

ETHICAL LIMITATIONS ON THE STATE'S USE OF ARATIONAL PERSUASION

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Abstract: *Policymakers frequently use arational appeals – such as those relying on emotion, cognitive biases, and subliminal messaging – to persuade citizens to adopt behaviors that support public goals. However, these communication tactics have been widely criticized for relying on arational triggers rather than reasoned argument. This Article develops a fuller account of the non-consequentialist objections to arational persuasion by state actors, as well as the arguments in favor of such tactics that have been presented by scholars of rhetoric, political theory, and cognitive science. The Article concludes by proposing ethically justifiable limitations on state communications that should be compelling to both critics and advocates of arational persuasion.*

INTRODUCTION

In order to achieve its policy objectives, the government must speak. To increase the persuasiveness of their messages, states put significant energy into developing communication campaigns that will grab viewers' attention. Policymakers have found, however, that the American public is not easily swayed by rational appeals to dry facts. As a result, many state messages take advantage of arational triggers, like emotions or cognitive biases, to persuade citizens to act in support of public goals. Examples of such messages include highway posters featuring Smokey the Bear, video-game-style recruiting campaigns for the U.S. Armed Forces, and the "Don't Mess With Texas" anti-littering campaign.

This phenomenon is particularly striking in the realms of medicine and public health. American public health campaigns have long relied on the use of emotional and visual messages to persuade citizens to avoid

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disease and practice healthy habits.¹ While such campaigns have traditionally been uncontroversial, two recent legal developments have brought the state's use of arational persuasion in medical and public health contexts to the forefront of public debate.

The Food and Drug Administration's 2011 tobacco labeling regulations require manufacturers to cover fifty percent or more of cigarette packaging with graphic images depicting the negative health consequences of smoking, including photographs of diseased lungs, cancerous oral lesions, and cadavers. Citing evidence that "messages that arouse emotional reactions" are more likely to trigger behavioral changes, the FDA selected images that "elicited significant impacts on [emotional and cognitive] salience measures" and thus were more likely to cause consumers to change their behavior.² Tobacco manufacturers, suing to enjoin enforcement of these laws, object that the government is using images "intended to elicit loathing, disgust, and repulsion" rather than appealing to reason.³ As a consequence of these objections and associated constitutional challenges, the FDA has since announced that it will not implement the regulations as drafted.⁴

A second example of the government's use of arational, rather than factual, methods to persuade is the adoption of state laws requiring that a woman seeking an abortion view an ultrasound image of her fetus before consenting to the procedure. Legislation to this effect has been passed in Louisiana, North Carolina, Oklahoma, and Texas.⁵ Policymakers suggest that viewing the fetal ultrasound will trigger maternal bonding instincts and feelings of love, in turn inspiring women who might otherwise choose abortions to carry their pregnancies to term. Critics, however, decry these laws as inappropriate attempts to play on women's emotions to influence their private medical decisions.⁶

Both the tobacco and ultrasound laws are currently being challenged

¹ National Institutes of Health National Library of Medicine, *Visual Culture and Public Health Posters*, available at <http://www.nlm.nih.gov/exhibition/visualculture/index.html>.

² *Required Warnings for Cigarette Packages and Advertisements*, 76 Fed. Reg. 36628 *et seq* (2011).

³ Duff Wilson, "U.S. Releases Graphic Images to Deter Smokers," *New York Times* (June 21, 2011).

⁴ Letter from the Office of Attorney General to John Boehner, Speaker of the House of Representatives, dated March 15, 2013.

⁵ Guttmacher Institute, "Requirements for Ultrasound" (Oct. 1, 2012), available at http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

⁶ See, e.g., Carol Sanger, "Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice," *UCLA Law Review* 56 (2008): 351-408; James Rocha, "Autonomous Abortions: The Inhibiting of Women's Autonomy through Legal Ultrasound Requirements," *Kennedy Institute of Ethics Journal* 22 (2012): 35-58.

on constitutional grounds. And while constitutional law may, in some contexts, set limits on the way the government communicates its messages, the vast majority of government speech remains untouched by constitutional restrictions.⁷ Thus, the more fundamental challenge to the state's use of persuasive appeals is ethical in nature.

While many commentators agree that some forms of governmental persuasion are problematic, it can be difficult to identify the theoretical basis for their objections. Moreover, these objections are not voiced consistently. Whether or not a person objects to state ultrasound laws depends more on her attitude towards abortion than her perspective on government persuasion generally. Indeed, many examples of arational appeals – messages about environmental protection and military recruiting, for example – are generally viewed positively, perhaps because public support for these issues is widespread.

However, evaluating the legitimacy of state appeals on the basis of one's agreement or disagreement with the underlying substantive message is problematic. Even when public opinion coalesces around a particular issue, some persuasive techniques surely seem excessive. For a real-world example, consider UNICEF's 2005 campaign to call attention to the devastating effects of war on children, a cause that surely everyone would support. The centerpiece of the UNICEF campaign in Belgium was a television ad featuring the Smurfs, a cartoon developed by a Belgian artist and much beloved throughout the world. The advertisement begins with an idyllic scene of the Smurf village and its inhabitants, but soon turns sinister as dozens of bombs fall upon the village, destroying it. The ad ends with the image of a crying Smurf baby surrounded by wreckage, and the message "Don't let war destroy the lives of the world's children." Public reaction to this campaign was swift and severe, with many expressing shock and horror.⁸

As the Smurfs campaign makes abundantly clear, emotional appeals can be extremely effective in attracting public attention. Were such persuasive campaigns prohibited, the government would face significant challenges in drawing attention to and gaining support for its policy goals. For this reason and others, it seems foolhardy to ban or restrict such approaches without justification. At the same time, the strong public reactions to the aforementioned tobacco and ultrasound laws suggest some cause for concern.

⁷ [Citation to author's unpublished manuscript redacted]

⁸ UNICEF, "FAQ: Smurfs: What's it all about?" UNICEF Press Centre Web site, http://www.unicef.org/media/media_28772.html; Katherine L. Hatfield *et al.*, "Seeing the Visual in Argumentation: A Rhetorical Analysis of UNICEF Belgium's Smurf Public Service Announcement" *Argumentation and Advocacy* 43:3/4 (2007): 144-151.

This Article develops an ethical argument against the state's use of arational methods of persuasion (in public health contexts and beyond), which can include not only emotional appeals, but also appeals to cognitive biases, subliminal messaging, misleading or deceptive communications, and threats or coercion. It examines the Kantian objections to the state's use of arational persuasion; assesses counter-arguments grounded in the disciplines of social psychology, rhetoric, and political theory; and then uses this analysis to identify possible content-neutral limitations on the use of persuasive government appeals.

The primary purpose of this Article is to call readers' attention to normative arguments that have to date been underdeveloped because of undue focus on the outcomes of persuasive appeals. However, this Article does reach a tentative conclusion as to how we might limit arational appeals by the government in an ethically sound way. It concludes that the strongest theoretical basis for justifying restrictions on arational persuasion is grounded in Kantian theories of autonomy, and proposes a limitation on the state's use of non-obvious or unavoidable messages that affect a listener's thought processes. While this distinction is, on its face, neutral as between rational and arational appeals, its practical impact is much greater in the context of some types of arational appeals, such as visual messages with immediate emotional impact, as well as hidden or otherwise non-obvious messages that a listener cannot choose to avoid. This conclusion, notably, calls into question many of the "nudging" techniques for public health improvement that have grown in popularity since the 2009 publication of Richard Thaler and Cass Sunstein's *Nudge*.⁹

While recognizing that state actions, in most cases, are ultimately driven by outcomes rather than by non-consequentialist ethical considerations, it is the author's hope that the analysis presented in this Article will help guide policymakers to be more thoughtful when choosing how to communicate government messages.

I. CATEGORIZING PERSUASIVE APPEALS AND DEFINING ARATIONAL PERSUASION

A vast array of literature tries to define the distinctions between persuasion, manipulation, and coercion; unfortunately, definitions vary widely. Some of the difficulty in defining these terms is that they are both descriptive and normative. The common understanding of manipulation and coercion is a negative one – that is, when a person manipulates or coerces, she is generally perceived to be acting in an unethical way. The

⁹ Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Books, 2009).

common understanding of persuasion, however, is less normatively loaded, and is typically understood to comprise both ethical and unethical actions. It is because of this perceived normative distinction that commentators are so keen on categorizing actions into one of the three categories.

I resist this approach. While many common examples of manipulation and coercion seem to be ethically unjustified, it is a mistake to imbue the terms with *a priori* normative value. Persuasion, manipulation, and coercion operate on a spectrum, and just as there can be unethical uses of persuasion, there can be ethical uses of manipulation. A better way of categorizing the types of conduct that might fall on this spectrum is by reference to purely descriptive (and therefore normatively neutral) distinctions between them.

For the purposes of this discussion, I will refer to conduct on the spectrum between persuasion and coercion as varying types of *persuasive appeals*.¹⁰ These share a core characteristic – namely, they are attempts by a speaker to move a listener to adopt a point of view or make a decision to which the listener might not have initially been predisposed. In framing the definition as one of attempt, rather than success, I do not bind the terms to a given outcome – that is, a persuasive appeal may be unsuccessful and still be described as persuasive.¹¹ Beyond these similarities, however, distinctions between various types of persuasive appeals fall generally into three categories – method, purpose, and context.

The primary distinction between persuasive appeals is the method by which the appeal is made. At one end of the spectrum, an appeal can be made on purely rational grounds, presenting truthful facts on both sides of the argument, with no inaccuracies, omissions, or biases. At the other end, appeals may influence choices on grounds unrelated to reason – because they distract from rational deliberation, operate on a plane apart from rational deliberation, or render rational deliberation irrelevant. The examples most frequently highlighted in this Article are appeals to emotion

¹⁰ This choice of language is likely to be controversial. For example, in discussing persuasion, Ruth Faden and Tom Beauchamp refer to it as a purely rational appeal, distinct in kind from manipulation and coercion. Ruth R. Faden & Tom L. Beauchamp, *A History and Theory of Informed Consent* (Oxford University Press, 1986), at 337-373 (defining persuasion as “the intentional and successful attempt to induce a person, through appeals to reason, to freely accept ... the beliefs, attitudes, values, intentions, or actions advocated by the persuader;” manipulation as a “catch-all category that includes any intentional and successful influence of a person by noncoercively altering the actual choices available to the person or by nonpersuasively altering the person’s perception of those choices;” and coercion as a situation where “one party intentionally and successfully influences another by presenting a credible threat of unwanted and avoidable harm so severe that the person is unable to resist acting to avoid it.”).

¹¹ Again, compare my approach with that of Faden and Beauchamp, who refer to persuasion as “intentional and successful attempts.” *Id.*

– those that aspire to change a listener’s emotional state and therefore her decisions. But numerous other examples of persuasive appeals are likewise describable as arational. Persuasive campaigns that rely on listeners’ cognitive biases, for example, operate by taking advantage of systematic errors in human perception that lead people to make choices that they might not fully support were they aware of these intrinsic flaws in reasoning. Appeals that distract the listener – for example, the image of a seductive young woman atop the hood of a car that the viewer might not otherwise purchase – can likewise be considered arational. Subliminal messages, which are communicated to listeners at a level below conscious awareness, can also lead people to make choice that their rational selves would not support. Other examples of arational persuasive appeals may include deception, provision of incomplete or misleading information, and the use of force or threats to compel action.

What these examples have in common is that they either distract from, or render irrelevant, the listener’s reliance on reason in making a given decision. Of course, persuasive appeals may vary in the degree to which they engage reason, and the spectrum of possibilities makes it impossible to set absolute categorizations. There is, to be sure, no such thing as a “purely rational” or “purely arational” appeal. However (and whether or not the reader agrees with the claim that arational appeals are problematic), drawing the distinction between primarily arational and primarily rational appeals at least identifies one objective means by which persuasive messages can be categorized.

A second objective distinction that may affect the categorization of persuasive appeals is the speaker’s purpose or motivation. An appeal may be aimed at getting the listener to reach a predetermined outcome, or it may be aimed at getting the listener to reconceptualize his decision-making but be amenable to the listener making a choice other than the one preferred by the speaker. The outcome the speaker hopes to achieve may be an outcome that is in line with the listener’s best interests, objectively determined, or it may be an outcome that is against the listener’s best interests. In either case, it is safe to assume that the speaker is persuading because he believes the preferred outcome is somehow in his own interests, broadly defined.

A third distinction is that of context, where the primary relevant factor is the relationship between the parties. Where the parties are on equal footing in terms of information and power, an appeal is more likely to be perceived as ethical. Where the speaker has more power or more information than the listener, the appeal is likely to be perceived as unethical. In the cases of persuasion by government actors, the focus of this Article, there is an inherent power imbalance.

II. NON-CONSEQUENTIALIST OBJECTIONS TO (AND SUPPORT FOR) ARATIONAL PERSUASION

While there are objective ways of categorizing persuasive appeals – by way of method, purpose, and context, as noted above – the public interpretation of these categorizations tends to be predictable. Most people will agree that rational appeals are ethically preferable to arational appeals; that appeals aimed at persuading a listener to reach one particular outcome, particularly if that outcome is against the listener’s interest, are less preferable to appeals that provide freedom for the listener to make a decision in her best interests; and that appeals by more powerful parties are more problematic than those by parties on equal footing.

Of these, however, the first conclusion – that, as a normative manner, we should strive for rational appeals and avoid those that influence choices in arational or non-obvious ways – is the most controversial. Advocates of arational appeals make a variety of strong arguments: that emotional and subconscious influences are inherent even in what might be considered rational decision-making; that triggering emotion is necessary to engage people in debate; or that rational decisions are not objectively better than decisions based on arational factors.

To determine whether these arguments have merit, it is first necessary to unpack the basis for the common belief that rational appeals are more ethical than arational appeals. Unfortunately, this is difficult to do. As many scholars have recognized, while the objection to arational persuasion is well recognized, it is hard to pin down exactly what theories ground this objection. In the context of “hidden persuasion,” which he defines as the attempt to make someone “buy, vote, or believe in a certain way by short-circuiting his conscious thought processes and planting suggestions or exerting pressures on the periphery of his consciousness,” Franklyn Haiman writes, “The average American appears to feel considerable ambivalence in regard to hidden persuasion. He vaguely senses there may be something wrong about it, but when asked to say why, is usually unable to present cogent arguments.”¹² In the context of public health communications, John Rossi and Michael Yudell note that while the public often views emotionally persuasive public health campaigns as problematic, “the reasons for this are often incompletely explained or explored.”¹³ Ultimately, a person’s approval or disapproval of a persuasive appeal is often based on whether she believes it serves a “good cause” or

¹² Franklyn S. Haiman, “Democratic Ethics and the Hidden Persuaders,” *Quarterly Journal of Speech* 44 (1958): 385-392, at 386.

¹³ John Rossi & Michael Yudell, “The Use of Persuasion in Public Health Communication: An Ethical Critique,” *Public Health Ethics* 5:2 (2012): 192-205.

not – that is, on the basis of its substantive outcome.

This Article is premised on the belief that justifying persuasive appeals by reference to utilitarian arguments about the merit of their intended outcomes is misguided. By focusing on results alone, we lose sight of significant normative concerns about the means by which these results are achieved. This is not to say that outcomes are irrelevant – surely, a subliminal campaign to encourage regular flossing is more justifiable than a subliminal campaign supporting genocide. However, purely utilitarian approaches neglect an important element of the ethical debate; it is this analytic gap that this Article attempts to fill.

While deontological objections to arational persuasion may be grounded in any number of theoretical foundations, this Article begins in the Kantian tradition. It explores the Kantian claim that arational persuasion is detrimental to the exercise of individual autonomy, and highlights two common responses to this claim. These responses aim to debunk the idea that autonomous decision-making is not possible when arational factors are at play, and therefore the conclusion that third parties who attempt to persuade by arational means violate ethical norms. Both these objections, notably, acknowledge the Kantian premise that autonomy is essential to personal decision-making; they merely challenge its implications. Hopefully, by better understanding nonconsequentialist arguments supporting and opposing arational persuasion (arguments arising not only from moral philosophy, but also social psychology, rhetoric, and political theory), we can begin to craft a set of practical boundaries for the state's use of such tactics.

A. *Challenging Arational Persuasion: Kantian Theories of Autonomy*

The most prominent and compelling non-consequentialist argument against the use of arational persuasion is that such appeals, unlike appeals to reason, risk violating listeners' autonomy.

Autonomy can be defined in a number of ways, but one conception, presented by contemporary philosopher Thomas E. Hill, seems particularly apt. Hill defines autonomy as "a capacity and disposition to make choices in a rational manner; and this means choosing in the absence of certain particular attitudes and inner obstacles [that interfere with rational choice], such as blind acceptance of tradition and authority, neurotic compulsions, and the like."¹⁴

Traditional conceptions of autonomy have their roots in Immanuel Kant's writings in *The Metaphysics of Morals*. Kant identifies the principle

¹⁴ Thomas E. Hill, Jr., "Autonomy and Benevolent Lies," *The Journal of Value Inquiry* 18 (1984): 251-267, at 256.

of autonomy, or self-governance, as “the sole principle of ethics.”¹⁵ According to Kant, only rational beings have autonomy of will, and it is only by virtue of our rationality that we can access and act upon moral truths. By exercising what Kant calls practical reason, we can identify the categorical imperative – the moral law whose morality is derived from its abstraction and universal applicability. Identifying moral law must be done without reference to externalities or “alien influences” that cloud one’s judgment away from the exercise of practical reason. Such alien influences, according to Kant, include “incitements from desires and impulses (and therefore from the whole sensible worlds of nature),”¹⁶ as well as influences from third parties.¹⁷ In his writing, he refers to passion, envy, pain, and concerns about reputation, among others, as influences that weaken autonomy and moral resolve.

Importantly, Kant emphasizes that the categorical imperative exists apart from consequences – for example, while a person may choose to be honest to protect his reputation, he has a moral obligation to act honestly even if this negative outcome were not to occur.¹⁸ Autonomous (and by definition rational) decisions, therefore, are valuable not because they reach the “right” result, but because they are our own.¹⁹

Though Kant wrote about the importance of rational and autonomous reasoning primarily in the context of ethical deliberation, contemporary interpretation of his work on autonomy has been much broader.

First, modern scholars emphasize the importance of autonomy in contexts beyond deliberation on moral truths. In particular, the field of medical ethics emphasizes the primacy of personal autonomy in medical

¹⁵ Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (Routledge 2012), at 120.

¹⁶ *Id.* at 141.

¹⁷ In his essay, “What is Enlightenment?,” Kant described enlightenment as “man’s release from his self-incurred tutelage” and called on his readers to have the courage to use their own understanding “without direction from another.” Kant, *Foundations of the Metaphysics of Morals*, 2nd ed. (MacMillan, 1990), at 85. John Stuart Mill makes a similar point: “A person whose desires and impulses are his own ... is said to have a character. One whose desires and impulses are not his own has no character, no more than a steam engine has a character.” John Stuart Mill, *On Liberty* (Boston, Ticknor and Fields, 1863) at 116.

¹⁸ Kant, *The Moral Law*, *supra* note 15, at 121.

¹⁹ Hill, *supra* note 14, at 17 (“Kant’s moral theory holds that each of us must, in the end, treat our own (final) moral judgments as authoritative, even though they are fallible.”). In the words of Steven Smith, it may sometimes be “more important that people do what they sincerely *think* is right than that they do what *actually* is right.” Steven D. Smith, “What Does Religion Have to Do with Freedom of Conscience?,” *University of Colorado Law Review* 76 (2005): 911-940 at 929.

decision-making of all kinds, from deciding whether to undergo prostate-specific antigen screening to expressing wishes relating to end-of-life care. Tom Beauchamp and James Childress, the authors of the seminal *Principles of Biomedical Ethics*, identify autonomy one of the four fundamental principles of medical ethics.²⁰ They define autonomy as “at a minimum, self-rule that is free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice.”²¹ Indeed, the notion of the primacy of rational thought in personal decision-making has a long history beyond the scope of ethical theory, as evidenced by what one contemporary scholar has described as “worship of reasoning” among classical thinkers like Plato, Descartes, and others.²² Indeed, what better defense of the primacy of rational thought than the fact that an author seeks, through cogent argument, to dispel the idea that objections to arational persuasion are based on nothing more than sentiment or gut instinct!

Second, modern understandings of autonomy rarely require that autonomous decision-making be based on purely rational reasoning, as suggested by Kant. Contemporary scholars recognize that a variety of arational preferences and beliefs are important contributors to decision-making, and contend that the mere influence of these factors does not negate autonomy. That is, while competence to reason is a necessary element for the exercise of autonomous decision-making, the actual exercise of this competence in any particular circumstance may not be.

Even with these broader conceptions of autonomy, however, contemporary ethicists in the Kantian tradition still express concerns about the negative impact of some types of persuasion on personal autonomy -- both the mere influence of a third party on one’s deliberative process; and more specifically, the use of arational means to persuade. Beauchamp and Childress, for example, affirm Kant’s assertion that when a persuader treats another as a means to an end, it violates her autonomy.²³ Daniel Hausman and Brynn Welch describe autonomy as “the control an individual has over his or her own evaluations and choices,” and consider “designing policies so as to take advantage of people’s paternalistic foibles for their own benefit” to be both paternalistic and problematic.²⁴ Legal scholar David

²⁰ Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics*, 6th Edition (Oxford, 2008).

²¹ *Id.* at 58-59 (“An autonomous person ... is one who has the capacity to rationally accept, identify with, or repudiate a lower-order desire independently of others’ manipulation of that desire.”).

²² Jonathan Haidt, “The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment,” *Psychological Review* 108:4 (2001): 814-834, at 815.

²³ Beauchamp & Childress, *supra* note 20, at 64.

²⁴ Daniel M. Hausman & Brynn Welch, “Debate: To Nudge or Not to Nudge,” *Journal*

Strauss describes the Kantian justification of the argument against government persuasion as the idea that government should not “interfere with a person’s control over her own reasoning processes” and deprive her of the opportunity for reasoned evaluation of arguments.²⁵ This belief is even reflected in American jurisprudence – in *Planned Parenthood v. Casey*, for example, the United States Supreme Court wrote that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” and held that this liberty would not exist were definitions of personhood “formed under compulsion of the State.”²⁶

B. Support for Arational Persuasion

Critics may question why rational analysis is so primary to Kantian conceptions of autonomy, and consequently whether the objections to arational persuasion are valid. Indeed, there is no shortage of criticism of this theory, both within moral philosophy and beyond. This Part explores two common non-consequentialist arguments have been offered in favor of using arational means of persuasion.

1. Passion, Not Reason, Drives Decision-Making

David Hume, in his *Treatise of Human Nature*, attempts to dispel the “fallacy” of the primacy of rational thought by exploring the relationship between reason and passion.²⁷ Contrary to Kant and others, Hume argues that human impulses do not derive from abstract reasoning, but are only directed by it towards ends that are fundamentally driven by passions. Thus, what motivates action is the inherent desire for some designed end or purpose; and the exercise of reason is merely the means by which we recognize the connection between a given action and an intrinsically desired end.

While Hume’s writings are often cited to support the idea that arational considerations do (and should) play a primary role in human decision-making, even Hume recognized that there are some cases when we ought to defer to reason at the expense of passion. When passion is contrary to reason - as when the passion is “founded on a false supposition”

of Political Philosophy 118 (2010): 123-136, at 128.

²⁵ David Strauss, “Persuasion, Autonomy, and Freedom of Expression,” *Columbia Law Review* 91 (1991): 334-371.

²⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, at 851 (1992).

²⁷ David Hume, “Of The Will and Direct Passions,” in *A Treatise of Human Nature*, Volume II (Dent & Sons, 1964), at 125-127.

or false judgment, or when it “chooses means insufficient for the designed end” – Hume concedes that reason ought to take priority.²⁸

Hume identifies these two situations as rare exceptions to the principle that passion directs (and ought to direct) reason. However, they might more accurately be read as exceptions that swallow the rule. If reason ought to take priority whenever passion is contrary to reason, then Hume’s principle carries much less weight. Indeed, we often consider reason to be at odds with passion, and precisely in such circumstances we see in modern life. A woman’s guilt at considering abortion when faced with the ultrasound image of her fetus may, according to some, be “founded on the supposition of objects” or facts “which do not really exist”²⁹ – for example, the belief that a fetus is physically or morally equivalent to a born child.³⁰ Viewers of graphic tobacco warnings who are struck by images of cancerous lungs, likewise, may be “deceive[d] in [their] judgment of causes and effects.”³¹ If many perceived conflicts between reason and passion can be framed in terms of these two exceptions, then Hume’s account does not have the impact it might seem to have at first.

Regardless of the merits of Hume’s account, even those who favor the primacy of rational thought as a general matter recognize that people often make decisions on arational grounds, such as unsupported personal preferences. This conclusion is not only readily accessible to the layperson, but also thoroughly supported by research in social psychology. Dan Kahneman, an insightful leader in social psychology, describes the human decision-making process as composed of two systems.³² System One, our primary system, makes choices quickly and easily, often relying on heuristics and past experience, to facilitate our day-to-day decision-making. System Two, our secondary system, instead, relies more on reasoned analysis and expends far greater energy and effort in making choices. While some scholars in other disciplines have described emotional or primary decision making as “short-circuiting” reason and leading to poor choices,³³ Kahneman and his colleagues are explicit in saying that neither

²⁸ *Id.* at 127-128.

²⁹ *Id.* at 128.

³⁰ Catherine Mills, “Ultrasound, Embodiment and Abortion,” in *Futures of Reproduction*, David N. Weisstub, ed. (Springer, 2011).

³¹ Hume, *supra* note 27, at 128.

³² Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

³³ Arthur N. Kruger, “The Ethics of Persuasion: A Re-Examination,” *Communication Education* 16 (1967) 295-305 (“When man experiences strong feelings, he tends to short-circuit his thinking process, to jump to conclusions, to act hastily, to yield to atavistic influences.”); Richard A. Posner, “Emotion versus Emotionalism in Law,” in *The Passions of Law*, Susan Bandes, ed. (NYU Press, 1999), at 310-311 (“[E]motion short-circuits reason conceived as a conscious, articulate process of deliberation, calculation, analysis, or

process is privileged or preferable. Primary decisions, for example, are an extremely efficient and highly accurate means of operating in the day to day world. Moreover, discoveries in cognitive science about the prevalence of System One reasoning also suggest that any external cues will inevitably trigger such reasoning. In other words, it may be impossible to conceive of a form of communication that does not activate arational decision tools.³⁴

Given that non-reasoned decisions are such a key part of human decision-making, and that even factual and seemingly neutral communications have within them elements of arational persuasion, then why not allow third parties to intentionally use arational tools such as emotional triggers or cognitive biases to persuade, in much the same way as they use rational argument? This inquiry serves as a helpful prompt for considering, in Part III, whether some types of state arational appeals may indeed be permissible, and, if so, how they might be identified.

2. Arational Persuasion as a Means of Public Engagement

A second argument in favor of arational persuasion that might be compelling to deontological critics draws a direct connection between arational triggers and subsequent rational (and autonomous) decision-making. It posits that in some cases, it may be necessary to grab a person's attention through arational means in order to inspire them to engage in rational decision-making. Classical theories of rhetoric, as well as political theories of deliberative democracy, often justify arational persuasion on these grounds.

Much scholarly work in the discipline of rhetoric focuses on persuasive discourse, or, in the words of legal scholar Michael Murray, "the discipline that examines ways of winning others over to our views, and of justifying those views to ourselves as well as others, when the question of how things in the world ought to work is contested or contestable."³⁵ The three foundational elements of rhetoric first described by Aristotle -- *logos* (logic, or the truth of the ideas presented), *pathos* (appeals to emotion, passion, or prejudice), and *ethos* (the listeners' impression of the credibility or character of the advocate),³⁶ continue to be relevant to modern discussions of persuasive rhetoric.

Aristotle described the value of *pathos* as follows: "[Persuasion is

reflection.").

³⁴ Kathryn M. Stanchi, "The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader," *Oregon Law Review* 89 (2010): 305-350.

³⁵ Michael D. Murray, "After the Great Recession: Law and Economics' Topics of Invention and Arrangement and Tropes of Style," *Loyola Law Review* 58 (2012): 615-654.

³⁶ Aristotle, *Treatise on Rhetoric* (Prometheus, 1995), at 12.

effected] through the medium of the hearers, when they shall have been brought to a state of excitement under the influence of the speech; for we do not, when influenced by pain or joy, or partiality or dislike, award our decisions in the same way[.]”³⁷ Similarly, Quintilian wrote, “it is in its power over the emotions that the life and soul of oratory is to found.”³⁸ This principle – that influencing a listener’s emotions is necessary to affect their judgment – is still widely recognized today. Many rhetoricians view this technique as a positive one, noting that emotional appeals are uniquely capable of “excit[ing] public opinion” and drawing people into debate in ways that neutral and factual appeals cannot.³⁹

Aristotle’s theories of *ethos* and *pathos* explicitly call upon state rhetoricians to rely on arational appeals, and many contemporary political theorists share in this tradition.⁴⁰ Their justification for the use of arational appeals in the public sphere is that deliberative democracy depends on public engagement, and it can be difficult to engage people with dry facts and purely logical reasoning. Emotional appeals, in particular, engage listeners and may cause them to think more deeply about issues they would not have otherwise considered. As professor of political science Bryan Garsten writes, “Rhetorical appeals to people’s partial and passionate points of view can often be a good means of drawing out their capacity for judgment and so drawing them into deliberation.”⁴¹ As long as citizens’ ultimate deliberations rest on reasoned principles of democratic discourse, one might argue, the use of arational appeals to draw peoples’ attention is justifiable.

However, there are a few problems with this approach. First, even the most prominent supporters of the use of *pathos* caution that this technique can be problematic. Aristotle, for example, recognized the importance of arational methods of persuasion, but cautioned that “perhaps the greatest and most dangerous disadvantage of democracy is that such citizens are alternately agitated, pandered to, flattered, and fooled by

³⁷ *Id.*

³⁸ Marcus Fabius Quintilian, *Quintilian’s Institutes of Oratory: or, Education of an Orator* (Loeb Classical Library, 1920), Book VI, Chapter 2, at 421.

³⁹ Richard M. Weaver, *The Ethics of Rhetoric* (Henry Regnery, 1953) at 7-9.

⁴⁰ “Democracy and manipulation have been bedfellows since the origin of democracy,” writes Terrence Ball. Terrence Ball, “Manipulation: As Old as Democracy Itself (and Sometimes Dangerous),” in Wayne Le Cheminant & John M. Parrish, *Manipulating Democracy: Democratic Theory, Political Psychology, and Mass Media* (Routledge, 2010), at 41-51 (citing the Declaration of Independence, the Gettysburg Address, and the Pledge of Allegiance as documents intended to “inspire, to motivate and, yes, to manipulate public opinion”).

⁴¹ Bryan Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Harvard University Press, 2009), at 4-5.

demagogues who play to their hopes, their prejudices, and - most especially - their fears."⁴² This concern is grounded in the context in which such arational appeals occur - that is, the fact that they are messages sent by a government with an inherent power advantage over individual citizens.

Political theories of deliberative democracy, likewise, have long debated the proper role of the state in communicating with and persuading its citizens. Noted thinkers like Habermas, Kant and others share the conviction that manipulation by the state violates the norms of democratic discourse.⁴³ Political manipulation, writes political theorist Nathaniel Klemp, "erodes the epistemic quality of political debate [and] threatens the ideal of democracy as rule of the people."⁴⁴ According to Klemp, Kant believed that political manipulation "creates conditions of choice that distort sound decision-making and erode the democratic ideal of popular sovereignty."⁴⁵ Thus, any time political manipulation substitutes the judgment of a single entity in power for the judgment of the democratic body, it is ethically problematic.⁴⁶ These arguments are based on the often-cited notion that the goal of democratic discourse ought to be a reaching of mutual agreement, rather than the prioritization of one party's perspective.⁴⁷

In defining problematic types of political manipulation, many thinkers focus specifically on the emotional or otherwise arational nature of

⁴² Ball, *supra* note 40, at 54.

⁴³ *Id.* at 41.

⁴⁴ Nathaniel Klemp, "When Rhetoric Turns Manipulative: Disentangling Persuasion and Manipulation," in Cheminant & Parrish, *supra* note 40, at 76-77.

⁴⁵ *Id.*

⁴⁶ Patricia Greenspan, "The Problem with Manipulation," *American Philosophical Quarterly* 40 (2003): 155-164, at 159-60; Klemp, *supra* note 44, at 77.

⁴⁷ These expectations, accordingly, may serve to distinguish communications by the state from communications by private citizens or corporations (although establishing such distinction is not necessary for the purposes of this analysis). James Fishkin, "Manipulation and Democratic Theory," in Cheminant & Parrish, *supra* note 40, at 39 ("[T]here is a crucial distinction between manipulative practices of persuasion, which we tolerate for selling consumer products, and the sort of collective public will formation that makes democracy meaningful."). Some may caution that drawing a distinction between persuasive speech by public entities and commercial entities would ultimately justify the use of clearly unethical communications by private parties (consider, for example, deceptive tobacco advertising in the early- to mid- 20th century). In a world where corporations often have just as much power as state actors, critics argue, it is dangerous to suggest that corporate actors have greater leeway in communicating with consumers. I recognize this as a valid objection, and offer the argument from deliberative democracy merely in the context of state speech, without comment as to other forms of speech. I take no stance on whether and to what extent the ethics of public communications differ from the ethics of private communications; this would require a much more thorough interrogation of the values implicated in corporate communication.

certain public appeals.⁴⁸ This premise is based on the vision that that deliberative democracy, by its very nature, ought to be reason-based. Accounts like Habermas' and Joshua Cohen's argue that the aim of deliberative democracy ought to be rational deliberation, and that emotional appeals by politicians therefore "ha[ve] corrosive effects on the deliberative process."⁴⁹ According to Hausman and Welch, arational persuasive appeals by the government "may be inconsistent with the respect towards citizens that a representative government ought to show."⁵⁰

That said, it is too simple to merely conclude that the state may never persuade its citizens. Rather, perhaps what is needed is a stronger understanding of what scholars like Klemp and others mean when they refer to "political manipulation." The next Part will explore this issue further, in an effort to understand whether theories of rhetoric or deliberative democracy can offer any guidance about what methods of state persuasion are ethically permissible.

III. CRAFTING POTENTIAL LIMITATIONS

Those who object to arational persuasion highlight the importance of rational deliberation for the exercise of personal autonomy. Appeals that override rationality or detract from an individual's ability to make reasoned decisions, according to the Kantian view, are therefore unethical. However, even those who view rational reasoning as fundamental to personal autonomy may be hesitant to claim that these types of appeals are *per se* impermissible.⁵¹ It is widely recognized that such appeals are valuable tools for those who govern a public that has shown itself to be non-responsive to the neutral presentation of facts.

This Part builds upon the analysis in Part II of the non-consequentialist arguments for and against the government's use of arational persuasion. It uses these arguments as a starting point to develop a fuller understanding of the ways in which arational persuasion by the state might be limited, ideally in a form acceptable both to critics and supporters.

⁴⁸ See, e.g., Drew Halfmann & Michael P. Young, "War Pictures: The Grotesque As A Mobilizing Tactic," *Mobilization: An International Quarterly* 15 (2010): 1-24, at 6; Haiman, *supra* note 12, at 387-88.

⁴⁹ Klemp, *supra* note 44, at 67.

⁵⁰ Hausman and Welch, *supra* note 2423, at 134.

⁵¹ See, e.g., Edward P.J. Corbett, *Classical Rhetoric for the Modern Student*, 3rd Edition (Oxford, 1990), at 87 ("The fact that some people exploit the emotions for unscrupulous purposes may constitute a caution about the use of emotional appeal, but it does not constitute a condemnation of emotional appeal.").

A. *Context: Suitability for Rational and Arational Decisions*

One potential limitation on arational appeals by the state might look to the context in which they occur. Rhetoricians, for example, have argued that only some situations “admit the pathetic” (that is, are suitable for emotional appeals), and that “attempt[s] to excite the passions in the wrong place” may be counterproductive.⁵² Setting aside the consequentialist issue of whether arational appeals in contexts that do not “admit the pathetic” are indeed effective, the argument that emotional persuasion could be appropriate in some contexts but not others is worth exploring further.

As noted in Part II, many individual decisions are made on the basis of emotions and cognitive biases. In such contexts, then, a third-party’s introduction of arational appeals might be permissible. For example, one’s choice of spouse is rarely made on the basis of rational deliberation – rather, emotion and preference are central to the decision. It would be wrong to say that a person is incapable of making an autonomous judgment about who they marry simply because that decision is influenced more by the sparkle in their partner’s eyes than the partner’s ability to provide financial support. Thus, if we can draw a distinction between decisions that can and should be made autonomously under the influence of emotion or other arational factors, and those that cannot or should not, perhaps we could draw a line between governmental appeals in the two contexts.

The result of such line-drawing might be that arational persuasion would be permissible only as it relates to decisions that need not be made on purely rational grounds. The state could use charming images of happy children to persuade you to choose chocolate over vanilla ice cream, but would not be permitted to use emotion to persuade you to comply with income tax laws or to support a particular public policy.

The obvious problem with this approach, however, is the impossibility of delineating which decisions are rightly made on rational grounds and which are not. The choice of whether or not to smoke cigarettes, for example, takes into account facts about addiction and lung cancer, but also emotions like the pleasure one feels when smoking. Which is primary? How *should* this decision be made? And who is to decide? These uncertainties make it difficult to draw clear lines between contexts where arational persuasion is permissible and when it is problematic.

⁵² Hugh Blair, “Lectures of Rhetoric and Belles Lettres, Lecture XXXII,” in *The Rhetorical Tradition: Readings from Classical Times to the Present*, P. Bizzell & B. Herzberg eds. (St. Martin’s Press 1990), at 824.

B. Sentiment: Praiseworthy and Darker Passions

Some rhetoricians have also drawn distinctions among the types of emotions that persuaders seek to engage, noting that reliance on *pathos* is permissible only when it appeals to "morally defensible or praiseworthy emotions" rather than "darker passions."⁵³ Quintilian, in particular, distinguished between violent emotions (*pathos*) and gentler ones (*ethos*), noting that *pathos* has the "effect of upsetting people and taking charge of their entire personalities," while *ethos* has "the effect of inviting agreement and inducing good feelings toward their causes."⁵⁴ Thus, using the ethics of rhetoric as a guide, one might argue that appeals to positive emotions – love, honor, duty, and the like – are permissible, whereas appeal to negative emotions – like fear, hatred, or jealousy – are not.

The distinction between praiseworthy emotions and baser emotions, however, is an extremely difficult one to make, because the drawing of lines between morally praiseworthy and baser emotions is a normative judgment that cannot be objectively determined.

First, an emotion that seems praiseworthy initially can be reprehensible when taken to excess – a fact clearly recognized by Aristotle, who categorized virtues and vices along a spectrum, from excess to deficiency. For example, is pride in one's nation a praiseworthy or a problematic emotion? Few would object to the state's encouragement of feelings of national pride to persuade young men and women to join the military. On the other hand, one can cite many historical examples of excessive nationalistic sentiment, such as in Nazi Germany, to support the idea that pride is in fact a dangerous emotion.

Second, the state may communicate a message seeking to inspire one emotion, but the listener may perceive it differently. In either case, it can be difficult for a policymaker to decide what kind of message is appropriate. Proponents of pre-abortion ultrasounds, for example, describe the experience of viewing an ultrasound as one that generates deep maternal feelings of love. Critics, however, argue that women who wish to terminate their pregnancies instead experience shame, guilt, and blame when they view the ultrasound images. There is likely an element of truth in both accounts; but if this is the case, it will be exceedingly difficult to distinguish between legitimate and illegitimate uses of *pathos*.

⁵³ John S. Dryzek, "Rhetoric in Democracy: A Systemic Approach," *Political Theory* 38 (2010): 319-339, at 327 (quoting Thomas A. Spragens, Jr., *Reason and Democracy* (Duke University Press, 1990) at 249).

⁵⁴ John Mackin, *Classical Rhetoric for Modern Discourse; an Art of Invention, Arrangement, and Style for Readers, Speakers, and Writers* (Free Press, 1969), at 197-198.

C. Degree: Arational Appeals that Trigger Reasoned Argument

A third means of distinguishing between persuasive appeals might consider the purpose of the appeals and how far they intrude into rational decision-making. It is widely acknowledged that emotional triggers are very effective in grabbing a person's attention, but this does not mean that the person's later decision-making will not be based on reason. Perhaps, then, we might conclude that arational appeals may be consistent with the exercise of rational autonomy where they are used merely to trigger a person's attention or engage them in public debate, but leave undisturbed their ability to reason from that point onward. Framing this in terms of Kahneman's research in social psychology, we might suggest that arational persuasion (for example, by reliance on System One cognitive biases) is permissible if it prompts a person to engage in System Two deliberation.

The main problem with this proposal is that it is difficult, if not impossible, to know when an appeal is likely to overtake an individual's ability to reason. Both science and common sense tell us that the exercise of reason falls on a spectrum. They are not mutually exclusive, and evaluating whether someone's decision-making is "more rational than not" is an impossible task for psychologists, let alone policymakers.

Some might suggest that this distinction could be drawn empirically. For example, we could test whether an arational message that also includes factual information causes viewers to be more or less likely to recall the relevant facts than if the information were presented in a neutral way. While this is certainly an option, it is far from clear whether the recollection of factual information is an adequate stand-in for rational reasoning and autonomous decision-making. If some viewers of New York City's gruesome "Pouring on the Pounds" anti-obesity video campaign⁵⁵ come out of it remembering that "Drinking one can of soda a day can make you ten pounds fatter a year," but others merely remember that there is a general link between soda and obesity, can we state with confidence that one person's choices will be more rational than the other's? It is doubtful.

Moreover, empirical work in social psychology tends to suggest that emotionally-triggering appeals – in particular, fear appeals and graphic images – have an unavoidable impact on the reasoning process.⁵⁶ Decades

⁵⁵ Links to the video are available at <http://www.nyc.gov/html/doh/html/pr2009/pr083-09.shtml>.

⁵⁶ See, e.g., Karolien Poels & Siegfried Dewitte, "How to Capture the Heart? Reviewing 20 Years of Emotion Measurement in Advertising," *Journal of Advertising Research* 46 (2006): 18-37, at 31; J. Forgas, "Affective Influences on Attitudes and Judgments," in Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith, *Handbook of Affective Sciences* (Oxford University Press, 2002), at 601; Jeremy A. Blumenthal, "Emotional Paternalism," *Florida State University Law Review* 35 (2007): 1-72, at 29-30.

of research have shown that people process information differently depending on their mood, and that increased perception of risk is “an important determinant of people’s motivation to adopt safer and healthier behavioral alternatives.”⁵⁷ The brain, moreover, processes graphic images more quickly than words; therefore, messages conveyed in visual terms trigger emotional responses more quickly than textual or verbal messages.⁵⁸ Not only are they quicker in capturing a viewer’s attentions, but vivid images have been found to be more engaging than verbal communications, more memorable, and often more effective.⁵⁹ If these findings are correct, then drawing a distinction between messages that impact rational decision-making and those that do not seems to be an impossible task.

A second objection to the claim that the state may be authorized to engage in arational persuasion to bring people into reasoned public debate is an empirical one. Clearly, “is” doesn’t imply “ought” (and “isn’t” doesn’t imply “oughtn’t”), but considering the ways the American government has actually used emotional persuasion in modern times belies the notion that the goal of these appeals is to trigger rational deliberation.

When considering contemporary examples of state persuasion, the government often uses emotional messages to communicate particular viewpoints, rather than support public discussion on both sides of the issue. In the tobacco and abortion contexts in particular, policymakers have explicitly stated that the purpose of their appeals is to reduce smoking and abortion rates. Indeed, a simple thought experiment confirms this. Imagine if empirical evidence were to demonstrate that displaying images of diseased lungs at the point of sale for tobacco products actually increases

⁵⁷ Loes T. E. Kessels, Robert A. C. Ruiter & Bernadette M. Jansma, “Increased Attention but More Efficient Disengagement: Neuroscientific Evidence for Defensive Processing of Threatening Health Information,” *Health Psychology* 29 (2010): 346-354. Kessels *et al*, however, conclude that while “high-threat smoking pictures capture more attention processes than low-threat smoking pictures” among both smokers and non-smokers, many smokers engaged in defensive “disengagement processes” that made the messages less effective. *Id.* at 353.

⁵⁸ Errol Morris has been quoted as saying that photographs, because of their immediacy, are so persuasive that they “stop us from thinking.” Rebecca Tushnet, “Worth a Thousand Words: The Images of Copyright Law,” *Harvard Law Review* 125 (2012): 683-759, at 691 (citing Michael Meyer, “Recovering Reality: Errol Morris Takes on Abu Ghraib,” *Columbia Journalism Review* 46:6 (Mar.-Apr. 2008): 53-55, at 53-54).

⁵⁹ Tushnet at 691; Julie Andsager, Erica Austin & Bruce Pinkleton, “Questioning the Value of Realism: Young Adults’ Processing of Messages in Alcohol-Related Public Service Announcements and Advertising,” *Journal of Communication* 51 (2001): 121-142; Annie Lang & Narine S. Yegiyan, “Understanding the Interactive Effects of Emotional Appeal and Claim Strength in Health Messages,” *Journal of Broadcast & Electronic Media* 52 (2008): 432-447, at 435; M. C. Farrelly, J. Niederdeppe & J. Yarsevich, “Youth tobacco prevention mass media campaigns: past, present, and future directions,” *Tobacco Control* 12 (2003): i35-147, at i44.

smoking rates. In such a case, we can be sure that the FDA would discontinue the graphic warnings.

If this assessment is correct – that the state uses arational tactics to persuade viewers to reach only one conclusion of many – then it is difficult to argue that these tactics are being used merely to draw viewers into a reasoned debate, rather than to achieve predetermined outcomes. After all, engaging in reasoned debate is likely to result in a variety of conclusions, not all of them consistent with the state’s perspective. And if the state’s goal in introducing arational messages is to inspire reasoned debate, it ought to be comfortable with diverse outcomes that do not necessary favor the state’s preferred solution.

Thus, the argument that arational appeals can or should be used trigger rational deliberation is highly unrealistic. Issue-based campaigning drives modern political life – few politicians campaign on a platform of encouraging reasoned democratic debate. While there are some areas in which the state encourages public commentary and criticism, persuasive appeals tend to be reserved for issues on which the state has a clear viewpoint. After all, if the state is ultimately neutral as to the outcome of public debate, it has far less reason to actively insert its message into people’s decision-making. Indeed, government persuasion is most useful in contexts where public opinion varies widely; where orthodoxy of belief exists within the community, persuasion is generally unnecessary.

D. Results: Alignment with Decisions Made Under Conditions of Reason

Another way of distinguishing between permissible and impermissible arational appeals is to consider whether those appeals lead the listener to reach a conclusion that he, upon rational consideration, would support. As described by one author, appeals to *pathos* are problematic whenever they cause a listener to take action that his “reason or conscience would later regret.”⁶⁰ Unlike the purely Kantian approach, this would not prohibit emotional appeals any time they bypass reason. Rather, it would focus on the ends of the appeal, comparing them with the ends of a rational appeal.

This idea, while raised even by classical scholars, seems similar in kind to the justifications behind modern behavioral economists’ advocacy of the “nudge” model. This modern approach recognizes that a variety of cognitive biases often prevent individuals from making the choices that they would make under ideal conditions of reason and rationality. Supporters of the nudge suggest that policymakers and other decision architects are

⁶⁰ Corbett, *supra* note 51, at 94.

justified in taking advantage of these cognitive biases in order to lead members of the public to outcomes that they would have chosen under rational conditions.⁶¹

The appeal of this approach, according to advocates, is that the individual being persuaded can have no objection to its outcome. Imagine that a rational actor would choose to fill three-quarters of his plate with vegetables rather than macaroni and cheese, but that cognitive tricks like attentional bias, choice-supportive bias, and selective perception typically cause him to choose the less healthy but seemingly more delicious option. Assuming the rational choice is to fill one's plate with vegetables, we might not object if a cafeteria manager offers the same choices but merely changes the design of the buffet, placing the healthier options at the head of the line.⁶² There would also likely be little controversy if the cafeteria decorations included posters with attractive images of vegetables and inspirational messages of health.

But justifying arational or emotional appeals on the grounds that they lead to the outcomes that a rational actor would have chosen is too simple. Under such an approach, any kind of manipulative or even coercive appeal would be justifiable if it led to the right ends. Surely, the cafeteria manager who recognizes the rational appeal of eating vegetables would not be justified in requiring that diners eat a full serving of broccoli before helping themselves to macaroni and cheese. Given that there are some techniques an ethical persuader may not use, justifying arational persuasion whenever it leads the listener to the result he would have chosen upon rational deliberation will not help us determine when arational appeals are appropriate.

This proposal, then, ultimately breaks down into a utilitarian calculus that would be unacceptable to the non-consequentialist supporter of rational autonomy. If the legitimacy of the state's persuasive appeal depends on whether its outcome is consistent with the decision that would be made under rational conditions, then we have come no farther than judging persuasive appeals based on substantive approval or disapproval of the underlying goal.

E. Method: Influencing Thought and Compelling Action

A final means of limiting arational appeals consistent with ethical principles would restrict the use of third-party persuasion where it affects a listener's reasoning process, rather than merely his actions. Whether a persuasive appeal is rational or arational, its ultimate purpose is to influence

⁶¹ Thaler & Sunstein, *supra* note 9, at 5.

⁶² Thaler & Sunstein, *supra* note 9, at 1-2.

a person's decision-making. And influencing a person's thought processes, according to some, may be more violative of autonomy than influencing his actions. Coercing someone to act against their will or otherwise limiting their liberty is surely problematic, but at least it preserves the person's ability to reason and evaluate autonomously.

For an example of how this decision might play out in practice, consider efforts by the state to promote dental health. Imagine there are two options available to achieve this goal – one, fluoridation of the public water supply; second, the insertion of subliminal messages in radio programming to encourage people to brush their teeth. Which would be more ethically problematic? By traditional accounts, forcing people to ingest fluoride against their will for paternalistic reasons seems troubling. But, apart from vocal minorities in some municipalities,⁶³ there seems to be limited widespread objection to the fluoridation of water – over 70% of Americans live in municipalities with fluoridated water.⁶⁴ In contrast, were people to discover that they had been subject to subliminal advertising, even for as positive a goal as improving dental health, public outrage would likely ensue.⁶⁵

In both examples, the state intervention may be unknown to the vast majority of people; in both, people may improve their dental hygiene through no conscious decision of their own. But the influence of subliminal advertising on listeners' thought processes seems different in kind than compulsory fluoridation – those opposed to compulsory fluoridation are still able to consider the policy and oppose it without the intrusion of state messages into their active deliberations. While subliminal advertising may

⁶³ For descriptions of recent debates about fluoridation in New Jersey and Portland, Oregon, see Kate Zernike, "In New Jersey, A Battle Over A Fluoridation Bill, And The Facts," *New York Times* (March 2, 2012); Francis X. Clines, "Portland Rejects Fluoridation – Again," *New York Times* (May 24, 2013).

⁶⁴ Data provided by the Centers for Disease Control as of Dec. 31, 2010. See <http://www.cdc.gov/fluoridation/statistics/2010stats.htm>.

⁶⁵ Public concern about subliminal messaging (whether initiated by the state or by private parties) is widespread, and is often reflected in popular media and film. Leonard Mlodinow, *Subliminal: How Your Unconscious Mind Rules Your Behavior* (Pantheon Books, 2012). Moreover, subliminal messaging has been roundly criticized as a matter of law. See, e.g., In Re Pub. Notice Concerning the Broad. of Info. by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016 (1974) (holding that the "use of subliminal perception is inconsistent with the obligations of a licensee" under the Federal Communications Act); Waller v. Osbourne, 763 F. Supp. 1144, 1148 (M.D. Ga. 1991), aff'd, 958 F.2d 1084 (11th Cir. 1992) (holding that music containing subliminal messages is "worthy of little, if any, first amendment constitutional protection."); Am. Home Products Corp. v. Johnson & Johnson, 577 F.2d 160, 168 (2d Cir. 1978) (holding that whether an advertisement incorporates subliminal influences may be relevant to a finding of false advertising).

be an extreme example, the same outcome would likely play out were the state to communicate through appeals to emotions or cognitive biases – a person’s thought process would be affected against her will, and she would not be able to make a decision without the intrusion of the government’s message.⁶⁶

What about intermediate cases? The “nudge” principle proposed by Thaler and Sunstein offers a way for choice architects to shape a person’s decisions without closing off any options. One example they use is that of a cafeteria line designed to present healthier options (like broccoli) first, followed by less-healthy options (like macaroni and cheese).⁶⁷ Given that research has shown that people are more likely to fill their plates with the items at the head of the cafeteria line, Thaler and Sunstein argue that arranging cafeterias to “nudge” healthier choices is not only ethically permissible, but may even be morally required. Such an approach does not limit the options available to diners; it merely takes advantage of their cognitive biases to nudge them towards the healthier choice. Is this case, then, closer to a case that compels action or influences thought?

I would argue that the case of cafeteria organization is closer in kind to a case of influencing thought in an arational manner. In the cafeteria example, the options available to diners are not limited in any way. Nor are they presented in such a way as to encourage rational deliberation (through labeling of nutrition information, for example). Rather, they cause a person’s choices to be affected by factors outside of her control and outside of her awareness. Not only does she not know that the structure of the cafeteria line is shaping her choices, she also does not know that a third party has actively intervened to accomplish this goal. Hausman and Welch note that when such arational nudges are used, a person’s “autonomy – the extent to which they have control over their own evaluations and deliberation – is diminished;” thus, “there may be something more insidious about shaping choices than about open constraint.”⁶⁸

If theories of autonomy prohibit undue third-party influence upon an individual’s autonomous thought processes, however, this would seem to prohibit all forms of third party persuasion that act on peoples’ reasoning processes, whether the persuasive appeals are rational or arational. And surely we cannot intend to prohibit efforts by a state to reason with its

⁶⁶ See generally, Hausman & Welch, *supra* note 2423, at 131 (arguing that influencing people to brush their teeth by way of a subliminal message “may be a greater threat to liberty, broadly conceived, than punishing drivers who do not wear seat belts, *because it threatens people’s control over their own evaluations and deliberation and so is open to abuse.*”) (emphasis added).

⁶⁷ Thaler & Sunstein, *supra* note 9, at 1-2.

⁶⁸ Hausman & Welch, *supra* note 2423, at 128-130

citizens on matters of public importance.

One way of drawing an ethically-relevant distinction between rational and arational appeals might consider the fact that many arational appeals, by virtue of their non-obviousness, often cannot be avoided.

Consider this example: surely the state may require that junk food packaging include nutritional information, and that people seeking loans be presented with a stack of paperwork describing the risks of borrowing money. However, it is relatively simple for a consumer to avoid these disclosures. Food labels tend to be discreet and unobtrusive, and a borrower is free to sign loan documents without reading them. Even patients considering medical procedures are legally permitted to waive their right to informed consent (though, of course, a physician is also free to refuse to treat a patient who does so). If the consumer chooses to avoid this information, the state cannot be blamed for her ignorance. In such cases, the listener is offered the opportunity to consider the state's message as part of her decision-making process, but is free to ignore it if she so chooses.

Many arational appeals, however, do not offer this possibility. Subliminal messages, for example, are not only unavoidable, but unrecognizable – an individual who would prefer not to take the state's perspective into account in making personal decisions does not have the opportunity to make this choice.⁶⁹ State influences that take advantage of a person's cognitive biases are likewise non-obvious because of the difficulty subjects have in recognizing their own biases and their triggers.

The graphic images associated with tobacco labeling and ultrasound requirements are concerning for similar reasons. As a matter of course, it is much easier to avoid reading words and understand their meaning than to avoid looking at an emotional image, even briefly, and internalizing it. Supporters of tobacco and ultrasound laws will argue that a smoker need not look at the package of cigarettes she is purchasing, and that a woman seeking an abortion can "avert her eyes" and stop her ears when her physician is describing the ultrasound. But these suggestions are flatly unrealistic. When a color image composes 50% of the front of cigarette packaging, it is nearly impossible for a purchaser to avoid the image. To avoid the ultrasound image and description, a woman seeking abortion must shut her eyes and stop her ears, much in the manner of a toddler throwing a tantrum.

⁶⁹ Di Ezio Di Nucci, "Habits, Nudges, and Consent," *American Journal of Bioethics* 13:6 (2013): 27-29, at 28 ("Nudges owe much of their effectiveness to the less than fully conscious character of their influence."); Franklin G. Miller & Luke Gelinas, "Nudging, Autonomy, and Valid Consent: Context Matters," *American Journal of Bioethics* 13:6 (2013): 12-13 (noting that arational nudges "involve attempts to influence others in ways that they are not aware of.").

Thus, if we are more concerned about third-party influences that infiltrate thought rather than those that compel action, perhaps persuasive appeals may be categorized according to the degree to which they intrude into a person's reasoning process. Such a categorization, in practice, would likely result in a distinction between rational appeals, which can typically be avoided or rejected, and arational appeals, which cannot, either because they are non-obvious and affect individuals at a subconscious level, or because they are simply impossible to ignore.⁷⁰

Some might view this proposal as problematic in that it does not serve to distinguish between persuasive appeals made by government actors and those made by private parties. If unavoidable arational appeals are ethically problematic because they influence a person's thought processes in a non-obvious way, this ought to be the case regardless of who the persuader is. For those who take this position, adding back the considerations of deliberative democracy described in Part II may serve to resolve this concern – to the extent that political theories of deliberate democracy require a foundation of rational deliberation and debate among all interested parties, we have firm doctrinal grounding for considering the ethics of state communications. Theories of private communication, in contrast, are far less developed, so taking a stand as to whether there ought to be an ethical distinction between state speech and corporate speech requires a far more thorough inquiry.

Of course, the argument that democratic communications ought to be grounded in rational deliberation is limited by its dependence on public expectations. As citizens in a democratic state, we expect reasoned debate from our policymakers and officials, because that is the model of our political system. However, in a totalitarian or paternalistic state, citizens' expectations would likely be very different. Thus, one limitation on the proposal that states should exercise caution when engaging in arational appeals that affect citizens' thought processes in non-obvious and unavoidable ways is that it will not be as compelling in conditions where citizens have different expectations of how the state should operate.

⁷⁰ An analogy might be drawn between this proposal and the "captive audience" doctrine within First Amendment law. While the First Amendment does not recognize a constitutionally protected "right not to listen," the captive audience doctrine does permit the state, in limited circumstances, to protect unwilling listeners from messages communicated in ways that make them difficult or impossible to avoid. Caroline Mala Corbin, "The First Amendment Right Against Compelled Listening," *Boston University Law Review* 89 (2009): 939-1016; *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Hill v. Colorado*, 530 U.S. 703 (2000).

CONCLUSION

This Article presents a normative theory that calls into question whether the state's use of arational persuasion, particularly in public health and medical contexts, is ethically permissible. The Kantian approach posits that the exercise of personal autonomy requires freedom from third-party influence on one's rational decision-making, and that therefore arational persuasion violates a listener's ability to make autonomous decisions. This theory is supported by principles of deliberative democracy, which are grounded in the ideal of rational deliberation and caution against the state's use of rhetorical tactics that encourage arational decision-making.

Imposing an absolute prohibition on the state's use of arational appeals, however, is unwise for a variety of reasons. First, as a practical matter, it is difficult (if not impossible) to engage people in debate with a dry presentation of facts. Emotional appeals, in particular, are extremely effective at grabbing people's attention, and the modern American public has demonstrated that it is either unable or unwilling to engage in the type of dialogue that would be necessary to resolve disputes on purely rational grounds. Secondly, and perhaps more importantly, the exercise of reason falls on a spectrum, and drawing a line that prohibits any form of arational appeal would be extremely difficult. Even the most dramatically presented public health appeals – for example, graphic images of diseased lungs on tobacco packaging – nevertheless contain factual elements; barring any appeal that relies on arational suasion would leave us with very few options.

The challenge, then, is to find some way of distinguishing between permissible and impermissible arational appeals. The ideal solution would identify objectively verifiable distinctions between different types of arational appeals; acknowledge Kantian concerns about the impact of arational persuasion on personal autonomy; and draw distinctions that do not break down into content-based judgments about the substantive goals of the message, and therefore would be compelling even to non-consequentialist thinkers.

Such a solution is hard to find. Of the potential limitations described in Part III, many are impossible to implement because of the difficulty in drawing objective lines – for example, determining which types of decisions ought to be made on rational grounds; categorizing praiseworthy and base emotions; and identifying appeals that merely trigger attention without affecting the process of rational decision-making.

Other suggestions, like accepting appeals that lead to the same results a rational decisionmaker would make in the absence of arational influence, seem unacceptable because they are not limiting enough. If any type of arational appeal is permissible as long as it leads to the result the

listener would reach upon rational deliberation, then few tactics seem out of bounds – including subliminal messaging, threats, and the use of force. And if we are to have any limits on the state’s use of arational persuasion, they ought at the very least to exclude these kinds of tactics.

The one limitation that seems both ethically sound and practically feasible recognizes Kantian theories of autonomous decision-making, which protect an individual’s right to make choices on her own grounds, and acknowledges the fact that arational appeals typically affect peoples’ thought processes in non-obvious or unavoidable ways. That is, while the state may legitimately seek to provide information when people are making decisions, it may not force this information upon them. If a consumer has no choice but to internalize the information the government is providing, as is often the case with visual, emotional, subliminal, or other non-obvious arational appeals, then the state’s persuasive appeal violates autonomy and should be restricted.

This proposal, it should be emphasized, is defensible on the basis of non-consequentialist theory alone. In practice, states take into account a variety of consequentialist concerns when making policy decisions, and often prioritize these concerns over considerations raised by theorists of deontology and virtue ethics. This Article does not propose that states abandon concerns about the practical outcomes of their policy decisions. Outcomes do matter, especially on issues of national importance. Rather, this Article cautions that when states rely on persuasive messaging to achieve favorable policy goals without considering the methods by which they seek to persuade, important ethical considerations are lost. Thus, identifying non-consequentialist limitations on persuasive government messages is an important step in encouraging policymakers to be more thoughtful when considering how to communicate the state’s messages to the public.