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Thinking Clearly About Speaking Freely – Part 1

by

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“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.” John Milton

“I disapprove of what you say, but I will defend to your death your right to say it.” Voltaire

“For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.” Thomas Jefferson

“If all of mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.” John Stuart Mill

“The ultimate good desired is ultimately reached by the free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition in the market.” Oliver Wendell Holmes

“Everyone is in favor of free speech. But some people’s idea of it is that they are free to say what they like but if anyone else says anything back, that is an outrage.” Winston Churchill

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“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.” Anthony Kennedy

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Of course, the quotations above, from a diverse group of thinkers with differing philosophical and political dispositions, and spanning the last half millennium, constitute just a small sampling of those that could be recited advocating what once were understood to be the classical liberal values of freedom of speech and freedom of conscience. That’s “liberal” with a small “l” in the Enlightenment sense, a usage that now nearly has lost its meaning and faded into distant memory.

But the loss is much more than the passing of a word’s earlier linguistic meaning. It’s the loss of understanding of the foundational role played by free speech and freedom of conscience in maintaining a free society in which individual liberty prevails.

Or put this way, it’s the curtailment of our liberty to think and speak freely and to trust, as Justice Holmes put it, in the “free trade in ideas” to promote the public good.

The reality is that, today, the public space in which citizens may speak freely about matters of public policy, including matters of conscience, is shrinking, in large part due to actions subsumed under what we have come to call the Cancel Culture. And the further reality is that often the basis for actions that “cancel” speech is a claim that the verboten speech is “harmful” or “hurtful” in some way, or that it constitutes “misinformation” or “disinformation.” I don’t need to recite familiar examples here.

I understand, of course, that there certainly is speech, even though lawful, that is “harmful” or “hurtful” in one way or another, or that, in fact, may constitute “misinformation” or “disinformation.” But I also understand that, to a significant extent, whether or not lawful speech is properly characterized as such frequently depends on one’s perspective.

All this said, the space in which ideas that ought to be contestable and publicly debated – tested in the marketplace of ideas – is shrinking due to overly expansive, often politically-driven interpretations and applications of these terms. And this shrinking of the public space in which citizens may speak freely constitutes a threat to America’s ability to sustain a healthy democracy.

Now I also understand, of course, that the First Amendment protects against government censorship, not censorship by private entities, such as those giant websites – Google’s YouTube, Facebook, Twitter, and others – that we have come to call Big Tech. That’s why I have often defended, as a matter of existing First Amendment jurisprudence, Twitter’s right to post or not post, or flag or not flag, content on its platform – even when I disagree with its actions.

But this does not mean that we shouldn’t have any concerns about private censorship, or its impact. And it does not mean that any actions that have the effect of changing the incentives,

financial or otherwise, of the Big Tech websites to cancel speech so freely – and thus diminish the space in which today’s Digital Age citizens may speak freely – necessarily infringe on the platforms’ First Amendment rights, although some actions might.

We should be concerned because, as the Supreme Court recognized in 2017 in [Packingham v. North Carolina](#), “social media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’” Indeed, Jack Dorsey, Twitter’s Chief Executive Officer, has referred in [congressional testimony](#) to Twitter as a “public square” and “a global town square” in the context of emphasizing the importance of “free and open exchange” on the site.

Over the past several months, as I have begun, along with many others, to worry more about the impact of the Cancel Culture, I have started to think more seriously about potential changes in law and policy. Most recently, I addressed this subject in response to Justice Clarence Thomas’s April 5 concurring opinion in [Biden v. Knight First Amendment Institute of Columbia University](#). And last year, along with Seth Cooper, my Free State Foundation colleague, I addressed in [comments](#) and [reply comments](#) filed with the FCC legal questions relating to the immunity from liability accorded online platforms under Section 230 of the Communications Act.

So, I have labeled this post “Part 1” in anticipation of continuing to think and speak on the subject, including the possibility of suggesting adoption of remedial measures.

For now, I want to conclude this way. If you still subscribe to the classical liberal view that a free society is grounded in the “free trade of ideas,” then I hope that you too will be willing to think seriously about the Cancel Culture’s impact on the ability of America’s citizens to speak freely, even about matters of conscience.

Even though the First Amendment rightly prohibits only government censorship, its rationale for protecting free speech clearly applies in the private sphere as well. And so the free speech values at the heart of the Founders’ First Amendment, an important part of our Constitutional Culture, should be nourished and supported in the private sphere too.

This is truer now than ever before – in a way the Founders could not possibly have imagined – when so much of our Digital Age speech, today’s trade in ideas, takes place on the giant online platforms that Jack Dorsey has called “public squares” and “global town squares.”

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