The Limits of Neutrality in the Legal Philosophy of Stavros Tsakyrakis

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Stavros Tsakyrakis revelled in theoretical debate. He welcomed challenge out of a deep conviction that good faith disagreement, fuelled by argument and counter-argument, facilitates the search for knowledge. Often, he would deliberately adopt extreme positions -or put his considered positions in stark terms-, the more so to bring an issue of principle into sharp relief and cut through to deeper insights. This method was most characteristically at work when Tsakyrakis analysed specific cases. In fact, he had a penchant for this type of focused analysis. His skill at identifying what was fundamentally at stake in a complex set of facts was uncanny. Equally remarkable, though, was his ability to discern the moral complexity often latent in factual complexity and confront it rather than suppress it, qualifying, if need be, his initial formulation of the applicable principle.

This chapter will, I hope, replicate Tsakyrakis' favourite mode of inquiry, though not, surely, the flair, immediacy, and wisdom with which he typically conducted it. I have chosen a topic that I believe was central to his thinking, albeit not always explicit. To introduce it, let me start with a topic that was truly front and centre both in his thinking and his writing. It is well known that Tsakyrakis held freedom of speech in especially high regard. Freedom of speech was the topic of his second[1] and third book,[2] and accounted for most of his very successful record in litigation before the European Court of Human Rights. It was also the subject of numerous interventions in Greek public affairs through speeches, newspaper articles and blog posts. But his interest in freedom of speech was not only the interest of the cause-driven activist lawyer or the civically minded intellectual. It was also, and im-

1. Σ. Τσακυράκης, *Η Ελευθερία του Λόγου στις Η.Π.Α.*, Αθήνα, εκδ. Π.Ν. Σάκκουλα, 1997.
2. Σ. Τσακυράκης, *Θρησκεία κατά Τέχνης*, Αθήνα, εκδ. Πόλις, 2005.

portantly, a profoundly theoretical interest. His ambition was that the study of freedom of speech would teach us broader philosophical lessons about the nature of fundamental rights. One of these lessons he elaborated with particular vigour in his later work. It was the alleged connection between rights adjudication and proportionality.[3] Here I am going to explore another key feature of (several) fundamental rights, the fact that they issue in a commitment to state neutrality. For Tsakyrakis, freedom of speech exemplifies this feature, but it is not the only right that does.

In what follows I shall reconstruct how Tsakyrakis formulated the commitment to neutrality. Tsakyrakis championed not only the practical usefulness of neutrality in deciding cases but also its explanatory potential in elucidating why and how rights matter. He returned to it again and again in his work arguing for its central place in a liberal political philosophy. However, as I shall try to show, the more he sharpened his conception of neutrality, the less absolute it became. Eventually it came to express a political ideal that in some areas imposes robust duties on government and in others allows more room than is sometimes thought for the expression of collective identity. In order to elaborate this dualism and focus the discussion, I shall refer to a recent decision of the US Supreme Court that I am certain would have engaged Tsakyrakis, *American Legion v American Humanist Association*.[4] This is not a freedom of speech case, so it helps make the broader point that the importance of neutrality transcends this or that right and goes to the heart of liberalism. How would Tsakyrakis have reacted to my reconstruction? We can never be sure. However, my aim is not solely to chart the trajectory of his thought. Equally, I seek to further our understanding of neutrality such that it satisfactorily addresses challenges to liberal politics facing us today. But I want to do this building on Tsakyrakis' ideas, sometimes agreeing with him and sometimes disagreeing -as I would if he were sitting in front of me.

1. Staying neutral

It may sound paradoxical to speak of neutrality in connection with Tsakyrakis who, in a sense, was anything but neutral. He was endearingly impatient with very rounded statements and would not abide sitting on the fence when important issues hang on the balance. At a doctrinal level, he was passionately opposed to the view that says we can and should reason about the law without making any substantive moral commitments. But, of course, these are just two of the many meanings of neutrality, and neither is my topic. On the sense of neutrality that I am interested in, it is a value-laden concept. In fact, neutrality takes sides, morally speaking: It reflects or is grounded in specifically liberal principles about the relationship between the state and the individual. Neutrality offers a characteristically

3. S. Tsakyrakis, 'Proportionality: An assault on human rights' (2009) 7 *International Journal of Constitutional Law* 468-493.

4. 588 U.S. ____ (2019)

liberal solution to the pervasive and deep-rooted diversity of religious and other ethical and moral outlooks that is present in the societies that we are familiar with. It urges us to look with suspicion whenever the state uses its coercive power to favour one of these outlooks over others or to suppress certain outlooks because they cause offence or strong ethical disapproval.[5] Thus understood, neutrality is not specifically tied to freedom of expression, though of course it applies to it as well. Just as we do not want the state to prescribe what we may and may not say, we want it to refrain from imposing a religious faith (in this sense neutrality is relevant to the right to religious freedom) and from dictating a certain option in matters of great personal importance such as whether one should have an abortion or marry a person from a different race (in this sense neutrality is relevant to the right to privacy).

What constraint, more precisely, does the liberal principle of neutrality pose on state action? At times Tsakyrakis adopted a rather sweeping construal. For instance, at one point he endorsed the outlook of the US Supreme Court on the issue of religious freedom which he summarised as follows: 'The state cannot identify itself with any religion, cannot be partial to any religion, cannot give preference to the "truths" of one religion over those of another'.[6] Clearly, this formulation can be extended beyond religious freedom to condemn any state identification with a certain political ideology, sexual morality, conception of the good life and so on. I shall call this understanding of neutrality *absolutist* because of its uncompromising condemnation of state partiality towards a certain religious or ethical outlook. The absolutist understanding appears compelling when the state *imposes* a religious or ethical belief on individuals. 'You cannot speak these blasphemous words' or 'You cannot engage in base sexual activities' are rights violations at least in great part because they represent failures of neutrality. The state cannot be said to respect individuals if it stops them from exercising their agency when they express opinions or enter into intimate relationships. Here, neutrality seems to give expression to an ideal of personal independence.[7] An important expression of our agency is that we *choose* our own opinions rather than adopt opinions imposed on us, and we *freely* form an intimate relationship rather than be locked into one. It is this expression of agency that the state frustrates when it favours a religious or ethical outlook by coercive means.

However, not all state action has a similarly coercive character, and it is doubtful whether personal independence carries weight across the board. Tsakyrakis encountered this complication in his treatment of the clash between religion and artistic freedom. There he

5. See relatedly Ronald Dworkin, 'Liberalism' in *A Matter of Principle* (Cambridge MA: Harvard University Press, 1985) 187.

6. Τσακυράκης, **Θρησκεία κατά Τέχνης** (n 2) 166 (my translation).

7. I should add that for Tsakyrakis personal independence is not the sole basis for the right to free speech. He contends that the right to free speech has "a dual character", because, alongside self-realization, it is a necessary condition for a genuine and vigorous democracy. For this reason Tsakyrakis thinks it is a truly "fundamental right". See his last interview with Elias Kanellis and Yiorgos Kaminis in *Books' Journal* 86 (May 2018). I am not going to examine whether the two groundings of the right always go hand in hand.

discussed a number of Greek cases where works of art were removed from state-funded exhibitions because they were thought to offend Christianity. We can assume that in these cases the artists were not *coerced* to do or refrain from doing something on the basis of a government judgment about what is worthy or unworthy. So, we are not dealing with the type of setting in which the absolutist understanding of neutrality seems most at home. Still, Tsakyrakis tries to salvage it by postulating a right to freedom of expression *on the part of the exhibition's viewers* to see the works in question.[8] When the government decided to remove them, it violated that right. It made a judgment about what the exhibition's viewers should and should not see, which on the absolutist understanding cannot be a justification for government action.

This solution has an ad hoc ring to it. If the artist does not have a right to have their work exhibited, it is extremely doubtful that the general public have it.[9] The difficulty facing the absolutist conception in this kind of case points to a deeper problem. We think that when the state, say, funds an exhibition, it has considerable latitude in deciding what should be exhibited. Surely, when using this latitude, the state also relies on judgments about the merits of specific works of art, precisely the kind of judgments that the absolutist conception rules out in a blanket way. The examples could be multiplied. The state does many things other than coerce,[10] so at best the absolutist understanding tells part of the story.

Later in his work Tsakyrakis shifted away from the absolutist understanding and embraced what I shall call a *relaxed* understanding. The crux of the relaxed understanding is that neutrality has a limited scope. The idea behind it (though not the nomenclature) was introduced in an article that Tsakyrakis and I co-authored in 2013 discussing the European Court of Human Rights decision in *Lautsi v Italy*.[11] The main question facing the ECtHR in *Lautsi* was whether the display of the crucifix on the walls of Italian state schools violated the rights of the appellants, two pupils and their parents, especially their freedom of religion. This case gave us the opportunity to raise broader questions about state neutrality and its relationship with human rights like freedom of religion. Although we disagreed with the Grand Chamber's decision to dismiss the complaint and argued that it had misunderstood and misapplied neutrality, we sensed that there was something at work in *Lautsi* that the absolutist understanding could not capture. Our conclusion was that neutrality does not always disapprove of the state taking sides in ethical matters. However, we insisted that

8. Τσακυράκης, Θρησκεία κατά Τέχνης (n 2) 64-66.

9. I expand on this critique in my review of Θρησκεία κατά Τέχνης. See Δ. Κυρίτσης, 'Θεωρία και Πράξη του Δικαιώματος Καλλιτεχνικής Έκφρασης', Το Σύνταγμα (2007) 395-425.

10. See generally Daniel Brudney, 'On Noncoercive Establishment' (2005) 33(6) *Political Theory* 812-39. Of course, all state power ultimately involves some coercion: collecting the funds from taxpayers to pay for the exhibition is backed by threat of coercive sanction.

11. Dimitrios Kyritsis and Stavros Tsakyrakis, 'Neutrality in the Classroom' (2013) 11 *International Journal of Constitutional Law* 200-217.

the state cannot do so when regulating an area of social life 'that pertains to central aspects of one's status as free and equal participant in a fair scheme of social cooperation'.[12] We offered this qualification to rebut an objection commonly levelled by opponents of neutrality who argue that a neutral state would have to be excessively sanitized; it would have to erase, say, the cross from its national flag (since it assigns one religion a special place in its national identity) or omit reference to God from the preamble of its constitution. But this objection is only good against the absolutist understanding. It does not sting the relaxed understanding we were advocating: Whereas state education does engage central aspects of one's status as free and equal participant in social cooperation, the national flag and the constitution preamble arguably do not.[13]

If sound, the relaxed understanding vindicates the many existing constitutional arrangements that, for instance, do not subscribe to a strict separation between church and state. And, as already indicated, it gives us the resources to uphold many noncoercive political practices that would fall foul of the absolutist understanding. Still, the fact that it has a better fit with constitutional reality does not *make it* sound. For example, some might doubt that it makes sense to draw the line between spheres of social life that the relaxed understanding does and apply different moral standards to each. They might think that the relaxed understanding is simply a checkerboard solution, splitting the difference between two contradictory principles, one allowing the state to be partial towards religious and ethical outlooks and the other deeming such partiality illegitimate; by contrast, the argument goes, the absolutist understanding is internally coherent.[14]

I cannot offer a complete defence of the relaxed understanding here. Still, it is important for grasping what it proposes that I explain why the aforementioned critique misses the point. Neutrality is not an end in itself. We care about neutrality insofar as we care about ensuring that all members of a pluralistic society can lead a worthwhile life as free and

12. Ibid 209.

13. I must tread carefully here. Although Tsakyrakis and I agreed in principle on the distinction between types of state action offered in the main text, we did not offer detailed criteria about how the relaxed understanding draws the line between the two spheres, as it was not necessary for the purpose of that article. Were we to do so, we would likely on occasion have reached different results. But I am more interested here in articulating the basic premise of the relaxed understanding and less in particular cases.

14. In this chapter I do not address a different criticism, according to which it is unconvincing to derive a stringent version of neutrality mandating various forms of disestablishment, e.g. the removal of the crucifix from state school classrooms, from the human right to freedom of religion. See Saladin Meckled-Garcia, 'The Ethics of Establishment: Fairness and human rights as different standards of neutrality' in François Guesnet, Cécile Laborde and Lois Lee (eds), *Negotiating Religion: Cross-disciplinary Perspectives* (London: Routledge, 2016) 95, 109. For Meckled-Garcia human rights are basic conditions of legitimacy, which are oriented towards a distinct value, respect for individual integrity. By contrast, neutrality tracks the value of fairness. Its role is also different; the mere fact that a policy violates neutrality does not make it illegitimate. This criticism is orthogonal to the relaxed/absolutist distinction, as I have portrayed it. Whichever of the two understandings of neutrality you espouse, Meckled-Garcia would insist it would be a mistake to bake it into the meaning of the human right to religious freedom.

equal regardless of their religious or ethical outlook. Conceptions of neutrality strive to track this aspiration. So does the relaxed understanding. In fact, it takes that this aspiration is compromised not only when the state uses its coercive power to impose its preferred religious or ethical outlook, but also when it non-coercively endorses it in areas of social life that pertain to central aspects of one's status as free and equal. It accepts that, in order to have a fully adequate opportunity to lead a worthwhile life as free and equal, we do not only need liberties and resources to live out our conception of the good life; we also need what Rawls called "the social bases of self-respect".[15] That is, our social institutions must express an attitude towards individual members that can reasonably inspire confidence that everyone's position in society is respected. Conversely, when our social institutions fail to do so, the principle of personal independence, which has always guided Tsakyrakis' formulation of neutrality, also suffers.

Such an attitude, Tsakyrakis and I argued, is urgently needed, say, in the operation of the political and judicial system and in state education, even when coercion is not on the cards. That is why in our article we sided with the Chamber judgment. Whether pupils of Italian state schools notice the crucifix or not, whether they are offended by its presence or not, the state must not use state education for promoting a sectarian collective identity. But beyond the areas of social life that engage the core of our status as free and equal, we ought not to feel diminished every time a majority of our fellow citizens use state power for just that purpose. We can in principle live our lives according to our own ethical outlook as free and equal and without fear in a social environment that bears the mark of the majority's value preferences, say, in a society that has an official religion or sponsors and promotes a certain kind of art or supports marriage and parenthood. Simply put, once the state has regulated central aspects of our status as free and equal in a neutral way, neutrality does not in principle give us grounds to *further* complain that others -even many others- think differently from us and act on an interest in shaping our common social environment accordingly, even when they enlist the state in doing so.[16] We may be troubled by the spread of their attitudes in society. We may bemoan, to use a relatively innocuous example, that the state diverts more funds to sports than contemporary art. But the solution is not to be found in human rights law. Rather, it is a matter of reclaiming the public sphere through private and political action.

15. John Rawls, *Justice as Fairness: A Restatement* (Cambridge MA: Harvard University Press, 2001) 58-59.

16. It is at this stage that it becomes much more persuasive to affirm, as Joseph Weiler characteristically does in connection with the *Lautsi* controversy, the European constitutional landscape's "rich diversity in the constitutional iconography of the state and different forms of entanglement of religion in its public life: from fully established churches to endorsed churches to cooperative arrangements as well as, of course, to states in which laïcité is part of the definition of the state, as in France" (JHH Weiler, 'Editorial: Lautsi: Cruxifix in the Classroom Redux' (2010) 21 *European Journal of International Law*). See also JHH Weiler, 'Lautsi: A reply' (2013) 11(1) *International Journal of Constitutional Law* 230-33.

No doubt, there is a difficult balance that needs to be struck in such cases between the demand of an individual to be treated as an equal member of society and the majority's interest in using the non-coercive power of the state to promote a collective identity. Government may well get this balance wrong. But the fact that the line is hard to discern or that a political community may be tempted to blur it does not mean that it should not be drawn. But in order to do so we need more detailed theoretical tools than we had provided in our earlier article. In the following section I shall begin this task by reference to a very different scenario.

2. *On Heroes and Tombs*

Until the end of his life Tsakyrakis was an avid observer of the US Supreme Court, whose jurisprudence he had closely studied in his book *Freedom of Speech in the USA*. He often commented on recent appointments and speculated on how the changing composition of the Court would affect constitutional doctrine. It is too early to say with any certainty, of course, but one area where signs of such a shift can be seen is in the Court's interpretation of the Establishment Clause of the First Amendment. Commentators have noted that a revisionist majority in the Court now favours upending some of the limitations placed on religious establishment – and on religious freedom more generally – by previous constitutional doctrine. A characteristic example of this emerging trend is the 2019 decision of *American Legion v. American Humanist Association*[17], in which the Court was asked whether public ownership of the Bladensburg cross, a monument in the shape of a gigantic crucifix that was erected in 1925 to commemorate the soldiers from Prince George's County, Maryland, that died during World War I, constituted an unconstitutional 'establishment of religion'. A plurality decided that it was not, but it was clear from the several concurring opinions as well as the dissent of Justices Ginsburg and Sotomayor that constitutional doctrine in this area is in a state of flux.

I cannot go into a detailed examination of the Establishment Clause jurisprudence of the US Supreme Court. My aim is solely to use some of the arguments put forward in this decision to illustrate the reach and content of the relaxed understanding of neutrality offered in the previous section, as Tsakyrakis and I did in our article with reference to *Lautsi*. *American Legion* offers a potentially instructive contrast because, unlike *Lautsi*, it arguably concerns a type of state action not readily engaging a central aspect of one's status as free and equal. Of course, before we can derive broader lessons from this case, it is important to bear in mind a crucial difference between it and cases decided under the ECHR. The US Constitution follows a more or less strict constitutional separation of state and religion, while many member states of the Council of Europe do not. Consequently, the European Court of Human Rights cannot favour this constitutional arrangement over others, insofar

17. (n 4).

as none violates the right to religious freedom. Likewise, we should not be too quick to inscribe a particular configuration of the relationship between state and religion into the very concept of liberal neutrality.

In *American Legion* the absolutist understanding of neutrality was represented in the dissent of Justice Ginsburg, who saw in the plurality's decision an erosion of the constitutional commitment to neutrality. Her rationale is sweeping: "When the government places its 'power, prestige [or] financial support … behind a particular religious belief',[18] the government's imprimatur 'mak[es] adherence to [that] religion relevant … to a person's standing in the political community.'"[19] Although Justice Ginsburg agrees that what animates neutrality is the concern to protect individuals' status as free and equal, she disputes that there are any areas of state action that do not engage it, so she rejects a central plank of the relaxed understanding.[20]

By contrast, other Justices sought to expand the scope for state-sponsored expressions of collective identity. In doing so, many of them took aim at the so-called *Lemon* test that directs judges to find a violation of the establishment clause unless 1) the impugned government action has "a secular legislative purpose"; 2) "its principal or primary effect … neither advances nor inhibits religion"; and 3) it does not "foster an excessive government entanglement with religion".[21] Justice Alito, for example, found that the *Lemon* test is too bland a heuristic. Importantly, it does not discriminate between "retaining established religiously expressive monuments, symbols and practices" and "erecting or adopting new ones". Regardless of their original purpose, it may well be that monuments, symbols and practices of the former type are preserved by the community today "for very different reasons".

I am not convinced that the *Lemon* test suffers from the shortcoming that Alito attributes to it. But his suggestion deserves to be considered independently. Alito claims that overtime a practice that initially had a parochial meaning may come to acquire a constitutionally innocuous, neutral meaning, and that this change cures its original constitutional defect. He maintains that, regardless of the religious connotations of the crucifix, the Bladensburg cross stands now as a symbol of secular ideals such as patriotism and self-sacrifice. The Italian government, recall, advanced a similar argument regarding the meaning of the crucifix in classrooms. It contended that the crucifix conveys a universal, non-parochial message and thus no longer stands for an endorsement of Christianity. In our earlier article we did not evaluate this argument because both the Chamber and the Grand Chamber had dismissed it. But things may well be different in other contexts. Social practices and symbols are not

18. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

19. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 594 (1989).

20. Recall that Justice Ginsburg does not offer a philosophical account of neutrality. She seeks to identify the meaning of neutrality under US constitutional law.

21. *Lemon v. Kurtzman,* 403 U.S. 602 (1970) at 612-3.

monolithic or unchangeable. As our societies become more diverse, they often reinvent themselves, adapting their practices and symbols to the new reality they face. When the adaptation is successful, these practices and symbols affirm rather than negate equal status.

Alito's suggestion is different from that of Justice Kavanaugh who wants to carve out an exception to the *Lemon* test for non-coercive government practices that are "rooted in history and tradition".[22] Kavanaugh seems willing to concede that some of these practices will be sectarian, remnants perhaps of an era that was less rigorous in its enforcement of the anti-establishment clause or marked by a more pronounced cultural homogeneity. However, in light of their continued presence, he argues that removing or discontinuing them now would signal hostility towards the sectarian outlook they embody and would thus be constitutionally suspect for this reason.[23] Contrary to Kavanaugh, the relaxed conception of neutrality is incompatible with granting the past favoured constitutional status. Just as a political society may decide to embrace a religious or ethical outlook in matters that do not pertain to one's status as free and equal, so it should be allowed to change course and opt for a more secular future. Religious people, especially those who were once the majority in a society, should recognise that their society's collective identity is up for grabs -provided, again, that their status as free and equal is secure.

3. Conclusion

Like all good liberals, Tsakyrakis was acutely aware that something might be a bad idea, morally speaking, but that it would be impermissible to deny others the ability to act on it. And while he understood full well the force of social pressure, he clung to the conviction that some changes in public culture can properly come about through more debate, not the silencing of the majority in the name of individual rights. In this chapter I have offered a conception of neutrality that develops themes from Tsakyrakis' work in seeking to delineate the scope of the individual's power to veto state policies that are partial to a particular religion or ethical outlook. I have said that this conception does not tolerate state partiality in matters pertaining to one's status as free and equal in social cooperation. But clearing this hurdle is only a necessary condition of legitimacy. Although it grants government much more leeway, neutrality does not necessarily tolerate partiality in all other matters. Examining the *American Legion* case of the US Supreme Court I indicated that it has bite even in situations that do not involve the state wielding its stick to oppress or demean the individual. But the divided Court in *American Legion* attests to the fact that in this, as in so

22. This, too, was an argument advanced by the respondent state in *Lautsi.* It was suggested that the display of the crucifix is justified by the long-standing bond between Italy and Christianity.

23. Justice Alito comes close to embracing this position when he writes that "a campaign to obliterate items with religious associations may evidence hostility to religion". He carefully qualifies the constitutional import of this statement by focusing on cases where "those religious associations are no longer in the forefront". However, the point made in the text applies to him as well.

many other areas of public life, there are no hard-and-fast rules. Tsakyrakis would not have found this an unfortunate conclusion. He was instinctively suspicious of simple solutions to complex issues. It is in navigating such complex moral issues that his loss is most acutely felt.