment because they would need to give up their dangerously intolerant beliefs. But being militantly intolerant, they would refuse to do so since they would willingly use subversive advocacy to threaten the stability of such a tolerant political order.

Rawls distinguishes between stability for the right reasons or *de jure* political stability, and stability for the wrong reasons or *de facto* political stability. The first kind of stability refers to whether citizens envisaged as politically reasonable and rational comply with fair principles of justice. Fair principles can be publicly justified to others similarly motivated who cannot reasonably reject them (Rawls, 1996, pp. 142–3). Since militant intolerant people are politically unreasonable, they are already excluded from this level of deliberation. The latter kind of stability refers to whether citizens actually comply with the principles of justice of a given political order regardless of its fairness. If they do comply with these principles, the political order is actually stable, but it might not be fair. For example, a *modus vivendi* can be a stable political order based on an actual or tacit agreement among citizens holding mutually exclusive comprehensive doctrines who temporarily accept the status quo as long as they are unable to impose their views on others. Militant intolerant people can accept a *modus vivendi* until they have reason to believe that they will succeed in imposing their views on all citizens. Rawls describes this equipoise stability 'as a balance of forces' (Rawls, 1999c, p. 45). A balance of forces, however, is a rather precarious agreement or truce that might collapse at any given time.

In TJ, Rawls allows for the possibility that militant intolerant groups might emerge in a non-ideal society. He optimistically assumes that if they insist on their intolerance, and they are unable to impose their will immediately on the rest of society, their intolerance would fade away (Rawls, 1999a, pp. 192–3). But this is an empirically dubious assumption. Neither their intolerance nor they themselves would necessarily disappear. If their intolerant message has no resonance with the majority of citizens, they would likely remain on the fringe of society. Being on the fringe of society, however, would probably stimulate in them a sense of alienation that could foment rather than prevent their radicalization.

Militant intolerant groups have had a long history in Western democracies. Despite a policy of toleration, they have sometimes succeeded in undermining democracy. For example, consider the failure of the Weimar Republic. While Weimar can be described as an attempt to establish a moderately well-governed democracy, its collapse can be partly explained by the internecine struggle among militant intolerant groups of the extreme right and the extreme left. These groups were allowed to express publicly their dangerous intolerant beliefs, including subversive advocacy, and they were able to compete freely for political power based on those beliefs. Rawls regards the fall of the Weimar Republic as a result of the lack of support by traditional elites; however, he neglects the role that militant intolerant groups played in bringing about its downfall.⁴ Extremist political parties played a similar role in precipitating the collapse of the Second Spanish Republic (Payne, 1993, pp. 52–7, pp. 73–80).

Contrary to the US, one could underscore that Germany and Spain never had a long and relatively stable constitutional democracy with a venerable tradition respecting freedom of speech. Since in PL Rawls primarily focuses on freedom of political speech and subversive advocacy in the US, it can be argued that the above-mentioned examples are un-illuminating for American politics or for American constitutional history. American constitutional democracy has outlasted even a civil war without completely abandoning democratic practices or permanently renouncing important constitutional values such as freedom of political speech. Hence, unlike Weimar and the Second Spanish Republic, American constitutional democracy has succeeded in neutralizing the threat posed by militant intolerant people without permanently undermining substantive constitutional and/or political values.

Yet militant intolerant groups are becoming more vicious and sophisticated in challenging liberal democracies worldwide. For example, consider the terrorist attack carried out by the Aum Shinrikyo religious sect in Tokyo on 20 March 1995; the terrorist attack on the Oklahoma City federal building on 19 April 1995 carried out by Timothy McVeigh and others who were allegedly associated with White Supremacist groups; in addition to the ones already mentioned carried out by Jihadists in the United States, Spain and England and other parts of the globe (Hoffman, 2006). So there is no guarantee that political or constitutional decisions that have worked in the past will necessarily work in the future. Regardless of Rawls' intentions in PL, if his ideal political theory is to have practical consequences beyond parochial considerations, it must grapple with the new global threats posed by militant intolerant groups, especially militant Islamists.

In PL, Rawls conjectures in the spirit of Locke that people will engage in ‘resistance and revolution’ as a last resort if they have been mistreated for quite some time and they see no other way of improving their situation (Locke, 1980, pp. 432–36; Rawls, 1996, p. 347). While his Lockean explanation of why people engage in revolution seems intuitively persuasive, it is nonetheless empirically disputable. People engage in resistance and revolution for mixed reasons. Oftentimes leaders of revolutionary movements and terrorist groups are not the ones who have suffered the most.⁵ Yet they choose to act on behalf of those whom they, whether justifiably or not, believe have been oppressed. In addition, since people are fallible, sometimes these leaders and acolytes might have false beliefs about themselves or others. Still, they might choose to act on their dubious beliefs. This could be the case with militant intolerant people whose dangerous intolerant beliefs are not only dogmatic but frequently specious too.

Actual citizens, including militant intolerant ones, need not be motivated by the same reasons as are Rawls’ ideal citizens. So if they are intransigent, as militant intolerant people are, they can be described as a ‘consensus-hindering fact’ (Krasnoff, 1998, pp. 272–6). Still, whether militant intolerant or not, citizens have no right to harm the innocent. Rawls’ political liberalism attempts to justify ideal political stability to politically reasonable citizens by appealing to his conception of public reason and his liberal principle of legitimacy. This principle states that the use of coercive political power is ‘fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason’ (Rawls, 1996, p. 137; 1999b, p. 578). Since militant intolerant people are politically unreasonable, they might impugn the fairness and legitimacy of a Rawlsian constitutional order.

Unlike Rawls, militant intolerant people conceive the actual stability of an existing political order as necessarily correlated with some kind of homogeneity and solidarity based on, for example, racial, ethnic, nationalist or religious characteristics. Consequently, their ideal of justice is skewed. It is based on exclusion rather than inclusion. Those who lack the preferred characteristics are viewed as enemies. Therefore, they target their alleged enemies by using verbal and/or physical threats against them. Yet in TJ and PL Rawls argues that the main justification for curtailing basic individual liberties is to enhance or protect the liberties of all citizens (Rawls, 1996, p. 356; 1999a, p. 266). By using inflammatory rhetoric such as ‘fighting words’ or utterances inciting violence against their alleged enemies, the militant intolerant might threaten not only their liberties but also their bodily integrity. Fighting words, as Justice Murphy states in *Chaplinsky*, are ‘those which by their very utterances inflict injury or tend to incite an immediate breach of the peace’ (*Chaplinsky v. New Hampshire*, 1942, p. 572). By virtue of the harm that these words are likely to cause to others, they have no constitutional protection. Likewise, utterances inciting violence are not constitutionally protected if they are directed at producing imminent violence and are likely to do so, as stated in *Brandenburg*. Therefore, on both Rawlsian and constitutional grounds, the freedom of speech of militant intolerant people, including their political speech, could be restricted if it is intended to harm others unjustifiably and it is likely to do so.

By justifying the above-mentioned restriction, Rawls faces some plausibly controversial choices. For example, he might allow the militant intolerant to advocate publicly their dangerously intolerant beliefs provided that their advocacy is not intended and not likely to produce imminent violence. To the extent that he conditions their advocacy, he is restricting their freedom of speech, including their political speech. Hence he is being intolerant, but justifiably so because he is trying to protect that which can be considered politically and morally valuable, namely the stability of a well-ordered constitutional democracy and the security of all. Yet authentic militant intolerant people would refuse to accept his proviso because that would force them to cease advocating their dangerous intolerant beliefs, the nature of which is to target those whom they identify as their enemies. If they were to accept Rawls' proviso, they would cease being authentic militant intolerant people. They assume that their dangerous intolerant beliefs are morally superior to those of their alleged enemies, so they feel that they ought to try to exclude them from society. Hence, as long as they remain militantly intolerant, stopping their advocacy against their alleged enemies would be unacceptable to them.

Rawls might allow the militant intolerant to advocate publicly their dangerous intolerant beliefs, even when their advocacy is intended to incite violence, provided that such advocacy, regardless of its vitriolic message, does not resonate with their target audience. That is, the target audience might simply choose to ignore, be indifferent or avoid reacting to their vitriolic message. That is how a mature audience might behave when they realize that that they are being provoked. Yet militant intolerant groups such as Jihadists, White Supremacists and Neo-Nazis oftentimes react violently to such liberal indifference. They view liberal indifference as being rather condescending or hypocritical at best. They believe that if they were powerful enough to challenge the actual stability of a liberal democracy, they would not be tolerated. Hence, from their perspective, the toleration allowed by the Rawlsian provisos would be deemed a sham.

Still, Rawlsian toleration need not be construed as a sham but as a way of preserving a tolerant political order based on public reason. The militant intolerant are unjustified in claiming a right to public advocacy intending to cause imminent or future violence, while simultaneously claiming a right to silence everybody else who disagrees with them. Their claim would seem arbitrary, and hence unwarranted. Accordingly, there are no compelling reasons to try to justify Rawls' political liberalism to them. That is why he states that the views of 'fundamentalist religious doctrines and autocratic and dictatorial rulers' are politically unreasonable and that 'within political liberalism nothing more need to be said' (Rawls, 1999b, p. 613). Yet their challenge to political liberalism remains.

Constitutional Interpretation

The presence and public advocacy of militant intolerant people, whether individuals or groups, in a liberal democracy is an anomaly because one of the virtues of such a tolerant political order is that the majority of citizens openly or tacitly consent to settle their differences peacefully by appealing to public reason. Regrettably, militant intolerant people refuse to do so. One could underscore that allowing their presence and public advocacy is

the price that citizens must pay if they want to live in a liberal and hence tolerant society. Yet such a seemingly plausible answer is unpersuasive. To suggest that this is the price one needs to pay to live in a liberal society is to downplay the pain and suffering that those targeted groups have experienced and continue to experience in liberal societies worldwide. For example, consider the vicious discrimination and violence inflicted by militant intolerant groups on African-Americans, immigrants and gays, to mention only a few of the victims. Inflicting such discrimination and violence against innocent people is simply unjustified. Freedom of speech is an important political and constitutional value, but it could also be used as an instrument of harm when aimed at promoting hate, discrimination and violence against the innocent (Delgado and Stefancic, 2004, pp. 217–23).

Rawls' conception of freedom of speech is paradigmatic of the essential tension that exists in liberalism when trying to balance the right of freedom of speech with public safety. At times there has been widespread support for a broad exercise of a right of freedom of speech, especially when there is a sense of security among citizens. During emergencies, however, the scope of this right has been narrowed. Sometimes government officials rush to restrict the exercise of freedom of speech by overreacting to a domestic or foreign crisis or by mere partisan opportunism. Unfortunately, it is only with hindsight that we learn that such restrictions might have been exaggerated or simply unnecessary (Stone, 2005, p. 524).

According to Rawls, a minimally restricted exercise of political speech is a bulwark for preserving democracy and hence self-government. In this regard, he accepts Alexander Meiklejohn's uncompromising defense of freedom of political speech as necessary for self-government (Meiklejohn, 1948, pp. 3–50). When discussing the notion of seditious libel and the priority of political speech, Rawls contends that while 'there is agreement that arson, murder, and lynching are crimes, this is not the case with resistance and revolution whenever they become serious questions even in a moderately well-governed democratic regime (as opposed to a well-ordered society, where by definition the problem does not arise)' (Rawls, 1996, p. 346). Yet whether militant intolerant people are seen as revolutionaries or as criminals would depend to a large extent on one's political prism. Advocates of resistance and revolution might have serious concerns about specific unjust laws and policies or about an oppressive political system. If so, they would usually offer reasons for their subversive advocacy. Thus, for Rawls, 'to repress subversive advocacy is to suppress the discussion of these reasons, and to do this is to restrict the free and informed use of our reason in judging the justice of the basic structure and its social policies' (Rawls, 1996, p. 346).

Rawls is rightly concerned that the suppression of subversive advocacy can have serious deleterious effects on helping to maintain a fair democratic order, assuming that those engaging in such advocacy are committed to maintaining this order. Unfortunately, militant intolerant people are not so committed. To some extent, American jurisprudence has been mindful of Rawls' concern. Even though there are no reliable patterns for predicting how judges, especially Supreme Court Justices, would behave, it seems that respect for freedom of speech fluctuates depending on how widespread a general feeling of security is among citizens. In times of great peril, such as war or the threat of it, the excesses of the legislative and executive branches and the deference of the courts to the latter, including the Supreme

Court, provide credence to Rawls' concern.⁶ At other times of social upheaval, however, the Supreme Court has been more receptive in recognizing a broad right of freedom of political speech (Tribe, 1985, pp. 188–92). For this reason, one could plausibly argue that a partial or temporary restriction of freedom of political speech need not have a permanent adverse effect on a liberal constitutional democracy.

A partial or temporary restriction of political speech might actually help to protect and enhance a liberal democratic order. For example, Canada and Germany are paradigmatic cases of constitutional democracies that outlaw hate speech regardless of its possible political connotation without necessarily jeopardizing freedom of speech, which is guaranteed in both countries (Delgado and Stefancic, 2004, pp. 196–7). In their political and constitutional traditions, the right to freedom from xenophobic speech takes precedence over the right to advocate hate against selected groups in society. In doing so, they restrict the right of freedom of speech to promote other important social values such as the personal integrity and freedom of those who have been targeted (Gray, 2000, pp. 77–80).

A tension exists between Rawls' ideal of protecting freedom of political speech and the actual constitutional protection of it. On the one hand, he rightly contends that the US Constitution does not actually protect all types of speech, such as 'libel and defamation of individuals, so-called fighting words (in certain circumstances) and even political speech when it becomes incitement to the imminent lawless use of force' (Rawls, 1996, p. 336). He seems to accept the spirit animating *Chaplinsky* regarding fighting words, and he is committed to *Brandenburg*. In *Brandenburg*, the per curiam decision maintains that '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 US 444, 1969, p. 447). On the other hand, he assumes that in an ideal 'well-designed constitution ... among a reasonable people such incitements to violence will seldom occur and never be serious'. He goes on to argue that 'so long as the advocacy of revolutionary and even seditious doctrines is fully protected ... there is no restriction on the content of political speech, but only regulations as to time and place, and the means used to express it' (Rawls, 1996, p. 336). Yet it seems that *Brandenburg* actually restricts the scope of subversive advocacy more than Rawls is willing to accept in his ideal well-designed constitution.

Rawls' conception of freedom of political speech fits well with his view of ideal constitutional politics. Restrictions on political speech would be minimal or virtually non-existent in an ideal well-designed constitutional order. But in existing political societies, including liberal constitutional democracies, restrictions are necessary. For example, there might be militant intolerant groups that use their right of freedom of political speech to incite violence immediately or in the long run against those perceived as their enemies, as was the case during the Weimar Republic and the Second Spanish Republic, or as is the case nowadays with militant Islamists worldwide. Once we admit that contextual restrictions exist for regulating the right of freedom of political speech, we may for all practical purposes be restricting its intentional content and message. Speech does not take place in a vacuum:

it needs a context and an audience. Thus by regulating the context, namely time, place and the means used to express one's ideas, we are thereby restricting its intentional content.

Regardless of his espousal of the Supreme Court decision in *Brandenburg*, Rawls attempts to transcend it by elaborating on Brandeis' concurring opinion in *Whitney*. Brandeis argued that freedom of speech is one of the 'fundamental rights' protected by the First Amendment. But even though fundamental, freedom of speech is not absolute, so Brandeis maintained. Freedom of speech, among other rights, can be restricted 'in order to protect the State from destruction or serious injury, political, economic, or moral' (*Whitney v. California*, 274 US 357, 1925, p. 373). Brandeis contends that 'only an emergency can justify repression' (*Whitney v. California*, p. 377). Yet for Rawls, even an emergency is insufficient to restrict freedom of speech because restricting or suppressing it 'always implies a partial suspension of democracy' (Rawls, 1996, p. 354). According to him, 'a constitutional doctrine which gives priority to free political speech and other basic liberties must hold that to impose such a suspension of freedom of political speech requires the existence of a constitutional crisis in which free political institutions cannot effectively operate or take the required measures to preserve themselves' (Rawls, 1996, p. 354).

Yet the notion of a constitutional crisis has no solid grounding in American constitutional interpretation, and its referent is rather nebulous. For example, it could refer to a serious dispute between different branches of government such that no compromise is possible, in which case it might precipitate a civil war. Or it could refer to a serious dispute about the nature of government among competing groups in society such that no compromise is possible among them, in which case it might precipitate a violent revolution. If the dispute were serious enough that 'free political institutions cannot effectively operate or take the required measures to preserve themselves', then such a state of affairs should be aptly described as a political rather than a constitutional crisis.

Rawls' claim in PL that a necessary condition for suspending the exercise of free political speech requires a constitutional crisis seems overly demanding. His claim, however, has some merit because government officials are frequently ready to act prematurely and appeal to an emergency so that they can silence those who dissent from their questionable policies. Yet a temporary suspension or restriction of such important political and constitutional rights as freedom of speech can be reasonably justified when there is a substantive risk of serious harm against innocent people, as Rawls admits by embracing *Chaplinsky* and *Brandenburg*. Or when there is a significant threat against public safety, as might occur in an emergency during a time of war, an imminent or future terrorist threat or an actual terrorist attack. Yet these emergencies might not be the result of constitutional crises, nor would they necessarily cause one. Also, by trying to move beyond *Brandenburg*, Rawls might be allowing militant intolerant people to hide behind freedom of speech and freedom of association to form political parties aiming at destroying a constitutional democracy. To allow them to foment a constitutional crisis before acting against them might be not only imprudent but also suicidal, as the examples of Weimar and the Second Spanish Republic demonstrate.

Contrary to Rawls' latitudinarian view of freedom of speech, some legal scholars favor criminalizing hate speech and suppressing hate groups using, for example, the standards of

international law (Matsuda, 1995, pp. 87–120). Others prefer a pragmatic balancing approach which depends on a cost–benefit analysis regarding freedom of speech and the immediacy and gravity of the harm that it might produce (Posner, 2003, p. 362). Still others favor, if necessary, proscribing parties and speech that aim to demolish a constitutional democracy (Murphy, 2007, p. 525). They all, however, value freedom of speech. They differ on where to draw the line.

Despite Rawls' claim that 'the basic liberties constitute a family, and that it is this family that has priority and not any single liberty by itself' (Rawls, 1996, pp. 356–7), his singling out of freedom of speech as necessary for preserving democracy overshadows other important constitutional values for the preservation of democracy, such as freedom of association, freedom of religion, due process or equal protection. Motley circumstances might exist whereby one could justifiably restrict freedom of speech, or any other important constitutional value, without the presence of a constitutional crisis. For example, when militant intolerant people in a liberal democracy attempt to intimidate and hence harm those targeted groups or individuals whom they consider to be unworthy of human dignity. Or when there is reason to believe that a militant intolerant group is conspiring to attempt to overthrow a legitimate political order. For example, Article I, section 9 of the United States Constitution clearly vests Congress with the power to suspend the writ of habeas corpus in 'Cases of Rebellion or Invasion'. During those circumstances, the right of freedom of speech is reasonably but temporarily restricted (Barber, 1984, p. 148).

By emphasizing an uncompromising interpretation of the freedom of speech clause in PL, Rawls allows militant intolerant people the possibility of publicly engaging in subversive advocacy. In so doing, they can legally attempt to subvert the foundation of American constitutional democracy by appealing to the categorical language of First Amendment clauses. For example, they could argue that the freedom of speech clause protects their subversive advocacy: 'Congress shall make no law ... abridging the freedom of speech'. Similarly, they could argue that the freedom of assembly clause protects them: 'Congress shall make no law ... abridging the right of the people peaceably to assemble'. Jihadist, White Supremacist and Neo-Nazi groups could even argue that their political message is actually a religious one protected by the free exercise clause: 'Congress shall make no law ... prohibiting the free exercise [of religion]'. Militant Islamists might attempt to justify their holy war against infidels and liberal constitutional democracies by appealing to fundamentalist interpretations of the Qur'an, as Bin Laden and Al Zawahiri attempt to do in their messages (Al Zawahiri, 2004; Bin Laden, 2004). Moreover, White Supremacist and Neo-Nazi groups might try to justify their struggle against different racial and ethnic groups and against liberal democracies by appealing to their notion of racial purity and their Christian identity (Butler, 2000, pp. 469–70; Dobratz and Shanks-Meile, 2000, pp. 132–47).

What options is Rawls left with when facing the actual threat of militant intolerant people in a non-ideal liberal democracy? The following are some plausible alternatives. First, he might outlaw them to preserve the stability of this political order, in which case he seems to violate their freedom of association and their freedom of speech. Second, he might conditionally tolerate their public advocacy if he has reason to think that such an advocacy

has no resonance in society. Or third, he might allow them to express publicly their dangerous intolerant beliefs provided that they do not intend to produce and are not likely to bring about imminent violence.

The first option seems inconsistent with the First Amendment, which is well entrenched in American jurisprudence; however, it is not inconsistent with the notion of constitutional democracy or with the contemporary international law of human rights. Germany's Basic Law is a relevant example of a constitutional democracy that suppresses militant intolerant groups but also values freedom of speech. By appealing to the notion of constitutional self-defense and militant democracy, Articles 9 (2), 18 and 21 (2) of The Basic Law ban groups and associations that challenge its constitutional framework (Kommers, 1997, pp. 509–11, pp. 217–8). The UN Charter (1945) and the Universal Declaration of Human Rights (1948) together with the International Covenant on Civil and Political Rights (1966) are good examples of international law that provides the legal foundation to censure and outlaw group defamation.⁷ The German alternative or an appeal to the international law of human rights might seem undesirable to those who, like Rawls, hold an uncompromising interpretation of the freedom of speech clause. Others who hold different hermeneutical approaches to constitutional interpretation might be more sympathetic to such alternatives.⁸ The second and third options seem congruent with a nuanced interpretation of First Amendment values.

Since in PL Rawls argues that to restrict the exercise of the right of free political speech necessitates a 'constitutional crisis', the first option is incompatible with it in the absence of such a crisis. As a result, when facing the presence and public advocacy of militant intolerant people, he and those who hold similar views might reasonably adopt the second or third option. Rawlsian toleration in the eyes of militant intolerant people, however, would seem disingenuous, since they are convinced that if they could seriously challenge the actual stability of a liberal democracy, they would not be tolerated. Moreover, if they were to advocate publicly their dangerous intolerant beliefs without intending to bring about violence, as suggested by the third option, they would cease being militant intolerants who support subversive advocacy. Still, their presumed objections to Rawlsian toleration and liberal toleration in general seem arbitrary. They are claiming a right to be tolerated so they can try to impose their intolerant views on the rest of society.

It seems, therefore, that political liberalism must live with an essential tension balancing freedom of speech and preserving the political stability necessary to secure public safety. According to Rawls, the balance should tilt in favor of freedom of political speech if it is not intended to incite and not likely to bring about imminent violence and only if the nation faces no constitutional crisis. If these two conditions are met, then, according to Rawls, freedom of political speech would trump other important constitutional values. But the first is a sufficient condition representing the standard announced by the Court in *Brandenburg* with a solid legacy in American constitutional interpretation. In contrast, the second is a necessary condition representing Rawls' newly proposed standard for restricting political speech. His newly proposed standard, however, represents a black hole with a questionable pedigree for a tradition of American constitutional interpretation that balances freedom of speech with other important constitutional and/or political values without

privileging any one of them. Regardless of its shortcomings, this tradition has passed the test of a civil war, two world wars, the Cold War and the 9/11 terrorist attacks without abandoning democracy, permanently narrowing the scope of the right of freedom of political speech or abrogating this right altogether.

Rawls, however, favors a view of ideal constitutional interpretation based on his conception of public reason and the pre-eminence of freedom of political speech. Such a view might help us understand with hindsight some of the excesses and deficiencies of American jurisprudence in times of emergency. Therefore, Rawls' Herculean effort should be commended. But 'arguments grounded in social and historical context may in the long run prove more effective' (Tribe, 1985, p. 192) against the militant intolerant threat than arguments appealing to ideal constitutional and/or political principles that have not yet passed muster. Militant intolerant people are oblivious to public reason. That is why Rawls' view of ideal constitutional interpretation can be futile when dealing with militant intolerant groups that aim at destroying liberal democracies. But a constitutional tradition grounded in 'social and historical context' such as the German Basic Law, which was born in the ashes of National Socialism, or the US Constitution, which survived a fratricidal civil war, might be more effective in dealing with them. Still, citizens' good judgement is necessary to try to safeguard such effectiveness. After all, as Justice Robert Jackson has warned in his dissenting opinion, 'there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact' (*Terminiello v. City of Chicago*, 337 US 1, 1949, p. 37). It is up to vigilant citizens of actual constitutional democracies to prevent such a pact.

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About the Author

Vicente Medina is Associate Professor of Philosophy at Seton Hall University in New Jersey, USA. His primary areas of interest are social and political philosophy and ethics. His most recent article is 'Unconditional vs. Conditional Critics of Terrorist Violence: A Seemingly Endless Debate' in *Public Affairs Quarterly*, 20 (4) (October 2006). He is currently working on a book on terrorism.

Vicente Medina, Department of Philosophy, Seton Hall University, 400 South Orange Ave, South Orange, NJ 07079, USA; email: medinavi@shu.edu

Notes

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- 1 For a classical belligerent message of Jihadist or militant Islamist groups against infidels, see Taymiyyah (1996) ; Qutb (2004); Maududi (2004). The term 'White Supremacist' denotes rather amorphous groups, e.g. the Ku Klux Klan (KKK), the National States Rights party (NSRP), the National Association for the Advancement of White People (NAAWP), White American Resistant (WAR), including Neo-Nazi groups such as the National Resistance party (NRP). Although some of these groups might not advocate violence, their vitriolic messages tend to instigate it against other racial and ethnic groups. For a level-headed study of these groups, see Dobratz and Shanks-Meile (2000). For the international cooperation of Neo-Nazi and White Supremacist groups, see Lee (2000).

- 2 For the controversial provenance of sharia laws, and whether such laws can be compatible with liberal democracies, see the recent debate generated in Britain after the Archbishop of Canterbury's lecture on this topic (Williams, 2008). For some replies to his lecture, see Halliday (2008); Scruton (2008).
- 3 For example, see Bin Laden (2004); Al Zawahiri (2004); Mathews (2000); Rockwell (2000).
- 4 Rawls (1996, pp. lxi–lxiii). For the role that extremist political parties played in undermining the Weimar Republic, see Halperin (1965, pp. 495–526); see also Finn (1991, pp. 152–64); Jacobson and Schlink (2000, pp. 8–14).
- 5 For example, consider the case of Islamic terrorism. There seems to be a general misperception that Islamic terrorists are poor and uneducated. Hence the underlying assumption of those who support this conjecture is that their suffering leads them to engage in terrorist activities. But the evidence does not support such a conjecture. It is their political convictions and their grievances (whether real or not) rather than their suffering that motivate them to act against their enemies. For a study debunking this misperception and conjecture, see Krueger (2007).
- 6 For example, consider the Sedition Act of 1789, President Lincoln's suspension of the writ of habeas corpus during the Civil War, the Espionage Act of 1917 and the Sedition Act of 1918, the internment of individuals of Japanese descent during the Second World War, the excesses of the House of Un-American Activities during the Cold War, the persecution and prosecution of anti-war protesters during the Vietnam War and the enactment of the controversial USA Patriot Act of 2001 after the 9/11 terrorist attacks. For a nuanced exposition of the threats to civil liberties, especially the right of freedom of speech in US history, see Stone (2005, pp. 12–4).
- 7 See, for example, UN Charter, Art. 55 (c), which promotes universal respect of human rights and fundamental freedoms 'for all without distinction as to race, sex, language, or religion'. Moreover, Art. 56 obliges member states to enforce those rights and freedoms. See also UN Declaration of Human Rights, Art. 2, which reaffirms the above-mentioned rights of the Charter; however, Art. 19 guarantees freedom of speech. Art. 19 of the UN Covenant on Civil and Political Rights also protects freedom of speech but circumscribes it 'for respect of the rights or reputation of others' and 'for the protection of national security or of public order, or of public health or morals'. Yet Art. 20 restricts freedom of speech even further by outlawing 'any propaganda for war' and 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. For the nuances involving the limitation of freedom of speech and laws against group defamation in international law, see Henkin (1995, pp. 123–34).
- 8 See, for example, Murphy (1980). For him, human dignity is the fundamental value that animates the US Constitution. Since, for him, human dignity rather than a broad right of freedom of political speech inspires the Constitution, he favors the German model of militant democracy, which defends human dignity above other values. See Murphy (2007, pp. 521–9). For a defense of a pluralist theory of constitutional interpretation based on balancing freedom of speech with equal protection, see Delgado and Stefancic (1997). For a pragmatic approach of balancing constitutional and/or political values, especially the right of freedom of speech and public safety in times of emergency, see Posner (2006).

References

- Al Zawahiri, A. (2004) 'Knights under The Prophet's Banner', in W. Laqueur (ed.), *Voices of Terror*. New York: Reed Press, pp. 427–33.
- Barber, S. A. (1984) *On What The Constitution Means*. Baltimore MD: The Johns Hopkins University Press.
- Bin Laden, O. (2004) 'Jihad against Jews and Crusaders', in W. Laqueur (ed.), *Voices of Terror*. New York: Reed Press, pp. 410–12.
- Butler, R. (2000) 'Aryan Nations Creed', in J. Kaplan (ed.), *Encyclopedia of White Power*. Lanham MD: Rowman & Littlefield, pp. 460–70.
- Delgado, R. and Stefancic, J. (1997) *Must We Defend the Nazis? Hate Speech, Pornography, and the New First Amendment*. New York: New York University Press.
- Delgado, R. and Stefancic, J. (2004) *Understanding Words that Wound*. Boulder CO: Westview Press.
- Dobratz, B. A. and Shanks-Meile, S. L. (2000) *The White Separatist Movement in the United States: White Power White Pride*. Baltimore MD: The Johns Hopkins University Press.
- Finn, J. E. (1991) *Constitutions in Crisis: Political Violence and the Rule of Law*. New York: Oxford University Press.
- Gray, J. (2000) *Two Faces of Liberalism*. New York: The New Press.
- Halliday, F. (2008) 'Islam, Law and Finance: The Elusive Divine'. Available from: http://www.opendemocracy.net/article/globalisation/global_politics/islamic_law [Accessed 23 June 2008].
- Halperin, S. W. (1965) *Germany Tried Democracy: A Political History of the Reich from 1918 to 1933*. New York: The Norton Library.
- Henkin, L. (1995) 'Group Defamation and International Law', in M. H. and E. M. Freedman (eds), *Group Defamation and Freedom of Speech: The Relationship between Language and Violence*. Westport CT: Greenwood Press, pp. 123–34.

- Hoffman, B. (2006) *Inside Terrorism*, revised and expanded edition. New York: Columbia University Press.
- Jacobson, A. J. and Schlink, B. (eds) (2000) *Weimar: Jurisprudence in Crisis*. Berkeley CA: University of California Press.
- Kommers, D. P. (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany*, second edition. Durham NC: Duke University Press.
- Krasnoff, L. (1998) 'Consensus, Stability, and Normativity in Rawls's Political Liberalism', *The Journal of Philosophy*, 95 (6), 269–93.
- Krueger, A. B. (2007) *What Makes a Terrorist*. Princeton NJ: Princeton University Press.
- Lee, M. (2000) *The Beast Reawakens: Fascism's Resurgence from Hitler's Spymasters to Today's Neo-Nazi Groups and Right-Wing Extremists*. New York: Routledge.
- Locke, J. (1980) *Two Treatises of Government*. Cambridge: Cambridge University Press.
- McKinnon, C. (2006) *Toleration: A Critical Introduction*. New York: Routledge.
- Mathews, R. (2000) 'Declaration of War', in J. Kaplan (ed.), *Encyclopedia of White Power*. Lanham MD: Rowman & Littlefield, pp. 523–5.
- Matsuda, M. (1995) 'Outsider Jurisprudence: Toward a Victim's Analysis of Racial Hate Message', in M. H. and E. M. Freedman (eds), *Group Defamation and Freedom of Speech: The Relationship between Language and Violence*. Westport CT: Greenwood Press, pp. 87–120.
- Maududi, A. A. (2004) 'Jihad in Islam', in W. Laqueur (ed.), *Voices of Terror*. New York: Reed Press, pp. 398–400.
- Meiklejohn, A. (1948) *Political Freedom: The Constitutional Powers of the People*. New York: Harper & Brothers.
- Murphy, W. F. (1980) 'An Ordering of Constitutional Values', *Southern California Law Review*, 53 (2), 703–60.
- Murphy, W. F. (2007) *Constitutional Democracy*. Baltimore MD: The Johns Hopkins University Press.
- Payne, S. G. (1993) *Spain's First Democracy: The Second Republic, 1931–1936*. Madison WI: The University of Wisconsin Press.
- Posner, R. (2003) *Law, Pragmatism, and Democracy*. Cambridge MA: Harvard University Press.
- Posner, R. (2006) *Not a Suicide Pact: The Constitution in a Time of Emergency*. New York: Oxford University Press.
- Qutb, S. (2004) 'Jihad in the Cause of God', in W. Laqueur (ed.), *Voices of Terror*. New York: Reed Press, pp. 394–97.
- Rawls, J. (1996) *Political Liberalism*. New York: Columbia University Press.
- Rawls, J. (1999a) *A Theory of Justice*, revised edition. Cambridge MA: Harvard University Press.
- Rawls, J. (1999b) 'The Idea of Public Reason Revisited', in J. Rawls and S. Freeman (eds), *Collected Papers*. Cambridge MA: Harvard University Press, pp. 130–80.
- Rawls, J. (1999c) *The Law of People*. Cambridge, MA: Harvard University Press.
- Rawls, J. (2001) *Justice as Fairness: A Restatement*, ed. E. Kelly. Cambridge MA: Harvard University Press.
- Rockwell, G. L. (2000) 'In Hoc Signo Vinces', in J. Kaplan (ed.), *Encyclopedia of White Power*. Lanham MD: Rowman & Littlefield, pp. 443–7.
- Scruton, R. (2008) 'Islamic Law in a Secular World'. Available from: http://www.opendemocracy.net/article/faith_ideas/europe_islam/secular_world [Accessed 23 June 2008].
- Stone, G. R. (2005) *Perilous Times: Free Speech in Wartime*. New York: W.W. Norton.
- Taymiyyah, T. A. (1996) 'The Religious and Moral Doctrine of Jihad', in R. Peter (ed.), *Jihad in Classical and Modern Islam: A Reader*. Princeton NJ: Markus Wiener, pp. 44–54.
- Tribe, L. H. (1985) *Constitutional Choices*. Cambridge MA: Harvard University Press.
- UN Charter (1945) Available from: <http://www.un.org/aboutun/charter/> [Accessed 23 June 2008].
- UN International Covenant on Civil and Political Rights (1966) Available from: <http://www2.ohchr.org/english/law/ccpr.htm> [Accessed 18 July 2009].
- UN Declaration of Human Rights (1948) Available from: <http://www.un.org/Overview/rights.html> [Accessed 23 June 2008].
- Williams, R. (2008) 'Civil and Religious Law in England: A Religious Perspective'. Available from: <http://www.archbishopofcanterbury.org/1575> [Accessed 23 June 2008].