

# Expression, Racism

## FREE SPEECH AND ITS HARMS

Frederick Schauer

c discourse, there is only more free speech the better. Questions about free speech Part of what I want to do h that the principle of free everything else.

self-regarding act. As a seven situated, I would run home me, whereupon my mother break your bones but names that this was a crock. My ech as incapable of causing self-regarding act, in the context tical theory between self-ets us off on the wrong foot peak just to hear the sound only, we speak in order to e of these effects can cause xamples of defamation of terference with contractual us frequency, the kinds of t others cause the types of sider sufficient to justify

her-regarding by inducing d otherwise not have been ample, is premised on the to change their behaviour. we find all around us, of iving their Fords, drinking Marlboros, will increase the a the images all around us ce against women are likely avour too.

use harm in a face-to-face ng on you from the window eing intentionally spit upon.

Although physically identical, the latter is dehumanizing and insulting. And when somebody comes up to us and addresses us with a derogatory racial or religious epithet, we feel harmed in almost the same way.

Because speech can harm in a number of different ways, a legal regime of free speech does not immunize speech from regulation because it is harmless, but rather immunizes speech despite the harm it may cause. The real culprit here is John Stuart Mill. Virtually all of his book *On Liberty*, except Chapter 2, is about why it is politically and morally impermissible for the state to regulate self-regarding conduct — acts that affect no one other than the actor. Chapter 2 is about freedom of speech. Because Chapter 2 is placed in the context of his larger discussion, Mill is commonly taken to have made the argument that self-regarding activities such as speech ought not to be regulated. I don't think Mill says this, but even if he does he is wrong. The principles that we discuss when we talk about regulating or not regulating self-regarding conduct have very little to do with the question of regulating speech, once we recognize that speech is other-regarding and potentially harm-producing.

Why should society tolerate potentially harm-producing speech? One possible answer is that toleration is quite simply a good thing and that we should not condemn or restrict that which just happens to be different. But we do not normally tolerate burglars, murderers, or rapists, although many societies have decided to tolerate a wide-range of other-regarding and harm-producing conduct when it takes place in the context of words or pictures. More commonly, therefore, people say that however bad it may be to tolerate harmful speech, it is even worse to tolerate government regulation of speech. This is because, it is said, the government regulation of speech is likely to be even more harmful than the speech it regulates. On this view, the state as regulator of speech is an evil greater than any other possible evil left unregulated. The operating assumption here is that when government is removed as regulator of speech, what remains is a domain in which ideas succeed or fail based on their truth or falsity.

In traditional American academi one position about free speech: the m Commonly the asking of sceptical q has been at best a marginal activity. is ask the questions about free speech speech encourages us to ask about ev

To start with, speech is an other-year old, like most others similarly s crying because I had been called a na advised me: "sticks and stones may b will never hurt you." I soon realized mother was wrong. To think of spee harm, to think of speech as a self-re of the distinction in classical poli regarding and other-regarding acts, g right at the beginning. Some of us s of our own voices but, more comm have an effect on others. And some harm, as in the more common e: character, invasion of privacy, or in relationships. Indeed, with enormo things that people say to others abou harms we would normally cons government regulation.

In addition, speech can be ot people to do things that they wou inclined to do. Advertising, for ex view that speech can cause people And if we suspect that the images people having a grand old time dri their Molsons, and smoking their M incidence of those behaviours, ther favourably portraying sexual violenc to increase the incidence of that beh

Finally, speech might also can epithetical form. A bit of water falli washers above is not the same as b

A common metaphor in much of free speech theory is the "marketplace of ideas". But it is not just a metaphor. The marketplace of ideas is, after all, a market, and markets are regulatory mechanisms that entrench certain forms of power at the expense of others. When we think of traditional markets, we are cognizant of the fact that some people might have greater financial power in those markets. So too with the marketplace of ideas. For example, one of the ads that appears quite frequently on United States television extols the Bill of Rights, extols freedom of speech, and invites viewers to call a toll-free number to receive a beautiful copy of the Bill of Rights. And whom do you call for this Bill of Rights? The cigarette manufacturer, Phillip Morris — a multinational tobacco company! They may be doing this because they are good citizens. But it may be that they are also or mostly concerned with a pending bill that would totally prohibit the advertising of cigarettes. Phillip Morris becomes a free speech claimant in part because it prefers the marketplace of ideas where it can happily fight it out with the American Cancer Society for the hearts and minds of the American people. Consider who between these combatants has the money, the resources, and the expertise in dealing with markets.

Moreover, the marketplace of ideas is also subject to those same influences of authority as are other markets. When Michael Jordan or Wayne Gretzky are paid large amounts of money to tout this product or that, to say that "Wheaties are better than Cheerios," their endorsement does not derive from an enormous amount of time spent studying cereals. People react a certain way to these messages because a Michael Jordan or a Wayne Gretzky utters them. That is one of the factors influencing the way markets work. If we are sceptical about the role of authority with respect to markets, therefore, we might also be sceptical about the same influence in the marketplace of ideas.

Ultimately, I think, there is a close philosophical compatibility between the marketplace of ideas and other market places. Especially in an era of mass electronic media, those with the resources to participate in the market would find the marketplace of ideas an attractive and comfortable concept. Consider a scenario where everybody in this country were given a gun. One of the things that guns do is to empower the disempowered. But if we give everybody a gun, then we are also giving guns to those who are already well-armed. Would such a scheme equalize power or would it make the already powerful even more so? A free speech system empowers everyone in the same way. On occasion it gives more power to those with very little. But it also gives more power to those who already have it.

Indeed, many of the recent free speech claimants are what might be called political conservatives. A list of recent claimants in First Amendment litigation includes Dun and Bradstreet, The Association of Cable Operators, Pacific Gas and Electric, The First National Bank of Boston, The National Conservative Political Action Committee, American Future

Systems (Tupperware), The Association of Private Clubs in the City of New York, and Phillip Morris. And whether these litigants are "conservative" or not, they are hardly the marginalized and powerless such as those more traditional free speech litigants — the Jehovah Witnesses, the anarchists of 1919, or the Communists of 1951.

Thus a free speech system can be harmful in two different ways. First, it can be harm-producing by protecting harm-producing acts. Second, it can exacerbate distinctions that are already drawn in society. Speech is an instrument of power, and if we think that certain allocations of power are harmful, then a free speech system that reinforces those allocations might itself be harmful.

I should conclude by noting that I am not really as sceptical about free speech as I might sound. Free speech is a good thing, one is expected to be for it, and I am, in fact, for it. But if free speech is a good thing, then we ought to be willing to apply the lessons of free speech to free speech. And if, as Mill said, we can never be certain of our ideas unless we have subjected them to the most stringent and the most sceptical challenges, then it is ironic that so much of the culture surrounding free speech forgets that message when free speech itself is at issue.

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