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Ethical Limitations on the State's Use of Arational Persuasion

NADIA N. SAWICKI

Policy makers frequently use arational appeals and nudges—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 nonconsequentialist objection to arational persuasion by state actors, focusing on theories of decisional autonomy and metadecisional voluntariness. 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. Policy makers recognize, however, that the public is not easily swayed by rational appeals to dry facts. Thus, state actors put significant energy into developing communication campaigns that will grab viewers' attention, often using arational triggers—like emotional appeals, dramatic graphic images, or reliance on cognitive biases—to persuade citizens to act in support of public goals. State communications on matters of medicine and public health are particularly notable in this regard, arising in contexts as varied as tobacco labeling, nutritional recommendations, informed consent requirements, and disease prevention. Such measures have found increased support since the 2008 publication of Richard Thaler and Cass Sunstein's *Nudge*, which advocates the use of libertarian paternalist nudges to further public policy (Thaler and Sunstein 2008).¹ A key feature of Thaler and Sunstein's nudge model is its recognition that human decision making is marred by bounded rationality and mistakes in reasoning; in taking advantage of such cognitive errors, many nudges can be viewed as examples of arational persuasion.

While many commentators agree that some forms of governmental persuasion are ethically problematic, it can be difficult to identify the theoretical basis for their objections. Moreover, these objections are not voiced consistently. For example, whether a person objects to graphic tobacco labeling laws typically depends more on her opinions about smoking than her perspective on government persuasion generally. Indeed, many examples of arational appeals—emotionally compelling campaigns about environmental

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protection and military recruiting, for example—are generally viewed positively, perhaps because public support for these issues is widespread. However, from an ethical perspective, the legitimacy of such campaigns depends not only on their substantive aims, but also their methods. Surely, even an attempt to persuade the public to support an uncontroverted good may be ethically troubling if it is made using techniques that are deceptive, coercive, or otherwise autonomy-violating. Unfortunately, such normative arguments have to date been underdeveloped because of undue focus on the outcomes of persuasive appeals.

In this article, I develop a nonconsequentialist argument for limiting, but not prohibiting, the state's use of nudges and other arational methods of persuasion in health-related contexts and beyond. In examining objections to the use of arational persuasion by government actors, I conclude that the strongest basis for justifying restrictions on such persuasion is grounded in theories of decisional autonomy and metadecisional voluntariness, which I define as an actor's ability to structure the procedural conditions under which she makes decisions. I then evaluate claims that some arational persuasive techniques may be autonomy-enhancing, and use this analysis to identify possible content-neutral limitations on the use of persuasive government appeals.

Ultimately, I conclude that the state's use of arational persuasive techniques may be autonomy-enhancing and therefore ethically permissible in two contexts. The first is where a persuasive appeal is used to trigger attention or provide information for a decision that the person has no choice but to make, and is provided in a form that is to some degree avoidable—for example, if it is nongraphic, obvious as to its persuasive intent, and presented at an early point in the decision-making process. The second is where a persuasive appeal is used to allow a person whose autonomy is otherwise compromised (due to internal constraints like cognitive errors, for example) to make a substantive decision that comports with what her true interests would be were she acting autonomously—this, however, requires that the state demonstrate that the person's autonomy is truly compromised and cannot be restored through rational means, and that the persuasive appeal is designed to be autonomy-enhancing in the long run. These conclusions, notably, call into question many of the nudging techniques for public health improvement that have received increased attention since the publication of *Nudge*.

While recognizing that state actions, in most cases, are ultimately driven by outcomes rather than by nonconsequentialist ethical considerations, it is my hope that the analysis presented here will elucidate this important normative argument and help guide policy makers in developing persuasive communication campaigns, particularly in the contexts of medicine and public health.

CATEGORIZING PERSUASIVE APPEALS AND DEFINING ARATIONAL PERSUASION

A vast array of literature tries to define the distinctions between persuasion, manipulation, and coercion, but definitions can vary widely. Coercion, commonly understood to be the most ethically problematic of the three, is typically understood to be the use of “a credible and severe threat of harm or force” to direct an actor's decision making (Beauchamp and Childress 2008, 133). The boundaries of manipulation and persuasion, however, are much more difficult to draw. Manipulation is commonly understood as an attempt to “sway people to do what the manipulator wants by means other than coercion or persuasion,” such as through deception, misdirection, the withholding of information, or other mechanisms a rational actor would not support (*ibid.*, 133-34). Persuasion, in contrast, is not necessarily aimed at promoting the interests of the persuader exclusively,

and typically contemplates a reasoned “dialogue or debate in which accurate information is available and in which it is expected that the other side will have its say” (Fishkin 2011, 34).

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 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 may 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 refer to conduct on the spectrum between what is typically called persuasion and what is typically called coercion as varying types of *persuasive appeals*.² I define these as 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.³ Theoretical justifications of such appeals, I argue, can be evaluated on the basis of three characteristics—purpose, context, and method.

A speaker’s purpose or motivation may affect the normative categorization of a persuasive appeal. For example, a persuader who seeks to achieve an outcome that is contrary to the listener’s best interest acts unethically when he makes a persuasive appeal to achieve this end. A second factor that may impact the justifiability of a persuasive appeal is the context in which it is made—the relationship between the persuading speaker and the listener. Where there is an asymmetry in information or power between parties, a persuasive appeal is more likely to be perceived as unjustifiable than when it is made by a speaker on equal footing with the listener. Some types of persuasive appeals may also be unjustified in cases where the persuader stands in a fiduciary relationship with the listener, or a relationship that otherwise imposes special obligations or responsibilities on the speaker (as in the case of state actors in a deliberative democracy).

My argument, however, focuses primarily on the third factor—the method by which a persuasive appeal is made. Some persuasive appeals may 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 of the spectrum, 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. Clearly, persuasive appeals vary in the degree to which they engage reason, and the spectrum of possibilities makes it impossible to set absolute categorizations.⁴ However, drawing the distinction between primarily arational and primarily rational appeals identifies one objective means by which persuasive messages can be categorized, and so deserves careful attention.

Human decision making is a complex process. Very few people make what one might call purely rational decisions—the types of purely logical, almost mathematical calculations exemplified by *Star Trek’s* Mr. Spock.⁵ Rather, our choices are necessarily influenced by a variety of what can be termed arational factors—including affect, emotion, habit, social pressure, bias, heuristics, and the like.⁶ As a consequence, even if a purely

rational calculation indicates that Choice A is optimal, the average person may still opt for Choice B.

Persuasion based on rational factors affects the factual inputs of a person's calculus. A purely rational persuader merely provides accurate information that supplements or changes the listener's initial factual understanding. To persuade a smoker to quit, for example, a rational persuader might say any of the following:

- "Smoking tobacco regularly increases your risk of lung cancer by 60 percent;"
- "City regulations now prohibit smoking in restaurants;"
- "I will not visit your home because it is a smoking household."⁷

Any of these statements might change the outcome of the listener's deliberative process, whether the listener is Mr. Spock or the average human.

Persuasion based on arational factors, in contrast, either distracts from, or renders irrelevant, the listener's reliance on reason in making a given decision. Arational persuasion is likely to be effective on the average person, but it would not impact the choices made by a purely rational actor like Mr. Spock. The following are examples of what might be considered arational persuasive appeals:

- **Emotional or Affect-Based Appeals:** Prominently displaying disturbing images of diseased lungs at the point of sale of tobacco products; bursting into tears when a friend lights a cigarette; discussing the risks of smoking at the funeral of a smoker's loved one.
- **Appeals Relying on Cognitive Biases:** Nudging (prominently displaying smoking-cessation tools at a pharmacy, while keeping cigarettes in a less-visible location); the availability heuristic (presenting salient or emotionally charged examples when persuading someone to quit smoking); optimism bias (suggesting that the listener will be more successful in her attempt to quit smoking than the average person); herd instinct ("Everyone else has quit smoking"); priming effects (asking a smoker to read an article that includes the words *cancer*, *death*, and *coughing* before engaging in a persuasive conversation).
- **Subliminal Messaging:** Using subtle or imperceptible stimuli to impact a person's decisions, such as flashing quick visual or auditory stimuli, or using priming effects.

These types of arational appeals have a few things in common. First, they may lead a listener to make a decision different than the one she would make under a purely rational calculus. Second, they do not rely on the listener's capacity for reasoned deliberation—that is, they may be effective even if they provide no new factual inputs into the listener's calculation.⁸ Finally, many are in some ways nonobvious—a listener who makes a decision based on arational persuasion may not know that the persuasive influence impacted her decision; indeed, she may not be aware of the influence at all.

THE AUTONOMY-BASED OBJECTION TO ARATIONAL PERSUASION

Rational persuasion is commonly considered ethically preferable to arational persuasion. However, the roots of the objection to arational persuasion can be difficult to decipher. Much like defining obscenity as "I know it when I see it" (*Jacobellis v Ohio* 1964, 197 (Stewart, J., concurring)), criticisms of arational persuasion tend to be unsatisfying precisely because they lack strong theoretic underpinnings. As First Amendment scholar

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” (Haiman 1958, 386).⁹

I argue that the fundamental ethical challenge to persuasion by arational means is grounded in principles of decisional autonomy. Under this view, arational appeals risk compromising autonomous decision making, and this risk is further exacerbated when the persuading party is a state actor committed to facilitating autonomous and democratic deliberation.

Most simply, autonomy can be defined as self-governance or self-choice. It is the capacity to make decisions that further one’s sense of self without undue interference. Autonomy is recognized as a nonconsequentialist good—autonomous decisions are valuable not necessarily because they reach the so-called right result, but because they are our own. There is no shortage of debate about the conditions necessary for autonomous decision making, but I consider four to be both comprehensive and relatively uncontroversial: identity, capacity, factual understanding, and voluntariness.

Identity requires having a sense of self and being able to establish self-affirming goals. The degree of identity required to satisfy this condition will depend on the decision in question—for example, even a person with complete amnesia (and therefore, no sense of identity in the colloquial sense) may be able to establish self-affirming preferences about what to eat for dinner. However, amnesia and some other psychiatric conditions (perhaps even addiction) will frequently affect one’s ability to set more substantial identity-affirming goals.

Capacity encompasses the cognitive ability to understand, interpret, and engage in reasoned deliberation. Capacity may be disrupted most substantially by physical injury to the brain, psychiatric disorder, or the influence of drugs or other intoxicants. Notably, this condition requires only *capacity* for rational deliberation, not necessarily its *exercise* with respect to any given decision. Thus, even a person influenced by arational factors like emotion may be able to act autonomously provided that her overall reasoning skills remain intact.

Factual understanding requires being able to see the world as it actually is, and having accurate information about the decision to be made. Thus, persons operating under the influence of deception or mistake of fact may not be able to make autonomous decisions. For example, if a person reaches for a bottle of stimulants, mistakenly thinking it is a bottle of sleeping pills, she has done so without complete autonomy. But as with issues of identity, the degree of factual understanding a person must have with respect to any given decision will vary depending on context.

The final requirement for autonomous action is voluntariness, defined as freedom from substantial controlling influences, whether external or internal, when deciding or acting.¹⁰ Of the four conditions of autonomous decision making, voluntariness is the one that most often intersects with the others, is most often misunderstood, and therefore is in need of greatest explanation. Notably, it is the condition of voluntariness that is most frequently impacted by arational persuasive appeals.

VOLUNTARINESS AND EXTERNAL INFLUENCE

Immanuel Kant, whose theories of autonomy continue to influence contemporary philosophers, emphasized that the exercise of what he calls “practical reason” must be done without reference to externalities or “alien influences” that cloud one’s judgment (Kant 2005, 130). Such alien influences include influences from third parties as well as

“incitements from desires and impulses” (ibid., 141). 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” (Mill 1863, 116).

Modern scholars share the notion that certain forms of influence can be autonomy-inhibiting. Tom Beauchamp and James Childress, for example, define autonomy as self-governance that is “free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice” (2008, 99).¹¹ Contemporary philosopher Thomas E. Hill, likewise, notes that autonomy requires “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” (1984, 256).

But clearly, not all forms of persuasive influence impact voluntariness in autonomy-inhibiting ways. A decision can be fully autonomous even if made by a person whose deliberations were influenced by third parties. Indeed, it would be impossible to make many decisions without taking into account external influences. The question, then, is when a persuasive appeal is so compelling that it effectively negates voluntariness.

Control: When External Influences Make It Impossible to Act in One's Own Interests

The most obvious type of external influence that negates autonomy by limiting voluntariness is one that makes it impossible or extremely difficult for a person to act in her own interests. Consider the use of force: If I am physically compelled by a third party to engage in an action, I am not acting voluntarily, because I am engaged in an action I do not intend, to further goals that are not my own, and under the influence of forces I cannot resist. Force is generally understood to negate voluntariness because those compelled to act by physical forces cannot act in any other way.

Likewise, most would argue that the use of threats, coercion, or extortion (“Your money or your life”) negates voluntariness. In such cases, an external influencer crafts the conditions of choice to limit the decision maker’s options, and the decision maker often has no reasonable choice but to engage in an act that does not further her interests.¹² Certainly, some individual decision makers may attempt to defy these threats, but because such attempts are rare, coercion is typically understood to be a voluntariness-negating influence.

The use of deception, which impacts factual understanding, may also negate voluntariness, though in a different way. Rather than changing the listener’s circumstances (as with threats or coercion), deception affects the inputs into her deliberation. For example, if an external influencer falsely convinces a decision maker that her preferences would be satisfied by Option 1 (and not Option 2), the reasonable decision maker will choose Option 1. Option 1 does not further her true interests, but it would be unreasonable for the average person to choose otherwise given the information available to her; thus, her ability to act in her own interests is substantially limited.

Finally, some types of arational appeals may impose similar constraints on the ability to act in accordance with one’s own interests. Emotional persuasion, to cite just one example, may cause a person to make a choice that does not ultimately further her true goals. While other options may still be available, a strong emotional influence may substantially increase the likelihood of choosing an outcome that fails to satisfy her higher-order preferences.¹³ Nudging, another type of arational persuasion, likewise directs a

decision maker to a preferred default option, albeit while leaving other options open and easily accessible.¹⁴

Because many decision makers faced with arational appeals will still retain legitimate identity-furthering options, only some influences will be so substantial as to limit voluntariness from the perspective of control. However, arational persuasive appeals may impact voluntariness in a second, and perhaps more insidious, way.

Conditions of Choice: When External Influences Make It Impossible to Choose on One's Own Terms

The second, and more subtle, situation where external influence might negate voluntariness is where persuasion impacts an actor's decision-making process in unavoidable and unconsented-to ways. Thus, while the decision maker is still able to choose to act in furtherance of her interests, she must do so while under the influence of unwanted information or suasion. As I will demonstrate below, arational persuasive appeals are far more likely than rational appeals to have this voluntariness-limiting effect on the conditions of choice. Two examples—one from the discipline of medical ethics and one from American constitutional law—are helpful in elucidating the manner in which unavoidable external influences can negatively impact autonomy.

Ethicists acknowledge that a person faced with a medical decision may, consistent with principles of autonomy, choose in the absence of full information, or even choose not to decide by delegating her decision making.¹⁵ This is known as the doctrine of *waiver*, where a patient “voluntarily relinquishes the right to an informed consent and relieves the physician of the obligation to obtain informed consent” (Beauchamp and Childress 2008, 131–32).¹⁶ Respecting patients' choices to avoid a decision, delegate a decision, or make a decision that is not fully informed, according to Alan Meisel and Mark Kuczewski, “respects their autonomy as much as providing information to patients who want it” (1996, 2525).¹⁷

This is because autonomous decision making has two components—most obviously, the substantive component about what decision a person actually makes (“What flavor ice cream will I have today?”), but also a secondary, procedural component about how that decision is made (“Should I ask the vendor what flavors are available today, or just guess? Should I consider that my partner, who may be sharing my ice cream, prefers chocolate? Should I consider whether the ice cream will stain my white shirt?”). One might refer to these as the primary decision (substantive) and the metadecision (procedural) (Meisel 1979). In order for a person to make an autonomous choice, she must have control over both steps in the decision-making process. Where an external influence controls or limits her substantive options (as in the cases described above), her primary decision cannot be said to be voluntary. Where an external influence limits the procedural conditions under which she must choose (as when unwanted information is forced upon her), her metadecision cannot be said to be voluntary.

A second illustrative example comes from American constitutional law. The *captive audience* doctrine permits the state, in limited circumstances, to protect unwilling listeners from messages communicated in ways that make them difficult or impossible to avoid, such as the sound of protesters outside an abortion clinic (*Hill v Colorado* 2000; *Madsen v Women's Health Center, Inc.* 1994); residential picketing (*Frisby v Schultz* 1988); or unavoidable audible intrusions into the home (*FCC v Pacifica Foundation* 1978; *Kovacs v Cooper* 1949). While the US Supreme Court has never recognized a broader right against compelled listening, the captive audience doctrine nevertheless recognizes that individuals have a privacy interest that may be “invaded in an essentially intolerable manner” by

some unwanted communicative intrusions (*Cohen v California* 1971, 21). While these impermissible intrusions are typically intrusions into a home, a physician's office, or other traditionally private spheres, at least one early Supreme Court case recognized that even some communications in public spaces may raise similar concerns.¹⁸ The captive audience doctrine, while based primarily on notions of privacy rather than autonomy, is thus similar to the waiver doctrine in informed consent. In both, there is a concern that exposure to unwanted and unavoidable messages will interfere with a person's private deliberations at a metadecisional level (arguably leading her to make a substantive decision that does not satisfy her interests).

Indeed, one could argue that persuasive influences that affect a listener's reasoning process, rather than limiting her reasonable choice of actions, violate autonomy in an especially pernicious way. Coercing someone to act against her will or otherwise limiting her liberty is surely problematic, but at least it preserves the person's ability to reason and evaluate autonomously. Thus, even though a state may be justified in banning something—cigarettes, for example—this authority does not necessarily (and should not automatically) include the authority to control the inputs for people's decision making about tobacco use.¹⁹ The US Supreme Court has recognized this point in the context of governmental regulation of speech, rejecting the "greater-includes-the-lesser" argument as "inconsistent with . . . logic" (*44 Liquormart, Inc. v Rhode Island* 1996, 511). Noting that restrictions on speech "may sometimes prove far more intrusive" than restrictions on conduct, the justices of the Court rejected "the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it" (*ibid.*). While the Court's reasoning was grounded partly in the fact that the US Constitution provides explicit protections for freedom of speech, the validity of its argument is not limited to nations with similar legal regimes. The drafters of the First Amendment to the Constitution believed that freedom of thought and the freedom to communicate without state interference or control were fundamental rights, and this moral sentiment is widely shared in most pluralistic societies.

For an example of how the distinction between influencing decision-making processes and influencing action might play out in practice, consider efforts by the state to promote dental health.²⁰ 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. By traditional accounts, forcing people to ingest fluoride without their consent for paternalistic reasons seems more ethically troubling. But apart from vocal minorities in some municipalities, there is limited widespread objection to fluoridation. 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.²¹

In both examples, the state intervention may be unknown to the vast majority of people; in both, people will improve their dental health 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 consciously consider the policy and oppose it without the intrusion of state messages into their deliberations. Hausman and Welch (2010, 131) conclude that influencing people to brush their teeth by way of a subliminal message "may be a greater threat to liberty, broadly conceived . . . because it threatens people's control over their own evaluations and deliberation and is so open to abuse." While subliminal advertising may 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 without her consent, and she would not be able to make a substantive decision without the intrusion of the government's message.

The Impact of Arational Persuasive Techniques

Arational persuasive appeals by their very nature are more likely than rational appeals to affect the conditions of choice in unavoidable ways. In changing the conditions of choice, arational appeals impact metadecisional voluntariness and, consequently, the ability of a decision maker to choose autonomously.

Consider emotional persuasion, for example. A persuader who causes a decision maker to enter an emotionally aroused state (whether the emotion is directly related to the decision at hand or not)²² may be impinging on her autonomy in a variety of ways. If the emotional disturbance is severe enough—for example, if it triggers a psychotic break or a severely depressed state—it may impinge on the actor's capacity or cognitive ability. More commonly, however, where the capacity for rational decision making remains intact, some forms of emotional persuasion are better understood as negating the condition of voluntariness by introducing unwanted inputs into the decision-making process.

As a wide body of research in communications and behavioral psychology has shown, emotionally triggering appeals—in particular, fear appeals and graphic images—have an unavoidable impact on a person's decision-making process (Feigenson and Park 2006; Poels and Dewitte 2006; Forgas 2003). While the precise mechanism by which emotional influences affect deliberation is unknown, the existence of the connection is clear. Researchers have demonstrated that emotional responses precede cognitive or rational responses, and that decisions affected by emotional or affective triggers are made intuitively and automatically, long before any reasoning or rationalization could occur (Zajonc 1980). Moreover, emotional appeals are often more effective than nonemotional appeals in triggering behavioral change (Blumenthal-Barby and Burroughs 2012; Lang and Yeghyan 2008), and decisions made on the basis of emotion or affect tend to be made with greater confidence (Zajonc 1980). This influence is exacerbated when the emotional influence is in the form of a graphic appeal, as messages conveyed through images capture attention and trigger emotional responses more quickly than textual or verbal messages (Tushnet 2012).²³ Because of the intrinsic connection between emotional influence and subsequent decision making, persuasive emotional appeals may cause a person to choose without full voluntariness at the metadecisional level.

Persuasive appeals like nudges that rely on listeners' cognitive biases may likewise negatively impact metadecisional voluntariness. Cognitive biases are systematic errors in human perception that lead people to make choices they might not support were they aware of these intrinsic flaws in reasoning (Thaler and Sunstein 2008). For example, a health-conscious customer at a lunch buffet might load her tray with fried chicken rather than steamed broccoli simply because the fried chicken is presented at the start of the buffet. Were she to think carefully about her decision, she would opt for broccoli, but the availability and visibility of the fried chicken effectively distracts her from thinking about the choice and whether it supports her interests. In much the same way natural choice architecture may influence decision making in ways that are unknowable and unavoidable, intentional external influences may do the same.

As another example, consider the impact of priming effects, a phenomenon where a person's exposure to one stimulus (i.e., an article using the words *cancer*, *death*, and *coughing*) subsequently influences her response to a second stimulus (i.e., an offer of a cigarette from a friend). Even though the person draws no conscious connection between the two stimuli, the first stimulus affects her subsequent choices. And because she is being

exposed to something that at the time of its presentation has no explicit connection to her future decisions, she has no reason to consider avoiding it. While her options when making a primary substantive decision are not limited in any way, she lacks the metadecisional opportunity to choose how she will make her primary decision.

In contrast, rational persuasive appeals are less likely to negate metadecisional voluntariness because they are typically easier to recognize and avoid. With respect to recognizability, rational appeals by their very nature tend to be obvious and direct. The purpose of rational persuasion is to trigger reasoned and conscious deliberation, and this purpose is not well served when the persuasive appeal is obscured from the decision maker. Where the existence of a persuasive appeal is obvious to the decision maker, she then has the affirmative option to exclude the appeal from her deliberations; no such opportunity is available to a decision maker faced with many arational appeals. With respect to avoidability, the methods by which rational appeals tend to be communicated may also make them easier to avoid as compared to arational appeals. A persuader making a rational appeal will often present facts and lines of argument, typically either verbally or in textual communication. Arational appeals, in contrast, often seek to persuade by altering the environment in which a person makes a decision, or providing visual or other stimuli that decision makers cannot avoid.

Tobacco labeling laws are a helpful example. While it is relatively easy to tune out and avoid reading the Surgeon General's written warning on a package of cigarettes, it would be much harder to avoid being influenced by graphic images depicting the negative health consequences of smoking (such as photographs of diseased lungs, cancerous oral lesions, and cadavers) that take up 50 percent or more of cigarette packaging (US Food and Drug Administration 2011). As explained below, a written appeal takes greater conscious effort to comprehend and thus is more easily avoidable than a graphic appeal.

Of course, there may be some rational appeals that similarly fail the avoidability test—such as factual information shouted loudly outside an abortion clinic (i.e., “A three-month-old fetus has fingerprints!”). Likewise, not all arational appeals are unavoidable—a textual description about living with lung cancer that uses dramatic and emotionally triggering words (i.e., *excruciating pain*, *disgusting hole in my throat*, or *violent, hacking coughs*), for example, may be easier to avoid than a billboard featuring only a dramatic and emotionally triggering image of a person with a tracheotomy. That said, arational persuasive appeals are on the whole more likely than most rational appeals to be unrecognizable and/or unavoidable, and therefore more likely to violate metadecisional voluntariness.

THE STATE AS EXTERNAL INFLUENCE

Ethical and practical concerns about arational appeals' impact on voluntariness are exacerbated when the state is the persuading party, because the state may bear unique ethical obligations to further citizens' autonomous deliberation in a way that private parties do not. Furthermore, government speech may be more likely than private speech to negatively impact voluntariness because it is characteristically more widespread and may be perceived as carrying greater weight.

Ethics of State Communications

In an ideal world where everyone strives for virtuous conduct, all persuaders would act in ways that optimally facilitate autonomous choice. But in the real world, there is generally no guarantee that persuaders will act in autonomy-furthering ways. Advertisements by

commercial companies, for example, are widely understood to be aimed at selling products rather than facilitating informed choices.

This is where the distinctive role of the state as persuasive speaker comes into play. Under political theories of deliberative democracy, the state has unique obligations not shared by private parties to create the conditions possible for democratic debate and deliberation. These include respecting citizens' autonomy, facilitating voluntary and informed decision making, and avoiding certain kinds of autonomy-inhibiting communications.

Noted scholars from Kant to Habermas share the conviction that some forms of persuasive state speech risk violating the norms of democratic discourse. According to political theorist Nathaniel Klemp, for example, political manipulation (which he defines as the state's use of hidden or irrational force) "erodes the epistemic quality of political debate" and "threatens the ideal of democracy as rule of the people" by creating "conditions of choice that distort sound decision-making and erode the democratic ideal of popular sovereignty" (2010, 76-77). Philosophers Daniel Hausman and Brynn Welch likewise argue that arational nudges by the government "may be inconsistent with the respect toward citizens that a representative government ought to show" (2010, 134). Theories of deliberative democracy also impose some substantive limitations on the types of reasoning that state speakers may offer in support of their positions in a pluralistic society—namely, that state arguments ought to be based on public reason (arguments that everyone in a community could accept as valid) rather than private reasons (values or beliefs shared by only a subset of the community) (Rawls 1997a, 1997b).

In defining problematic types of political persuasion, many scholars focus specifically on the emotional nature of certain public appeals (Halfmann and Young 2010; Haiman 1958). It is precisely because deliberative democracy, by its very nature, ought to be reason based that emotional appeals by politicians "ha[ve] corrosive effects on the deliberative process" (Klemp 2010, 67).²⁴ Indeed, even the most prominent supporters of the state's use of emotional persuasion caution that this technique can be problematic. Aristotle, for example, recognized the importance of arational persuasion but understood that many forms of what might be called "undemocratic manipulation" can lead to tyranny (Ball 2010, 46). Reflecting on Aristotle's concerns, Terence Ball comments that "perhaps the greatest and most dangerous disadvantage of democracy is that such citizens are alternately agitated, pandered to, flattered, and fooled by demagogues who play to their hopes, their prejudices, and - most especially - their fears" (*ibid.*, 54).

These obligations of ethical conduct may serve to distinguish communications by state actors in deliberative democracies from communications by private citizens or corporations. This is not to say that, under some theories of communications, private parties may also be bound by ethical obligations to avoid autonomy-inhibiting persuasion.²⁵ But to the extent that political theories of deliberative democracy require a foundation of rational deliberation and debate among interested parties, there is firmer doctrinal ground for considering the ethics of state communications.²⁶

Characteristics of State Speech

A second factor that calls into question the ethical propriety of some forms of state persuasion is that state speech has a much greater practical likelihood of negating voluntariness due to its power and its scope. In politics, of course, there are very few instances of political persuasion that make it truly impossible for a person to act in her own interests (as by the use of force). However, political speech has the potential to negate voluntariness in the second, more subtle way, discussed above—by interfering in unwanted and unavoidable ways in citizens' decision-making processes. Legal scholar David Strauss,

for example, describes the autonomy-based 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 (1991, 354).

Thus, some forms of political persuasion or legal regulation may threaten to be so powerful that they effectively substitute the judgment of a single entity in power for the judgment of the democratic body (Klemp 2010; Greenspan 2003). This power arises in part because government communications may, in many cases, be harder to avoid than private speech. The government, unlike a private speaker, directs its speech to the whole citizenry, and does so with the express goal of influencing the public’s decisions and behavior. If the power and expanse of the government means that its messages are in effect unavoidable, then those messages inevitably intrude into personal decision making at the metadecisional level.

The context of informed consent abortion laws in the United States provides one concrete example of this. In many states, physicians are required by law to provide women seeking abortions with state-mandated materials about the risks of abortion, which often include color images of the fetus at various stages of development. Yet other states have adopted ultrasound *display-and-describe* laws, which require that a physician obtaining a woman’s informed consent to abortion first perform an ultrasound, display the image of the fetus to the patient, and verbally describe the image to the patient, even if she does not wish to receive this information (La. Rev. Stat Ann § 40:1061.10(D); NC.Gen Stat § 90-21.85, permanently enjoined by *Stuart v Camnitz* 2014; Okla Stat tit 63 § 1-738.3d, found unconstitutional by *Nova Health Systems v Pruitt* 2012; Tex Health & Safety Code Ann § 171.012(a)(4) and (5), upheld on motion for preliminary injunction by *Texas Medical Providers Performing Abortion Services v Lakey* 2012; Wisc Stat Ann § 253.10(3g)). These communications are experienced in the privacy of the physician’s office, a location women seeking abortions cannot avoid. In this way, the state’s power to enact legislation can implicate its greater power to compel exposure to unwanted and unavoidable messages.

A second concern is that people’s expectations of the government’s speech may lead listeners to give government speech more credence or attention than it deserves. A recommendation from an official authority, for example, is likely to carry more power than a recommendation from a private individual—perhaps due to expectations that the state has more accurate information, that it relies on expertise unavailable to the general public, or that it will in fact conduct itself in autonomy-furthering ways.

JUSTIFYING STATE ARATIONAL PERSUASION

In the section above, I concluded that arational persuasive appeals by the state are more likely than rational appeals to affect metadecisional voluntariness and violate decisional autonomy. Here, I demonstrate that while a commitment to the deontological value of autonomous decision making requires a cautious approach to arational persuasion, it does not bar the practice entirely. First, not all forms of arational persuasion actually hinder metadecisional voluntariness—for example, when arational triggers are merely used to draw attention, but leave a person’s capacity for subsequent autonomous decision making unimpaired. Second, if a person is hindered from acting in her own interests due to internal cognitive constraints, the state may be ethically justified in enhancing her decisional autonomy by intervening in ways that would be consistent with her autonomous preferences. Understanding these two conditions helps maintain a commitment to

principles of autonomous decision making while still setting reasonable guidelines as to when the state's use of arational persuasion might be justified.

TRIGGERING AUTONOMOUS DECISION MAKING

Arational state persuasion may promote decisional autonomy in cases where it is necessary to trigger autonomous and reasoned decision making that would not otherwise occur. Arational state appeals are often justified as a means of increasing public engagement; indeed, such appeals are valuable tools for those who govern a public that has shown itself to be nonresponsive to the neutral presentation of facts. Thus, one might argue, as long as citizens' ultimate deliberations are autonomous, arational appeals may be justifiable when they inspire a listener to engage thoughtfully with an issue she is likely to be faced with in the future, or are necessary to make salient information the listener needs to make a fully autonomous choice.

An example of the first—an arational appeal that inspires a person to engage thoughtfully with an issue she is likely to face—might be a highly emotional and dramatic “This is your brain on drugs” antidrug video aimed at junior high school students. By relying on emotional images rather than factual information, it takes advantage of arational factors to persuade. However, such a campaign might ultimately be autonomy-enhancing because, while these students may not yet have been exposed to drug use, the campaign may draw their attention to the issue and cause them to think preemptively about how they would respond if they were faced with peer pressure to use drugs. Later, when faced with such pressure, a student might be able to act with greater autonomy by resisting peer influences. While the immediate impact of such an appeal may be arational, it may cause a person to engage with the issue and give it careful thought in a way that a bland and purely rational appeal would not.²⁷

An example of the second—an arational appeal that provides salient information helpful to making an autonomous decision—might be an antismoking advertisement featuring an emotionally upsetting video of a person with a tracheotomy.²⁸ While the viewer may be generally aware of the link between smoking and cancer, she may not understand the physical consequences and quality of life issues surrounding treatment for cancer of the larynx. By making these consequences more salient through a graphic appeal, this type of arational trigger may communicate information that a fact-based rational appeal cannot. The viewer, provided with this new information, may then be able to make a more informed decision about whether to stop smoking.²⁹ Thus, an arational trigger that leaves undisturbed the person's ability to reason autonomously and make informed decisions in the future might be a permissible form of persuasion.

CORRECTING FOR INTERNAL AND EXTERNAL CONSTRAINTS

In some instances, arational persuasion may be autonomy-enhancing if it can override the effects of internal or external hindrances to voluntary decision making. A classic example is the nudge model advocated by some behavioral economists, which recognizes that a variety of cognitive biases often prevent individuals from making the choices that they would make under ideal conditions of reason. Supporters of nudge suggest that policy makers and other decision architects are 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 (Thaler and Sunstein 2008).

The appeal of this approach, according to advocates, is that the individual being persuaded can have no objection to its outcome. Consider a rational actor, who would choose to fill three-quarters of his plate with vegetables rather than fried chicken; often,

cognitive tricks like attentional bias, choice-supportive bias, and selective perception will 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 healthier options at the head of the line (Thaler and Sunstein 2008). There would also likely be little controversy if the cafeteria featured posters with attractive images of vegetables and inspirational messages of health. Thus, perhaps one way of distinguishing between permissible and impermissible state arational appeals is to consider whether those appeals correct for internal errors that impact voluntariness and lead the listener to reach a conclusion that he, upon rational and autonomous consideration, would support.

SETTING REASONABLE LIMITATIONS

These proposals are not, however, without problems. Appeals that use arational means to trigger attention, make needed information salient, or correct for internal constraints, still run the risk of inhibiting metadecisional voluntariness. Moreover, defending state arational persuasion on the grounds that it fosters decisions people would make under autonomous conditions is problematic because it violates the deontological commitment we began with. A person who makes the so-called right decision as a result of voluntariness-inhibiting influences (even if we define the *right decision* as the one she would have made had she been acting autonomously) is not acting freely. While the state may certainly have legitimate utilitarian reasons for taking this approach, defending arational persuasion on this basis effectively negates the autonomy argument altogether.

However, there are two ways to effectively negotiate around these problems. First, it may be possible to distinguish between appeals that significantly impact metadecisional voluntariness, and those that are less sticky and therefore more ethically justifiable. Secondly, one might distinguish between situations where arational appeals are truly necessary to eliminate or negate a decision maker's internal constraints, and those where such appeals are used simply because they are more convenient than relying on rational persuasion. In exploring these limitations, I will be relying on examples of persuasive state appeals in the medical and public health contexts, including laws requiring graphic tobacco labeling, food labeling, and informed consent to abortion.

Ensuring Metadecisional Voluntariness

If people have a right to choose whether or not to make a decision at all, as well as the right to choose what factors they take into consideration when making a decision, then introducing unwanted arational triggers or relying on arational techniques to correct for internal hindrances may interfere with this right. However, while people have a right to choose to avoid decision making altogether, some decisions simply cannot be avoided, particularly in medical and public health contexts. Thus, there can be no legitimate claim of waiver in such situations. For example, it is almost inevitable that a teenager will someday be faced with peer pressure to do drugs; and at that time, she will have to choose a course of action. Similarly, a person choosing foods in a supermarket or cafeteria line cannot avoid a decision unless she chooses not to eat. In such cases, a person cannot oppose arational persuasion on the grounds that it is prompting her to think about a decision she has chosen not to make (or to avoid).

Even in cases where a person will be called upon at some point to make a decision, the introduction of persuasive influences may not always negate the voluntariness of a person's choice. For an external influence to negate metadecisional voluntariness, it needs to

be both unwanted and unavoidable—either because it is so prominent that the person has no choice but to internalize it (as with a graphic billboard directly in her line of sight), or because it is presented in a hidden way unlinked to the decision and so does not offer a person the opportunity to consciously avoid it (as with choice architecture). But as some appeals may be more easily avoided than others, a person who has an opportunity to exclude an arational influence from her decision making may still be able to maintain voluntariness at the metadecisional level. Three characteristics are particularly relevant to this inquiry.

First, there are distinctions in terms of avoidability depending on the format in which the persuasive appeal is presented—whether it is graphic or textual, whether it is large or small, whether the person must face it directly or whether they have the opportunity to turn away. As noted above, images are more quickly internalized than words, and have an almost instantaneous effect on reasoning and decision making. In contrast, even the most emotionally stirring textual description is more easily avoidable than the same message presented in visual or audio form. For example, surely the state may require that food packaging include nutritional information, or 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,³⁰ and a borrower is free to sign loan documents without reading them. 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. This opportunity is not, however, available in the contexts of graphic tobacco labeling and preabortion ultrasound requirements. As a matter of course, it is much easier to avoid reading words and subsequently understand their meaning than to avoid looking at an image, even briefly, and internalizing it. Supporters of tobacco and ultrasound laws may 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 when her physician is describing the ultrasound. But these suggestions are unrealistic. When a color image composes 50 percent 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 must effectively shut her eyes and stop her ears.

A second consideration impacting voluntariness and avoidability is whether the persuasive motives of an appeal are obvious or hidden. A smoker buying a pack of cigarettes is consciously aware that the images on the box are state-sponsored messages intended to dissuade her from smoking. Because she is aware that this is a persuasive appeal, she can perhaps make a choice to avoid it. In contrast, a regulation that requires stores to prominently display smoking-cessation tools at the checkout counter while hiding cigarettes at the back of the store is a persuasive tactic that many consumers simply will not notice or will not recognize as an active persuasive appeal; thus, consumers will have no opportunity to make a choice to avoid it. A similar argument can be made regarding subliminal messages and priming effects, which are not only unavoidable, but unrecognizable—an individual who would prefer not to take the state's perspective into account does not have the opportunity to make this choice when the state message is being presented at a subconscious level.

A final consideration that may be relevant to a persuasive appeal's impact on metadecisional voluntariness is its timing. Concerns about the autonomy-inhibiting effects of certain arational appeals may be exacerbated when the persuasive appeals are made immediately at the point of decision making. The stickiness of some emotional and graphic appeals, for example, is likely to be greatest immediately after the appeal is presented but may fade over time—either because the person's recollection of the appeal diminishes or because she becomes more able to consciously exclude it from her future

decision making. For example, presenting an unnecessary ultrasound image to a woman seeking an abortion at the moment that she is consenting to the procedure is likely to be more autonomy-inhibiting than presenting this image earlier in her decision-making process.

If these arguments are compelling, arational appeals may be justifiable as autonomy-enhancing (or at least not autonomy-inhibiting) in situations where (1) they are used to trigger attention or provide salient information for a decision that the person must make, and (2) they are provided in forms that are to some degree avoidable—for example, if they are textual rather than graphic, obvious as to their persuasive intent, and presented at an early point in the decision-making process. The more these avoidability conditions are satisfied, the more likely the nudge or arational appeal is to be ethically justifiable.

Thus, a state using arational appeals for the purpose of triggering autonomous decision making would be well advised to consider options that pose less of a threat to metadecisional voluntariness. It should aim to present its arational appeals using formats that a decision maker can avoid internalizing if she so chooses—for example, using emotionally charged textual descriptions rather than emotionally charged graphic images; presenting decision makers with brochures rather than billboards; or using other formats that a viewer can avoid. States should also seek to put decision makers on notice when they are making persuasive appeals—essentially providing a warning to the effect of, “We are going to try to convince you of something; if you do not want to be convinced, you can decline.” This suggestion, notably, calls into question the merits of nudging by choice architecture, where a decision maker is placed in a situation where she is not aware that the state is intending to shape her opinions.³¹ Finally, states should aim to present their arational appeals in advance of the time the decision maker will be called upon to choose rather than immediately at the point of choice, where there is less of an opportunity to disengage with the state’s message.

Returning to some of the examples above, a state wishing to use arational persuasive appeals to persuade citizens to eat healthy foods, avoid tobacco, or choose childbirth over abortion would thus be more justified in approaching these issues by way of general public education campaigns rather than directed appeals at the point of sale (for tobacco and food products) or during a doctor’s appointment (for abortion). Such appeals would be preferable in terms of timing and in terms of obviousness, which might then give the state some leeway in terms of format. Graphic billboards or advertisements about the risks of smoking, obesity, and abortion, however, would still likely be problematic. Despite being general education campaigns, these types of appeals may be unavoidable, presented to viewers without warning, and internalized quickly even by viewers who turn away.

Remedying Conditions of Constraint

The second justification for arational state appeals is that they may be necessary to allow a person whose autonomy is otherwise compromised to make a substantive decision that comports with her own true interests. If the state is unable to remove constraints to a person’s voluntary decision making, then perhaps it may be justified in taking advantage of these constraints (like cognitive errors, for example) in order to achieve an outcome that the autonomous actor would support. Under such an approach, however, any kind of appeal would be justifiable if it led to the right ends; and surely, there are some techniques an ethical persuader may not use. If the legitimacy of the state’s persuasive appeal depends on whether its outcome is consistent with the decision that would be made under autonomous conditions, then we have not come much further than judging persuasive appeals based on substantive approval or disapproval of the underlying goal.

There is, however, a way to defend against this objection without abandoning the non-consequentialist commitment to autonomy. When choosing between an autonomy-enhancing persuasive appeal and one that causes a person to make a nonautonomous decision that nevertheless satisfies her interests (and that she would approve of after the fact), the supporter of autonomy would surely choose the first. But there may be some cases where the persuader has no such choice. For example, a person's cognitive biases might be so ingrained that debiasing is impossible; or a person might be hindered by constraints that a persuading party cannot remove using rational appeals. A classic example would be the man standing on the edge of a bridge, attempting suicide. Most would agree that an observer would be justified in using force or trickery to stop the man from jumping—the presumption being that no fully autonomous actor would choose suicide, that intervention is necessary to prevent a harm that the man cannot understand due to his mental illness, and that no amount of rational persuasion will convince him that he is acting against his own interests. By rescuing the man against his will and offering him the opportunity for treatment and counseling, he can be restored to his autonomous and voluntary state, in which he (presumably) would agree that suicide would have been a mistake.

Might we use this example as an analogy? For example, would it be permissible to use graphic tobacco labels to persuade a smoker at the point of sale to put down a pack of cigarettes on the grounds that he is operating under the influence of addiction, and that no amount of rational reasoning will convince him to quit, even though quitting is in his self-defined interests?³² Perhaps, but only if we determine that the three conditions necessary to justify the suicide intervention are present here. First, the state actor must be reasonably sure that the subject is not in a position to make a fully autonomous decision, whether due to internal or external constraints (in the case of the suicide attempt, mental illness). Second, he must be reasonably sure that there is no way to remove these constraints and restore the actor's autonomy through rational persuasion (because it is difficult to reason with a person attempting suicide). Finally, the method the state uses, even if arational and autonomy-inhibiting in the moment, must be designed to be autonomy-restoring in the long run in a way the decision maker would ultimately approve of (by ensuring that he will be provided with mental health treatment to address his suicidal ideation, for example).

How easy or difficult it will be to satisfy these conditions in public health contexts will vary. While it is relatively easy to conclude that most people attempting suicide are acting under the influence of factors that render their decision not fully voluntary, it is much more difficult to conclude that a person making choices that have a less severe impact on his health or safety—eating fried chicken rather than broccoli, for example—is doing so without full voluntariness. And the fact that humans necessarily operate with bounded rationality and frequently act under the influences of cognitive biases is likely not enough, on its own, to negate voluntariness for these purposes. If we treated every decision made as a result of natural cognitive errors as nonautonomous, then the state could potentially intervene in an extraordinary number of contexts.

Furthermore, there are many contexts where rational persuasion could serve to debias an actor or otherwise free him from internal or external constraints. Providing nutrition information on a food label or in a cafeteria, for example, may help diners think carefully about the choices they are making rather than reflexively reaching for the most accessible food option. A woman pressured by her partner to have an abortion may be able to make a more autonomous decision if she is provided with information about counseling and safe houses for victims of domestic violence. However, the degree of effort needed to restore an actor's voluntariness by way of rational persuasion is surely also relevant—how

hard must we try to persuade the actor through rational means before we decide that these means are ineffective? How this question is answered will have a significant impact on when and how frequently arational persuasion may be justified.

Finally, unlike the case of saving a person attempting suicide in order to provide him with mental health treatment, not every state attempt at arational persuasion in health contexts is ultimately aimed at restoring autonomous decision making. Viewing graphic tobacco images does not cure addiction; nor do emotionally compelling ultrasound images restore voluntary decision making for a woman coerced into abortion. Presenting broccoli at the head of the cafeteria line does nothing to cure cognitive bias; in fact, it takes advantage of it. Moreover, there is no guarantee that the state's prediction about what the autonomous actor would have wanted will be correct.

Thus, while it may be challenging for the state to claim that arational persuasive appeals are necessary to correct for existing constraints on decisional autonomy, it is theoretically possible. To justify its position, the state must be able to demonstrate that the subject's autonomy is significantly compromised due to internal or external constraints; that there is no efficient way to eliminate these constraints through rational persuasion; and that its methods are aimed at restoring the subject's autonomy in the long term.

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. I conclude that the exercise of decisional autonomy demands freedom from external influences that impede voluntary decision making, and that arational persuasive techniques, particularly when used by state actors, threaten to violate this requirement because they typically affect peoples' thought processes in nonobvious or unavoidable ways.

Imposing an absolute prohibition on the state's use of arational appeals, however, is unwise for a variety of reasons—particularly because such appeals may, in some cases, be necessary to facilitate autonomous decision making. I conclude that there are two limited contexts in which the state can legitimately claim authority to persuade citizens using arational means. First, arational persuasive appeals may be autonomy-enhancing in situations where they are used to trigger attention or provide information for a decision that the person has no choice but to make, and they are provided in forms that are to some degree avoidable—for example, if they are textual rather than graphic, obvious as to their persuasive intent, and presented at an early point in the decision-making process. Second, such appeals may be autonomy-enhancing when they allow a person whose autonomy is otherwise compromised to make a substantive decision that comports with what her true interests would be were she acting autonomously. However, this is likely to be the case in only limited situations—where the state actor can be sure that the subject of persuasion is not in a position to make a fully voluntary and autonomous decision; where there is no way to effectively remove these constraints through rational persuasion; and where the persuasive methods used, even if arational and autonomy-inhibiting in the moment, are designed to be autonomy-restoring in the long run.

These limitations are both ethically sound and practically feasible. They recognize theories of metadecisional voluntariness that protect an individual's right to make choices on her own grounds; acknowledge the fact that arational state appeals are more likely than other forms of persuasion to impact metadecisional voluntariness; and yet acknowledge that, in some cases, such techniques may facilitate autonomous decision making.

The proposal set forth in this article, it should be emphasized, is based on nonconsequentialist ethical theories 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 deontological theorists. This article does not propose that states abandon concerns about the practical outcomes of their policy decisions—indeed, arational appeals may be justified in a variety of contexts where their autonomy-limiting effects are minimal and the public benefit is great.³³ Rather, this article cautions that when states rely on persuasive messaging to achieve policy goals without considering the methods by which they seek to persuade, important ethical considerations are lost. Identifying nonconsequentialist limitations on persuasive government speech, therefore, is an important step in encouraging policy makers to be more thoughtful when considering how to communicate the state's messages to the public.

NOTES

1. A “nudge,” as described by Thaler and Sunstein, is an alteration of choice architecture in such a way that predictably leads people to make decisions that maximize well-being. A nudge is paternalistic in that it encourages decisions that further the chooser's best interests (which, conveniently, in the examples they provide, also seem to further public interests as a whole). However, it is also libertarian, in that a nudge does not constrain peoples' options—people can effectively opt out of the nudged option without much cost or effort.
2. This choice of language is arguably controversial. For example, in discussing persuasion, Ruth Faden and Tom Beauchamp (1986) refer to it as a purely rational appeal, distinct in kind from what they term manipulation and coercion.
3. 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. Compare my approach with that of Faden and Beauchamp, who refer to persuasion as an “intentional and successful attempt” (1986, 261, 347).
4. To cite just one example, presenting facts in support of a position without presenting corresponding facts supporting the opposite position—such as providing information about the harms of smoking without acknowledging the pleasure many people gain from smoking—clearly falls on the side of rational appeal. However, even such a rational appeal may be autonomy-hindering inasmuch as its persuasiveness depends on the omission of relevant facts. This article, however, focuses primarily on the impact of arational (rather than rational) influences on decision making.
5. Note that this differs from a purely utilitarian calculation, because even a completely rational decision maker may take into account nonconsequentialist moral values.
6. Indeed, neurological research demonstrates that people whose brains are unable to process emotional and affective signals have significantly impaired decision-making capacity (see Bechara 2004; Bechara, Damasio, and Damasio 2000).
7. I offer this statement as an example of rational persuasion, although it may operate somewhat differently from the other factual statements. Like what some might colloquially term coercion or manipulation, this appeal is not purely informational—rather, it fundamentally changes the external circumstances under which the actor makes her decision (akin to “If you do not give me your wallet, I will shoot you.”). However, the information about this change in circumstances also constitutes a new factual input that a rational actor would consider. Note, however, that there may also be emotional influences in this situation—sadness, for example—that would affect an actor's decision making in arational ways.
8. Consider an image of a cancerous lung on cigarette packaging. This image may be effective in changing an actor's behavior both because it triggers disgust at a subconscious level and because it provides new factual input into his rational deliberation (for example, if he did not know there was a link between smoking and lung cancer). However, the arational aspects of the appeal may be so compelling that the actor might change his behavior even if he is rationally unaffected by the factual input (for example, if he already knows about the link between smoking and cancer).

9. Likewise, in the specific 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" (2012, 192).
10. Voluntariness incorporates not only voluntary decision making, but also intentionality of action—that is, one's engagement in an intended physical act (as opposed to action as a result of seizure, spasm, or physical force).
11. Beauchamp and Childress also define an autonomous person as "one who has the capacity to reflectively accept, identify with, or repudiate a lower order desire independently of others' manipulation of that desire" (2008, 100).
12. However, voluntariness is not thwarted merely because a decision maker is offered only one reasonable alternative. The nature of the proffered alternatives, and the fact that they are limited to non-identity-furthering options, is just as important. For further discussion of this point, see Wertheimer and Miller (2008) and Millum (2014).
13. Whether an arational appeal actually negates voluntariness in any given case, however, depends very much on the characteristics of the decision maker. For example, some actors may be unusually sensitive to emotional influences, while others may be able to easily ignore such appeals.
14. That said, the types of nudges envisioned by Thaler and Sunstein typically do not implicate the control element of voluntariness because they are aimed at furthering the decision maker's interests rather than the interests of others. Thaler and Sunstein describe nudging as a form of "libertarian paternalism," with the paternalistic element tied to the goal of "steer[ing] people's choices in directions that will improve their lives . . . as judged by themselves" (2008, 5).
15. Alan Meisel refers to these two options as "waiver of information" and "waiver of decision" (1979, 453n.133).
16. The doctrine of waiver of informed consent is also recognized in American common law (see *Stuart v Loomis* 2014; *Cobbs v Grant* 1972).
17. See also Berg et al. (2001, 88), noting that compelling patients to receive unwanted information or make unwanted decisions "is a denial of the right to self-determination." While there are certainly concerns that allowing patients to waive their decision-making authority may leave them more vulnerable to abuse of trust by physicians and family members (Beauchamp and Childress 2008), this is a pragmatic concern rather than a philosophical one.
18. In a case comparing regulations of billboards with newspaper advertisements, the US Supreme Court noted that public forms of advertising (as opposed to print advertisements) "are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part . . . [T]he message of the billboard [is] thrust upon [people] by all the arts and devices that skill can produce," whereas "[i]n the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement" (*Packer Corporation v Utah* 1932, 110).
19. This is not to say that all influences on a person's reasoning process will necessarily be more autonomy-infringing than limitations on action. This discussion is merely intended to emphasize that some persuasive appeals by the state may have a significant impact on autonomous decision making, and so their ethical justifiability ought to be evaluated just as carefully as state limitations on action.
20. This example was inspired by Hausman and Welch (2010).
21. Public concern about subliminal messaging (whether by the state or by private parties) is widespread and often reflected in popular media and film (Mlodinow 2012). Subliminal messaging has also been roundly criticized as a matter of American law (see *Waller v Osbourne* 1991; *American Home Products Corporation v Johnson & Johnson* 1978; Federal Communications Commission 1974).
22. For example, in an attempt to discourage a person from buying cigarettes by using disgust, one might post an image of diseased lungs (related to the decision), or one might post an image of excrement (unrelated to the decision). The first, but not the second, might serve to make salient information relevant to the person's decision.
23. Indeed, when the US Food and Drug Administration (FDA) adopted regulations requiring the display of graphic images depicting the negative health consequences of smoking, it did so precisely because of their emotional impact, citing evidence that "messages that arouse emotional reactions" are more likely to trigger behavioral changes (US Food and Drug Administration 2011, 36,635). After a variety of public objections and constitutional challenges, the FDA announced that it will not implement the regulations as drafted (Office of Attorney General Letter to John Boehner 2013).

24. One reason for this concern may be that emotional appeals are more likely to call upon private, rather than public, reasoning. Not every member of society will share the same response to an emotional appeal; for example, an ultrasound image may have a very different effect on a deeply religious person who believes life begins at conception as compared to a pro-choice advocate whose pregnancy threatens her own health (Sawicki 2014).
25. Some may caution that drawing a distinction between persuasion by public entities and private entities would justify the use of unethical communications by commercial actors (consider deceptive tobacco advertising in the mid-twentieth century). In a world where corporations often have just as much power as state actors, critics argue, it is dangerous to suggest that private actors have greater leeway in communicating with consumers. This is a valid objection, but I 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 the ethics of public communications differ from the ethics of private communications; this would require a much more thorough inquiry not necessary for this article's analysis.
26. The ethical obligations associated with actors in a democratic state, it should be noted, exist regardless of whether those obligations are in fact satisfied. Thus, while some might argue that the American public no longer expects the state to be neutral and rational in its communications, this does not negate the existence of underlying ethical constraints.
27. Note, however, that this example might not ultimately be justifiable if it fails the avoidability conditions described herein. Moreover, this example is somewhat unique in that the persuasive appeal is targeted at teenagers, who arguably lack full autonomy and therefore may justifiably be treated in a paternalistic manner.
28. For an example, see Centers for Disease Control and Prevention (2012a, 2012b).
29. Again, however, this example may not ultimately be justifiable if it fails the avoidability conditions described herein.
30. That said, many countries are experimenting with the use of simplified front-of-pack graphic approaches to nutritional labeling, which might implicate some of the same concerns highlighted about other graphic appeals (Scrinis and Parker 2016).
31. A great deal of literature on nudging and choice architecture asks whether there is an ethically relevant difference between natural choice architecture not guided by specific policy goals, and choice architecture developed by state persuaders with the intent of achieving a certain outcome. I suggest that there is. A decision maker who wishes to craft the conditions under which she makes her decisions will likely have greater reasons to be skeptical of choice architects aimed at persuading her in a particular direction as compared to natural choice architecture that is not explicitly aimed at achieving specific goals. For an excellent discussion of the limitations of choice architects and why their goals might be suspect, see Lodge and Wegrich (2016).
32. According to a recent poll, 88 percent of current smokers say they wish they had never started smoking (Jones and Saad 2012).
33. One example might be the state's use of artistic expression to support widely accepted public values—for example, using art or music to promote solidarity in times of crisis. Such techniques can obviously be abused (consider the Nazi Propaganda Ministry's promotion of artistic and literary work supporting Hitler's regime), and preventing their abuse requires an understanding of both their consequentialist and autonomy-based limitations. Thanks to an anonymous commenter for prompting me to consider this issue further.

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