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**THE IRRELEVANCE OF SINCERITY: DELIBERATIVE  
DEMOCRACY IN THE SUPREME COURT**

JOHN M. KANG\*

I. INTRODUCTION

It is no secret that insincerity occupies an ethically ambivalent if unsavory place in our culture. Even as it pervasively animates our micro social encounters, and even as we concede its utility and more than occasional necessity, insincerity has never stood on the same podium of virtue as, for instance, honesty, loyalty and love. One may say more strongly that insincerity is no virtue at all. Usually it occupies an ethically tainted corner as implied by its very definition as an act whose success depends on its concealment. Whereas a virtue like honesty carries presumptive public esteem, insincerity is greeted with suspicion and, when discovered, charged to justify its presence. Part of that suspicion derives not simply from insincerity's tactics of concealment but what those tactics might be concealing. Whereas we tend to believe that impartial justifications may be declared publicly with the ostensible aim of benefiting others besides one's self, insincere justifications imply the concealment of a motive that is so unspeakably self-regarding or even plain selfish in nature that it cannot expect to garner support from others through an open public airing. That is why more palatable, more insincere, justifications must be found. Perhaps because of these familiar cultural assumptions regarding insincerity, the contempt to which it is subjected tends to be especially conspicuous in the culturally revered realm of democracy.

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Section II ("Insincerity Defined") of this Article is reprinted from John M. Kang, *The Case for Insincerity*, in 29 *STUDIES IN LAW, POLITICS, AND SOCIETY* 143-64 (Austin Sarat & Patricia Ewick eds., 2003). This Article is part of a larger project on insincerity and the interested reader may consult the aforementioned essay along with John M. Kang, *The Uses of Insincerity: Thomas Hobbes' Theory of Law and Society*, 15 *L. & LIT.* (forthcoming Dec. 2003). The author can be reached for comments and questions at johnkang@umich.edu.

Insincerity is regarded as a roguish intruder in democratic discourse where people are expected to speak their minds freely, yet with a measure of sincere concern for their fellow citizens. This general cultural response has found formal articulation in the scholarly movement, which, in recent years, has been assembled under the heading of “deliberative democracy.” Its advocates—who include a diverse mix of some of the most prominent law professors, philosophers, and political theorists—argue that people should frame their justifications in terms of the common good or the public generally, and that such justifications, at least sometimes, should be sincere. Law professors like Frank Michelman and Cass Sunstein try to justify sincerity in public discourse as part of a civic republican tradition,<sup>1</sup> the Kantian philosopher John Rawls justifies sincerity in terms of inviolable principles derived from an imagined “original position,”<sup>2</sup> the Frankfurt social theorist Jürgen Habermas makes sincerity an essential part of the aspect of legitimacy in his theory of discourse ethics,<sup>3</sup> and political theorists Amy Gutmann and Dennis Thompson turn to

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1. Michelman seems to imply this requirement of sincerity by suggesting that public-regarding dialogue (as opposed to selfish assertions) can lead to personal or political “transformation” by hearing the sincere arguments of others. Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1513-14, 1531 (1988). He also objects explicitly to “deception” stemming from self-interest in public arguments. *Id.* at 1507. Cass Sunstein similarly argues that an “emphasis on deliberation in republican thought is closely allied with the republican beliefs that the *motivating force* of political behavior should not be self-interest, narrowly defined, and that civic virtue should play a role in political life.” Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550 (1988) (emphasis added). Sunstein continues to state that:

[T]here is no mystery to this claim; it refers simply to the understanding that in their capacity as political actors, citizens and representatives are *not supposed to ask* only what is in their private interest, but also what will best serve the community in general—understood as a response to the best general theory of social welfare.

*Id.* (emphasis added) (footnote omitted).

2. Rawls’ argument is one of the most formally sophisticated arguments for sincerity, and it is also one that is hard to encapsulate briefly. Rather than offering an adequate—but also digressively long—summary that would continue for several pages in the footnote, the reader is urged to consult John M. Kang, *The Case for Insincerity*, in 29 STUDIES IN LAW, POLITICS, AND SOCIETY 143-64 (Austin Sarat & Patricia Ewick eds., 2003).

3. JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 21, 41, 99-100 (Thomas McCarthy trans., Beacon Press 1984) (1981). It is true that Habermas’s earlier work appears to nod approvingly at the historical efforts by the bourgeoisie to ignore status and focus on the arguments, and thus, he seems to hint that he is indifferent to sincerity in public discourse. For example, see the belated English translation, JÜRGEN HABERMAS, STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 36-43 (Thomas Burger trans., 2000). But in his later, more explicitly theoretical works, Habermas seems to believe that more information, including information about one’s motives, can be potentially useful to the ideal speech situation. See JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 72 (Thomas McCarthy trans., Beacon Press 1987) (1981); see also JÜRGEN HABERMAS,

conventional ideas of fairness and reciprocity, and against insincerity, in their proposal for the norms that should govern political arguments.<sup>4</sup>

Against such insistence on sincerity, this article argues that sincerity is both logically and practically irrelevant in contributing to a meaningful realm of free speech that can help generate diverse options for an audience to consider in its search for provisional political “truths.” This is not to say that this author necessarily encourage insincerity in public discourse. Rather, this article seeks to challenge the cultural and philosophical criticisms that have stigmatized insincerity in the arena of public discourse.

The argument is organized as follows. Part II provides a brief operational definition of insincerity. Part III turns to the First Amendment of the United States Constitution, and while the focus centers on this most American of documents, the arguments are sufficiently general to speak to the concerns of those living in other countries who are interested in deliberative democracy. Part III discusses the three models of First Amendment jurisprudence in the area of free speech. This section argues that free speech can be understood from three conceptually distinct approaches in libertarianism, communitarianism, and democracy. Part IV argues that the logic of both libertarianism and communitarianism, two otherwise competing approaches, depends on the sincerity of the speaker, whereas the democratic approach does not. Specifically, this section focuses on an aspect of the democratic approach called “critical interaction,” where listeners and readers are subjected to speech

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JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 89 (Ciaran Cronin trans., MIT Press 1993) (1991).

4. Amy Gutmann and Dennis Thompson favor a practice of justification that involves “reciprocity,” where “motive” is premised on a “desire to justify to others,” not “self-interest.” AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 53 (1996). Even “enlightened self-interest” “cannot be the principle that ultimately governs disagreement in a democracy” because “it provides no principled limitation on taking advantage of other citizens, and no principled basis for giving others an advantage at no gain to oneself.” *Id.* at 57-58. Furthermore, they argue that:

An official who conceals information with the intention of causing citizens to believe something the official knows is false creates a deceptive secret. The rare occasions on which such secrets are justified usually involve practices directed against criminals or enemies in wartime. But that the immediate target of the deception is someone who does not have a right to the information is not a sufficient justification because other citizens too will be deceived.

*Id.* at 117. In addition to Gutmann and Thompson, Rawls, Habermas, Michelman and Sunstein, there are other advocates of deliberative democracy who offer broadly complementary arguments regarding sincerity. See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17-34 (Alan Hamlin & Philip Pettit eds., 1989); Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 105-07, 110-13 (Seyla Benhabib ed., 1996); JOHN DUNN, *WESTERN POLITICAL THEORY IN THE FACE OF THE FUTURE* ch. 1 (1979).

that is critical, sometimes fiercely so, of their preexisting beliefs and assumptions. What is relevant here is that the audience, understood collectively as a formally self-sovereign people, is given a meaningful diversity of ideas. A focus on the sincerity of the speaker is not simply irrelevant, but potentially counterproductive.

## II. INSINCERITY DEFINED

As evinced in their sometimes bland homilies against its practice, those who criticize insincerity in public discourse tend to reflect a familiar social contempt for insincerity as an unsavory attempt to hoodwink an innocent audience. Kent Greenawalt labels such insincerity as “deceitful”<sup>5</sup> and “dishonest.”<sup>6</sup> Robert Audi derides it as “manipulative”<sup>7</sup> and its propensity “a moral defect.”<sup>8</sup> John Rawls rebukes it as “hypocritical.”<sup>9</sup> But a study of the nature and effects of insincerity requires a more nuanced appraisal of its complexity. We know that insincerity, at a minimum, means delivering reasons that one believes personally unpersuasive or irrelevant. As evaluation, it can mean offering opinions that do not reflect one’s true feelings.<sup>10</sup> Within these broad definitional parameters, insincerity can don assorted guises and perform different functions depending on the context. Yet this article will argue that insincerity should be distinguished from lying. While insincerity intends to mislead the audience into making wrong inferences about the speaker’s true disposition about his reasons, lying involves deliberately misrepresenting the factual content of the reasons themselves. While it is hard to argue that lying, thus conceived, is categorically worse than insincerity in terms of ethics or politics, there is a legitimate argument that lying fundamentally threatens the stability of promises and agreements in ways that insincerity does not.<sup>11</sup> American courts seem to hold something of that opinion

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5. KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 163 (1995).

6. *Id.*

7. See ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 110 (2000).

8. *Id.* at 128.

9. JOHN RAWLS, POLITICAL LIBERALISM 215 (1996).

10. This definition is consistent with Lionel Trilling’s observation that the modern understanding of sincerity “refers primarily to a congruence between avowal and actual feeling.” LIONEL TRILLING, SINCERITY AND AUTHENTICITY 2 (1972). This article’s definition is also complementary to Timur Kuran’s definition of insincerity as “preference falsification” as opposed to the falsification inherent in a factual representation. See TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 4 (1995).

11. For example, while Kant does not condone either insincerity or lying, as I have defined them, his case against the latter partly rests on a concern that “truthfulness is a duty that must be regarded as the basis of all duties founded on contract, and the laws of such duties would be rendered uncertain and useless if even the slightest exception to them were admitted.” IMMANUEL KANT, *On a Supposed Right to Lie Because of Philanthropic Concerns*, in

because there are obvious causes of action—fraud and libel, for example—for damages resulting from lying as I have defined it. But it is much harder to identify a cause of action that corresponds to the damages that are said to result from insincerity as this article defines it.<sup>12</sup> Indeed, the law specifically protects against misrepresentation by advertisers who indulge in insincerity through exaggeration or what lawyers call “puffing.”<sup>13</sup> The chief rationale for this distinction is that the average consumer knows that the puffing probably is not true and thus does not rely on it, and even if some do actually rely on the statements, it is unfair to hold advertisers accountable for claims that are theoretically unverifiable.<sup>14</sup> Stated otherwise, the distinction seems to be that facts adhere to the empirically testable essence of the merchandise, but puffing or opinion derive from an individual’s particular, and thus potentially subjective, experience with it. This distinction in turn seems to suggest that insincerity, more so than lying, involves ideas of pleasure and preference along with those of disgust and dislike that collectively imply a potentially unique set of normative commitments and assumptions on the part of the individual.

Having offered an operational definition of insincerity, I can move to the ways in which it relates to the different models of free speech under the First Amendment.

### III. THREE MODELS OF PUBLIC DISCOURSE

There are three principal philosophical approaches to understanding the First Amendment’s right to free speech. These approaches can be called the justifications from libertarianism, communitarianism, and democracy.<sup>15</sup> Other

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GROUNDING FOR THE METAPHYSICS OF MORALS 63, 65 (James W. Ellington trans., Hackett Publishing Co. 3d ed. 1993) (1785).

12. It is true that libel, as a cause of action, need not require intent. Therefore, negligence and recklessness may suffice in some cases. *See e.g.*, *Savage v. Pac. Gas and Elec. Co.*, 21 Cal. Rptr. 2d 305 (Cal. Ct. App. 1993).

13. “Puffing” is usually defined as “an exaggeration or overstatement expressed in broad, vague, and commendatory language.” *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993). 15 U.S.C. § 1125(a)(1)(b) (2000) permits companies to sue each other for false advertising that misrepresents and thus hurts competitors. *Id.* Under the Act, a company enjoys a complete defense if it can show that the part of the advertisement in question contains no factual assertion, but is, for example, an opinion or puffing. *See Jean Wegman Burns, Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 867-68 (1999).

14. Burns, *supra* note 13, at 868-69.

15. In a textually attentive study, David Brink offers a potential fourth approach from “Millian deliberation” whereby deliberation is channeled to promote personal development. *See* David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 LEGAL THEORY 119 (2001). It seems however, that aspects of his approach may be subsumed by others. Brink’s approach seems to borrow its ethos from a version of libertarianism that stresses self-actualization, and it seems to borrow its structure and operation from a version of the democratic approach, which stresses deliberation. *See id.*

names have been used to describe them,<sup>16</sup> but the differences in names are not essential, only the differences in ideas. Before beginning their explication, there is the matter of definitional qualification. These approaches can embody diverse and competing conceptions, and it is necessary to be careful not to insist dogmatically on oversimplifications. Furthermore, it is not this article's aim to explore every variant of each approach or to argue the merits of any one variant; rather this article's aim is more general in trying to identify each approach's broad characteristics and only insofar as necessary to illuminate its thesis about sincerity and insincerity. Having offered these qualifications, a description of the three approaches follow.

A. *The Libertarian Approach*

According to the libertarian approach, the relevant community has no moral right to prohibit a speaker from speech because it is offensive to the community's substantive moral commitments or its informal codes of civility.<sup>17</sup> There are two basic assumptions that underwrite this position. Although one need not logically imply the other, they tend to be articulated together. First, even as he insists that the community is collectively bound to permit his freedom of expression, the libertarian is skeptical about the existence of any overarching substantive morals that can justifiably bind the community's members. This premise tends to rely on Kantian assertions about the priority of the right over the good,<sup>18</sup> although it can also be reflected more colloquially by judges who observe that "one man's vulgarity is another's lyric."<sup>19</sup> Second, the libertarian holds that freedom of speech is valuable in enabling individuals to seek self-actualization or to affirm or reaffirm their identities. Philosophically, this view again tends to draw from a Kantian vocabulary of "self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish."<sup>20</sup> In addition, the libertarian approach "makes its appeal to the individualistic ethos that so dominates our popular and political culture."<sup>21</sup> Whatever its precise source of justification, the libertarian view is likely to criticize as unjustifiable the

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16. Robert Post, for example, refers to the democratic approach as the "collectivist" approach. ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 268-69 (1995). David Richards describes the libertarian approach in terms of Lockean and Kantian arguments for respecting individual conscience. DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* chs. 3-5 (1986).

17. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 496 (1990).

18. See, e.g., RICHARDS, *supra* note 16, at ch. 4.

19. *Cohen v. California*, 403 U.S. 15, 25 (1971).

20. David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974); see RICHARDS, *supra* note 16, at ch. 4.

21. OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996).

restrictions on violent pornography, racist speech, and other forms of communication that are regarded as offensive by general community convention, for such forms of speech are, to the libertarian, examples of potential self-actualization by the speaker.<sup>22</sup>

*B. The Communitarian Approach*

The communitarian approach stands at the opposite pole from the libertarian approach. It prioritizes the community's moral commitments and norms of civility over the individual rights of the speaker.<sup>23</sup> To employ a previously used term, the communitarian approach privileges the community's collective attempts at self-actualization over those of any particular individual.<sup>24</sup> Accordingly, legislation that proscribes the right to expression is not regarded as stemming simply from administrative concerns over time, place, and manner, but from a morally informed endeavor to define the community. The rationale for the communitarian approach is varied. It may rest on the following premises.<sup>25</sup> First, it may rest on the belief that by affirming the community's values against assault by individual speakers, the state can strengthen its claim of political legitimacy, and hence, the consent of the people is more likely to be genuine.<sup>26</sup> Second, the rationale may derive from the idea that preserving shared social beliefs rooted in tradition and culture, as opposed to abandoning the community's members to a series of superficial options delivered by irresponsible speakers, is necessary to help people fashion for themselves meaningful individual lives.<sup>27</sup> Third, the rationale may arise from the premise that an individual identity is not chosen per se by a person, but rather is ascribed by the community. Thus to permit the erosion of community values would be to permit the partial erosion of a person's sense of self.<sup>28</sup>

To these varied rationales for the communitarian approach, there is a difference of opinion among communitarians regarding whether people

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22. For example, David A. J. Richards relies on a modified Kantian premise to justify nearly unlimited rights to pornography. See Richards, *supra* note 20; see also RICHARDS, *supra* note 16, at 204-09.

23. See Martin G. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 270 (1991).

24. *Id.*

25. This is not meant to suggest that other premises are unavailable.

26. Charles Taylor, *Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada*, in CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA 183, 213, 215 (Alan Cairns & Cynthia Williams research coordinators, 1985); WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 224 (1990).

27. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 204-05 (1981); CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 157 (1979).

28. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (1982).



actually share the values that define the community, or whether they should. Sometimes, the argument for shared values presents itself as an attempt to codify an empirical fact regarding what the community holds dear. For example, Michael Sandel advocates the regulation of pornography by a local community “on the grounds that pornography offends its way of life.”<sup>29</sup> Other times, the argument for shared values is more of an aspiration. While not typically considered a communitarian, Catharine MacKinnon provides an illustration. MacKinnon also wants to regulate pornography, but, unlike Sandel, she does not see pornography as threatening the community’s values, which, for her, are the values constructed from a male-dominated perspective. Rather, for MacKinnon, pornography, even violent pornography, reproduces in exaggerated form what the community already regards as “normal” beliefs about gender and sex.<sup>30</sup> Hence, MacKinnon argues that the purpose of pornography regulation is not to reflect present community values, but to aspire to something better as an ethical matter by endorsing a vision of community values that rests on treating women as deserving of equal respect.<sup>31</sup>

### C. *The Democratic Approach*

Unlike the communitarian or libertarian approaches, the democratic approach uses the First Amendment to serve the ends of democracy by regulating public discourse in such a manner so as to maximize access to information, so that people might better exercise their rights of self-sovereignty.<sup>32</sup> The democratic approach attempts to ensure that people are exposed to a rich array of information and competing views, so that whatever they decide as a matter of political course is theoretically borne of meaningful deliberation.<sup>33</sup> There are accordingly two rights that function symbiotically in this political enterprise:

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29. Michael J. Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15, 17.

30. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* ch. 3 (1987). See generally CATHARINE A. MACKINNON, *ONLY WORDS* (1993) [hereinafter *ONLY WORDS*].

31. *ONLY WORDS*, *supra* note 30, at ch. 3.

32. Owen Fiss argues for the democratic approach and against the libertarian and communitarian approaches. One of the ways that he attempts to critique the latter two is by persuasively showing that their respective proponents simply assert, rather than argue, the primacy of their respective approaches. FISS, *supra* note 21, at 3, 12-13. Yet if that is true, the fault inheres in the proponents of the two approaches, not necessarily the merits of the approaches themselves, which await a fuller defense by others.

33. For a classic articulation of the democratic view, see, for example, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). For more recent treatments, see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* ch. 7 (1993) (discussing political deliberation, especially on pages 202-

[T]hat of every citizen to participate in self-government by trying to win support for his or her politically relevant ideas; and that of potential listeners to hear and be informed so that they may decide how best—in *their* judgments—to allocate political resources.<sup>34</sup>

These two rights may collectively evoke Justice Holmes’s familiar metaphor of a “marketplace of ideas” in public discourse whereby arguments compete with each other to vie for the audience’s support.<sup>35</sup> While not entirely the same as the democratic approach, the marketplace metaphor is nonetheless complementary. Less complementary are the aims of both the communitarian and libertarian approaches. The democratic approach explicitly permits offensive criticism of what the communitarian regards as off-limits in certain ethical commitments and civil norms and it rejects the libertarian premise that the primary benefit of public discourse is to reduce concerns of individual psychological fulfillment logically irrespective of community norms.<sup>36</sup>

Structurally, the democratic approach envisions what Robert Post calls “critical interaction,” a “freedom from the boundaries of community expectations and norms” that “initiates the very possibility of public discourse

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03 and 253-54). See FISS, *supra* note 21 (providing a largely lucid account of political deliberation). The democratic approach can be applied to other aspects of the Constitution, including the Fourteenth Amendment’s Equal Protection Clause. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

34. WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 623 (2d ed. 1995).

35. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting). A full presentation of the “marketplace of ideas” rationale was offered earlier by John Stuart Mill. Mill explains that:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race: posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

JOHN STUART MILL, *ON LIBERTY* 23 (1921).

36. There has been widespread debate over which of these views should principally animate the First Amendment’s regulation of public discourse. Given its organizational parameters, this Article cannot fully introduce, let alone settle, that debate. It can, however, attempt a clarification in this regard. Arguably, most would want the First Amendment to understand public discourse in terms of all three approaches, for most aspire to realize psychological fulfillment, and at other times, to enjoy the belonging and stability engendered by community norms, and, at other times, to seek to exercise our powers of democratic self-sovereignty. All three approaches represent liberal virtues, and in their abstract conditions, they can coexist without conceptual conflict. Furthermore, all three approaches tend to rely to some extent on conceptions about autonomy, choice, and equality, all familiar liberal ideas. Much of the disagreement would seem to be regarding the proper balance of the virtues within each approach. The debate arises when the aims attendant to libertarianism, communitarianism, and democracy conflict with each other, as in the legal regulation of pornography and racist speech.

by distinguishing it as pure communication able to reach out beyond the confines of any single community.”<sup>37</sup> Outside such community confines, speech in critical interaction may be remarkably abusive and unabashedly vulgar in tone and substance.<sup>38</sup> Critical interaction is the domain of public discourse in which misogynistic pornography, for example, may assault the community’s norms under cover of First Amendment protection.<sup>39</sup>

What this article seeks to do is explore the ways in which insincerity, and not its opposite, promotes the aims of critical interaction. This article explains that against the claims of some prominent philosophers and legal theorists, the public discourse that is so vital to democracy need not depend, logically or practically, on sincerity.

#### IV. CRITICAL INTERACTION IS PROMOTED BY INSINCERITY

Some contemporary philosophers and legal theorists tend to insist that speakers present justifications that meet certain standards.<sup>40</sup> Paramount among them are the requirements that justifications under some circumstances should be impartial insofar as opponents are likely to find them reasonable<sup>41</sup> and that the tone of debate should be one of earnest civility.<sup>42</sup> Much of the animating

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37. POST, *supra* note 16, at 146.

38. *See id.* at 147-48.

39. *See* Lili Levi, *The Hard Case of Broadcast Identity*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 59 (1992). Owen Fiss argues that the democratic approach broadly forbids First Amendment protection for misogynistic pornography and racist speech because they stigmatize the voices of its victims and thus undermine their credibility and thus their ability to participate equally in democratic politics. *See* FISS, *supra* note 21, at 13. Worth examining is Robert Post’s critique of Fiss’s understanding of the democratic approach as insufficiently attentive to the aims of self-sovereignty. *See* POST, *supra* note 16, at 268-89. This article’s intent is not to open debate about which version of the democratic approach is more justifiable, but rather to sketch its aims and structural properties by presenting the most straightforward version.

40. *See* Paul G. Chevigny, *The Dialogic Right of Free Expression: A Reply to Michael Martin*, 57 N.Y.U. L. REV. 920, 921-22 (1982).

41. *See, e.g.*, RAWLS, *supra* note 9, at 224 (stating that justifications resting on public reason should “appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial”); GUTMANN & THOMPSON, *supra* note 4, Ch. 2.

42. RAWLS, *supra* note 9, at 217, 219, 224, 226, 251 n.41. Amy Gutmann and Dennis Thompson go further than mere civility by calling upon a stronger commitment in “civic magnanimity.” GUTMANN & THOMPSON, *supra* note 4, at 82-85. Coming from two self-styled liberals, their discussion of civic magnanimity has a rather surprisingly Aristotelian flavor in its emphasis on an “excellence of character.” *Id.* at 79. They argue that “mutual respect demands more than toleration. It requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees. It consists in an excellence of character that permits a democracy to flourish. . . . This is a distinctively deliberative kind of character.” *Id.* (footnote omitted).

logic for both imperatives relies on a commitment to basic fairness<sup>43</sup> or even some higher ethical assumption about how all people deserve to be treated with equal respect as autonomous and deliberative beings.<sup>44</sup> The Supreme Court, as an institution, has unequivocally rejected the approach of such theorists and philosophers. The Court reads the Constitution as permitting in public discourse vulgarly partisan justifications dressed in even more vulgarly uncivil garb.<sup>45</sup> A chief reason why the Court interprets the First Amendment as barring regulation of both imperatives in public discourse is to ensure that the audience is exposed to a wide range of viewpoints and information.<sup>46</sup> Expressed negatively, the logic is that without such permissiveness, speakers are less likely, in both quantitative and qualitative terms, to criticize ideas and public figures. This possibility may in turn hinder the ability of the listeners as a sovereign people to reflect meaningfully about their political options as presented in public discourse. Whereas some philosophers and legal theorists propose theories that are underwritten by ethical premises of some sort, the Court's version of public discourse is more explicitly political.

A. *Public Discourse and the Democratic Approach*

A famous instance of the democratic approach is found in *New York Times Co. v. Sullivan*.<sup>47</sup> In that case, the *New York Times* ran an advertisement saying that peaceful efforts at civil rights reform in Montgomery, Alabama, and elsewhere, were "being met by an unprecedented wave of terror by those who would deny and negate [the Constitution]."<sup>48</sup> The advertisement did not mention who specifically was responsible for such terror, but L. B. Sullivan, a city official responsible for the Montgomery police, argued that he was falsely depicted and sued the *New York Times* for libel.<sup>49</sup> An Alabama jury awarded what was then an exorbitant sum for libel in the amount of \$500,000.<sup>50</sup> The Alabama Supreme Court affirmed.<sup>51</sup> The United States Supreme Court reversed the Alabama Supreme Court in one of its most important First Amendment decisions.<sup>52</sup> Justice Brennan, writing for the Court, argued that a

43. Gutmann and Thompson seem to approach public discourse in this manner. See GUTMANN & THOMPSON, *supra* note 4, at 82-85.

44. RAWLS, *supra* note 9, at 217-18, 226.

45. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 47-48 (1988) (holding that the First Amendment protects a parody of the Reverend Jerry Falwell having sex "with his mother in an outhouse").

46. See Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and its Relation to Public Discourse*, 99 YALE L.J. 925, 937-38 (1990).

47. 376 U.S. 254 (1964).

48. *Id.* at 256.

49. *Id.*

50. *Id.*

51. *Id.*

52. *New York Times Co.*, 376 U.S. at 292.

public official like Sullivan was subject to an “actual malice” standard whereby he could only recover damages for libel if he could show that the defendant made a false statement regarding the public official acting within his official capacity, and that the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>53</sup> Merely publicizing some shameful factual inaccuracy was thus insufficient to establish liability. Even doing so “negligently”—below the standard of responsibility for a reasonable person—was not enough.<sup>54</sup> The Court thus granted unprecedented First Amendment protection to speakers and thereby made public officials remarkably vulnerable in the realm of public discourse. The rationale for the Court’s new rule was that “public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>55</sup>

There are two points in Justice Brennan’s statements that deserve emphasis. First, he delivers a paradox in that an aspect of public discourse in a civilized democracy must permit speech that is anything other than civilized or democratic, for that is the only way to examine public issues in a vigorous manner and to generate new possibilities pertaining to them.<sup>56</sup> Second, following logically from the first point, Justice Brennan, under his formulation of actual malice, silently ignores as constitutionally relevant whether a speaker intentionally sought to libel and injure a public official because of hatred or revenge.<sup>57</sup>

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53. *Id.* at 279-80.

54. *See id.* The Court clarified this aspect in *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Court stated:

[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

*Id.* at 731.

55. *Id.* at 270.

56. It is hard to see how the *New York Times* advertisement is uncivilized or undemocratic. The theoretical possibilities created by Justice Brennan’s rule permit unpleasant forms of speech, something that becomes abundantly clear in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). There, Larry Flynt, the publisher of the notoriously pornographic *Hustler Magazine*, ran a parody of the Reverend Jerry Falwell having sex “with his mother in an outhouse.” *Id.* at 47-48. *See infra* note 57.

57. While perhaps it is less likely to receive more explicit notice than Brennan’s first point, his second point has received clear reaffirmation in later cases. A per curiam opinion found that the trial judge misunderstood the actual malice standard when the “jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials ‘with bad or corrupt motive,’ or ‘from personal spite, ill will or a desire to injure plaintiff.’” *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967). In *Greenbelt Cooperative Publishing Ass’n*

It is no accident that the actual malice test embodies both the aspiration to democracy and the flat indifference to sincerity. There are latent hints in Justice Brennan's opinion in *New York Times Co.* regarding this relationship,

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*v. Bresler*, 398 U.S. 6 (1970), the Court overturned the lower court's decision because the judge, in instructing the jury about the elements for liability pertaining to libel, wrongly "defined 'malice' to include 'spite, hostility or deliberate intention to harm.'" *Id.* at 10. Similarly, in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Court stated that it "is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Id.* at 666. As illustration, the *Harte-Hanks* Court pointed to its earlier case of *Hustler Magazine*, where the ardently spiteful pornographer Larry Flynt depicted Jerry Falwell in an emotionally jarring parody as having sex "with his mother in an outhouse." *Hustler Magazine*, 485 U.S. at 48. *See supra* note 56. Quoting *Hustler Magazine*, the *Harte-Hanks* Court again stated that a public figure "may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact which was made . . . with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Harte-Hanks Communications*, 491 U.S. at 667 (quoting *Hustler Magazine*, 485 U.S. at 56). Furthermore, the *Harte-Hanks* Court also clarified that:

[T]he fact that the defendant published the defamatory material in order to increase its profits [would not] suffice to prove actual malice. The allegedly defamatory statements at issue in the *New York Times* case were themselves published as part of a paid advertisement. If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.

*Id.* at 667 (citation omitted).

*Garrison v. Louisiana*, 379 U.S. 64 (1964) was yet another occasion in which the Court could reiterate its indifference towards motives in the promotion of truth. *Id.* at 72-73. The Court quoted with approval the following statement by a lower court:

If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice . . . .

It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable, and that, in such case, must be sufficient.

*Id.* at 73 (quoting *State v. Burnham*, 9 N.H. 34, 42-43 (1837)).

The textual evidence presented above clearly indicates that if a speaker delivers some extravagant charge later discovered to be untrue against a public official and that he later confesses to be motivated purely by a personal hatred for the official, he is nonetheless protected by the First Amendment as long as he shows that the statement was not made with actual malice. Yet the same speaker's motivation would be legally relevant if he aimed his remarks against someone who was, for example, an anonymous private person, or certainly, if the person depicted in the speech were a private person involved in a strictly private matter. In this way, the actual malice test specifically recognizes the hindrance to free speech regarding public issues posed by a concern regarding the speaker's sincerity. Indeed, while the actual malice test does allude to the speaker's state of mind, the requirement that the plaintiff show that the speaker knew that the speech was false does not refer to sincere motivation, but rather to the speech act's factual representations.

but the connection needs to be made explicit. That move first necessitates the counterintuitive realization that even though we casually regard sincerity and truth as mutually sympathetic, there are ironic possibilities that they are mutually resistant, and so too that it is actually insincerity that might lead to the discovery of truth. Consider the difference between what Don Herzog calls psychological objectivity and sociological objectivity.<sup>58</sup> Both forms of objectivity represent a state of mind where one may reflect on what is the “truth.”<sup>59</sup> Psychological objectivity requires that “each and every individual strive for a dispassionate and disinterested judgment.”<sup>60</sup> Implicit in the requirement is that people be sincere in their judgments and arguments. Accordingly, “[h]irlings and other partisans are then obviously untrustworthy; we shouldn’t pay even perfunctory attention to their stridently one-sided views.”<sup>61</sup> But sociological objectivity requires “a relatively detached audience capable of sorting out arguments pressed by partisans.”<sup>62</sup> Under this view, “[i]nstead of disparaging their political enthusiasm, we can capitalize on it: they’re motivated to search out every error made by their opponents, to marshal all the resources of their own case as forcibly as they can.”<sup>63</sup> Here, it is irrelevant whether the speakers are secretly obsessed with indulging their narrow interests or in sincerely furthering the noble cause of democracy—whatever such innocence of motive could possibly mean. What matters is that the audience is exposed to a diversity of views and ideas.<sup>64</sup> Such diversity creates more choices for a theoretically self-sovereign people to make informed and sophisticated decisions about their political future.

That is why insincerity is not necessarily objectionable from the perspective of a democratic approach. In fact, insincerity is emblematic of a larger dynamic in politics where people constantly seek to further their own particular interests. We already know that the justifications and arguments proffered by such groups are often not animated by pious motives to further public discourse, but rather by self-interested motivation to further their own causes. Yet that hardly qualifies as a reason to admonish them, for they may invent outstanding justifications for their positions or deliver devastating critiques of their opponents that may enrich public discourse. By removing sincerity as legally irrelevant to public discourse, the audience is able to hear a greater variety and potentially better quality of arguments. In this way, the

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58. DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 159 (1998). For an early intimation of these categories, see Don Herzog, *Some Questions for Republicans*, 14 *POL. THEORY* 473 (1986).

59. HERZOG, *supra* note 58, at 159.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. HERZOG, *supra* note 58, at 159.

democratic approach reveals itself as inherently distinct from the libertarian and communitarian approaches in its relationship to insincere public discourse. Whereas the democratic approach removes sincerity as logically irrelevant from public discourse, the other two approaches are logically contingent upon sincerity, although in quite different ways.

*B. Public Discourse and the Libertarian Approach*

The libertarian approach conceives public discourse in terms of the speaker's self-actualization. The purpose of public discourse then is to enable people to express themselves in their presumably sincere condition. We can find an instance of this view from one of Thoreau's more than occasional gestures toward romanticism. Thoreau stated:

I know this well, that if one thousand, if one hundred, if ten men whom I could name,—if ten *honest* men only,—ay, if *one* HONEST man, in this State of Massachusetts, *ceasing to hold slaves*, were actually to withdraw from this co-partnership, and be locked up in the county jail therefore, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be: what is once well done is done forever.<sup>65</sup>

The act of civil disobedience is performed not primarily to benefit the community. One man's lone decision to serve jail time would have hardly signaled something like the abolition of slavery in America. Rather, the dramatic gesture is meant to cleanse one's conscience.<sup>66</sup> It is an act to demonstrate sincerely both to the community and to one's self what one is really made of. The speech act is thus not simply expressive but also self-actualizing.

Something similar might be said of the Court's understanding of some of the cases that fall into the categories of the sacred and the profane. For the latter, we can look to *Cohen v. California*.<sup>67</sup> There, the Court reversed the prosecution of Robert Cohen, who violated a disturbance of the peace statute for wearing, in a Los Angeles courthouse, a jacket emblazoned with the words "Fuck the Draft."<sup>68</sup> The Court held that the First Amendment protected Cohen's expression.<sup>69</sup> Part of its justification stemmed from the view that "the Constitution leaves matters of taste and style so largely to the individual,"<sup>70</sup> and because Cohen's message contained "inexpressible emotions."<sup>71</sup> The

65. Henry David Thoreau, *Civil Disobedience*, in *AMERICAN SPIRITUALITIES: A READER* 309 (Catherine L. Albanese ed., 2001).

66. See the related discussion in HANNAH ARENDT, *CRISES OF THE REPUBLIC* 58-68 (1972).

67. 403 U.S. 15 (1971).

68. *Id.* at 16-17.

69. *Id.* at 26.

70. *Id.* at 25.

71. *Id.* at 26.



focus on the aesthetic and emotive dimensions of the speaker—as opposed to the potential political meaning for the listeners—seems to suggest that the Court is primarily interested in making legal space for the speaker’s self-actualization along such dimensions. The silent, but crucial, assumption for protecting such self-actualization is that it is sincere.

While factually quite different from the profanity of *Cohen*, the religious character of *Thomas v. Review Board*<sup>72</sup> presented similar issues regarding self-actualization. Eddie Thomas was a foundry worker in Indiana who was transferred from making steel sheeting to making tank gun turrets.<sup>73</sup> As a Jehovah’s Witness, he refused to participate in activities that would contribute to war.<sup>74</sup> The foundry fired him, and Thomas sought unemployment benefits.<sup>75</sup> The Indiana Supreme Court refused to permit the dispensing of such benefits because “although the claimant’s reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was.”<sup>76</sup> The confusion or doubt is understandable. How could producing steel sheeting that could be added to a tank’s armor differ from building its turret, leading to its ultimate construction, and hence its availability for combat? The Indiana Supreme Court, moreover, could point to another Jehovah’s Witness who had no qualms about making turrets.<sup>77</sup> Still, on appeal, Chief Justice Burger, writing for the Court, reversed the Indiana Supreme Court, stating that:

Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is “struggling” with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.<sup>78</sup>

In this passage, Chief Justice Burger does not justify Thomas’s expression as constitutionally protected because it is likely to cause reflection or persuade anyone who witnesses it. Burger thus avoids the democratic approach. He also facially avoids the communitarian approach, because there is no suggestion that Thomas’s specific conduct reinforces some pervasive belief among Jehovah’s Witnesses as a group. Rather, Burger justifies his decision by turning to a libertarian approach. Burger seems to imply that no one—including other Jehovah’s Witnesses—would necessarily even understand Thomas’s actions as coherent. The action is constitutionally protected, it

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72. 450 U.S. 707 (1981).

73. *Id.* at 709.

74. *Id.*

75. *Id.*

76. *Id.* at 714 (quoting *Thomas v. Review Bd.*, 391 N.E.2d 1127, 1133 (Ind. 1979), *rev’d* 450 U.S. 707 (1981)).

77. *Thomas*, 450 U.S. at 715.

78. *Id.*

seems, largely because it is the way that Thomas himself has come to terms with his religion. That justification in turn must depend on the assumption that Thomas's religious expression is sincere, and that it does not stem from a desire to avoid strenuous or dangerous activity or to avoid being under the control of an overbearing supervisor.

C. *A Communitarian View*

Sincerity is also essential to the logic of the communitarian approach to public discourse. Instead of focusing on the self-actualization of the speaker, this view tends to focus on the self-actualization of the community. There are easy examples in the modes of speech that both reflect and constitute communitarian enterprises like marriage and group-based religious observance. When couples exchange marital vows, some of them surely marry for reasons that have nothing to do with love or devotion and have no intent on keeping promises of any kind in sickness or in health. The logic of the marital union as we presently understand it, however, requires that they outwardly act as if they do and that the audience ceremoniously assumes that they do as well. Similarly, we know that many people attend Sunday church services for a host of reasons that have little to do with religious devotion. They may see it as another social event, an opportunity to find a potential spouse, or simply an excuse to get a terrific lunch at no charge. Again, like with the exchange of marital vows, the logic of prayer and communion during Sunday services formally presupposes that people are sincere in their devotion and that they are not there to indulge these other desires. For a person to publicly disclose the true, but culturally unspeakable, motivations behind his participation in these communitarian practices would undermine the practices' premises and aims.

In addition to the rituals and ceremonies within civil society, there are common laws fashioned by judges that also reflect communitarian values whose legitimacy depends on the formal assumption that the values are sincerely felt by the community.<sup>79</sup> There are numerous instances where judges turn to what they perceive as the community's values as an interpretive guide for their reading of the Constitution.<sup>80</sup> Justice Cardozo understood the rights attendant to the Fourteenth Amendment Due Process Clause as "so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>81</sup> And Justice Frankfurter memorably declared that the same Due Process Clause

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79. See, e.g., *Inc. Vill. of Lynbrook v. United Artists Corp.*, 347 N.Y.S.2d 856, 859 (N.Y. Sup. Ct. 1973).

80. See Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Leob*, 79 IOWA L. REV. 989, 1057 n.400 (1994).

81. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

does not tolerate governmental conduct that “shocks the conscience” of those in the community.<sup>82</sup>

Aside from these examples, perhaps a singularly memorable one is provided by Chief Justice Burger’s concurring opinion in *Bowers v. Hardwick*.<sup>83</sup> In *Bowers*, Michael Hardwick, a gay man, was arrested for violating Georgia’s anti-sodomy statute, a statute that Georgia refused to apply to heterosexuals.<sup>84</sup> Upholding the Georgia statute, Chief Justice Burger thickly invoked the grammar of communitarianism by expressing a cultural contempt for homosexual sodomy:

[T]he proscriptions against sodomy have very “ancient roots.” Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian [sic] moral and ethical standards. . . . Blackstone described “the infamous *crime against nature*” as an offense of “deeper malignity” than rape, a heinous act “the very mention of which is a disgrace to human nature,” and “a crime not fit to be named.” . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.<sup>85</sup>

Chief Justice Burger’s grandiose invocations would lose their cultural authority if they were revealed as empirically unfounded because the residents of Georgia never sincerely felt any animosity against homosexual sodomy. The same may be said of the references to “the traditions and conscience of our people”<sup>86</sup> and to “those canons of decency and fairness . . . of English-speaking peoples”<sup>87</sup> by Justices Cardozo and Frankfurter. It might be true that such pronouncements about the community’s beliefs, as one famous English judge insists, “does not depend on the counting of heads” to determine their legitimacy.<sup>88</sup> But if the method of verification is an open question, what is not a matter of uncertainty is the premise that to be logically coherent, let alone persuasive, such invocations to community values need to presume that the community accepts them sincerely.

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82. *Rochin v. California*, 342 U.S. 165, 172 (1952). Justice Frankfurter also stated: Regard for the requirements of the Due Process Clause “inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.”

*Id.* at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)).

83. 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring).

84. *Id.* at 201 (Blackmun, J., dissenting).

85. *Id.* at 196-97 (emphasis in original).

86. *Snyder*, 291 U.S. at 105.

87. *Rochin*, 342 U.S. at 169.

88. Lord Patrick Devlin, *Morals and the Criminal Law*, in *THE PHILOSOPHY OF LAW* 66, 78 (R.M. Dworkin ed., 1977).

*D. Democratic Approach Revisited*

But both the logic and the aim of the democratic approach to free speech formally reject sincerity as irrelevant. We can explore this position more precisely by examining how the demands of insincerity are theoretically distributed upon both speaker and audience. Whereas psychological objectivity is preoccupied with the public affirmation of what the speaker and audience each consider as true, what we have called sociological objectivity requires a willingness by speaker and audience to suspend at least outwardly what they normally take to be true. Sociological objectivity thus implies an assumption of fallibilism, that nothing is a priori invulnerable to change or criticism.<sup>89</sup> We can see an example in John Stuart Mill's explication of the devil's advocate. Mill speaks of how the Roman Catholic Church listens patiently to a priest whose job is to serve as a "devil's advocate" charged with uncovering scandalous secrets on all candidates for sainthood and forcefully arguing against their canonization.<sup>90</sup> This example, while practiced by "[t]he most intolerant of churches,"<sup>91</sup> is to serve for Mill as a general paradigm for public discourse.<sup>92</sup> And although Mill is unhappily silent on the uses of insincerity, his example highlights the ways in which insincerity is required of both speaker and audience. First, the devil's advocate would have to be willing, with seemingly stout confidence, to launch arguments and forge ahead with lines of inquiry that he may personally loathe as shameful and repulsive. Second, those priests in the audience who feel intense fondness towards the candidate—those who may have personally initiated the canonization as partial gratitude for the candidate's life-altering inspiration—would have to repress the potentially simmering rage they feel toward an especially mischievous devil's advocate who gleefully digs into obscure rumors concerning the candidate's alcoholism, gambling, and other habits. In the pursuit of truth, then, both the speaker and the audience might have to behave in a potentially insincere manner by repressing that which they sincerely cherish and, instead, outwardly portray behavior that they sincerely detest.

One can sharpen that image by juxtaposing it to a hypothetical where both speaker and audience are decidedly sincere. We need not look for such a hypothetical in the boisterous rabble of a crowded market square in Mill's nineteenth century London, but to the seemingly austere confines of the present Supreme Court. If we expect anyone to overcome narrow prejudices, and instead to pursue relentlessly the broader aims of sociological objectivity,

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89. A famous version of fallibilism can be found in J. S. Mill's statement that the "beliefs which we have most warrant for have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded." MILL, *supra* note 35, at 29.

90. *Id.* at 28.

91. *Id.*

92. *Id.*

we might look, among other places, to the Court's justices. John Rawls certainly does. He places a qualified confidence in "a supreme court" as a model of what he calls "public reason" and principled deliberation.<sup>93</sup> There would seem to be cultural support for Rawls's confidence. The Supreme Court would seem to stand as a cultural exemplum of everything conducive to critical interaction—a collection of highly learned, highly intellectual, and apparently dispassionate individuals who publicly present themselves not as representatives for special interests, nor even as representatives for the people as a whole, but as fellow travelers in the search for truth, as perhaps the closest modern equivalent to philosopher kings and queens.<sup>94</sup> The very structure of the Court's deliberative process would seem to lend credence to this cultural picture. The justices regularly convene at conference meetings to discuss and argue the cases before the Court. The strictly confidential nature of the meetings affords the justices ample opportunity to assume the sort of devil's advocate extolled by Mill to speculate and to experiment in a way unavailable in the public glare of reporters and visitors who would mark the justices' every word and demeanor. At the conference, the justices are confronted with having to persuade their opponents and to defend their positions, and there may even be opportunity for the justices to learn something from those who diametrically oppose their views. These Court meetings would seem to represent, then, the sort of vibrant and potentially extraordinary deliberation idealized by some advocates of deliberative democracy.

But what if the justices behaved far more sincerely? Or, to employ the terms that I have used thus far, what would occur if the justices engaged in those practices of discourse associated with the pursuit, or better, reaffirmation of some version of psychological objectivity? Justices who share similar ideological commitments would engage only each other. Thus conservative justices like Antonin Scalia and Clarence Thomas would send each other internal memorandums, and liberal Justices like John Stevens and Ruth Ginsberg would do the same. The end result would be a practice that is inconsistent with the critical interaction of the democratic approach. It would instead be a practice whose ethos resembles that which animates the libertarian and communitarian approaches. The justices would seem to view discourse as a means of expressing and reaffirming some aspect of their preformed, unreconstructed individual identity, whether that be as a liberal or a

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93. RAWLS, *supra* note 9, at 233. For similar views of Supreme Court justices, see CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* ch. 2 (2001). Also see the broadly congenial treatments in Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10-11 (1979) and Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

94. The image may easily call to mind the contemporary example of Ronald Dworkin's paradigmatic philosopher-judge in Hercules. See RONALD DWORCKIN, *TAKING RIGHTS SERIOUSLY* 105-30 (1978).

conservative. Concurrently, they would also seem to treat discourse as a means to reaffirm what they perceive as those values antecedent to deliberation that define their respective liberal or conservative community's norms. As a practical matter, then, the philosophical insistence on sincerity in public discourse seems problematic for democracy, for instead of generating more political options through argument and debate in critical interaction, it tends to reaffirm that which the respective parties already know and publicly profess.<sup>95</sup>

#### V. CONCLUSION

While it is natural to associate sincerity with truth, it is perhaps insincerity that may contribute more to the crucial work of free speech by which we may arrive at provisional political truths. In particular, critical interaction benefits from ignoring the motives of the speakers and paying attention instead to the arguments' merits. Such indifference to insincerity helps to generate more choices for the audience.

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95. The sort of self-enclosed exchange of psychological truths tends to be duplicated in the cultural mediums of academic magazines and journals, perhaps leading to the uncomfortable feeling that "conservatives write on conservatism for conservative readers, liberals on liberalism for liberals, Marxists on Marxism for Marxists, and so on." HERZOG, *supra* note 58, at ix.

