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## BUILDING FORWARD BETTER AFTER THE RAIN

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# AMERICA'S NEW CENSORS

*Alan M. Dershowitz*

**F**REEDOM of speech in America is facing the greatest threats since the Alien and Sedition acts of 1798, which unconstitutionally punished “false, scandalous, or malicious writing” against the United States. Today’s threats are even greater than during McCarthyism. This is true for three important reasons.

First, today’s censorship comes, for the most part, from so-called progressives, who are far more influential and credible than the reactionaries who promoted and implemented McCarthyism. The current efforts to censor politically incorrect and “untruthful” views are led by young people, academics, high tech innovators, and writers—yes, writers! These self-righteous and self-appointed Solons of what is and is not permissible speech represent our future, whereas the

McCarthyite censors were a throwback to the past—a last gasp of repression from a dying political order.

The new censors are our future leaders. They are quickly gaining influence over the social media, the newsrooms of print and TV, the academy, and other institutions that control the flow of information that impacts all aspects of American political life. These censorial zealots will soon be the CEOs, editors-in-chief, deans, and government officials who run our nation. They are destined to have even more influence over what we can read, see, and hear. If today’s attitudes toward freedom of speech by many millennials become tomorrow’s rules, our nation will lose much of its freedom of thought, expression, and dissent. Those of us who cherish these freedoms must become more proactive in their defense.

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*Alan M. Dershowitz*

**S**Second, these new progressive censors base their opposition to untrammelled freedom of expression on policies supported by many Americans, especially centrist liberals: anti-racism, anti-sexism, anti-homophobia, anti-hate speech, anti-Holocaust denial, anti-climate denial, and anti-falsehoods. Moreover, these arguments are being offered by people we admire and love. I call them the “good” censors. To paraphrase Pogo: “We have seen the enemy of free speech, and he and she are us!” It is much more difficult to combat us than they.

Third, the current regime of censorship is more dangerous because for the

most part it is not prohibited by the First Amendment: it is promulgated and enforced by private parties who have their own First Amendment rights, rather than by government agents who are bound by the Constitution to “make no law [...] abridging the freedom of speech.” When the government suppresses speech—as it did during McCarthyism by means of a Congressional Committee and other state actors—such suppressions can be challenged in the courts, as they were during the 1950s. To be sure, some of the McCarthyite suppression came from private media companies, such as Hollywood studios and television networks (blacklists and



“Red Channels”). They, too, were more difficult to challenge than governmental censorship and suppression.

**D**uring both McCarthyism and the current attack on free speech, the chilling of speech by self-censorship silenced many voices, fearful of recriminations. This, too, is a growing danger that is more difficult to combat than overt governmental censorship.

Nor are these new threats to freedom of speech merely transient reactions to current crises, as McCarthyism proved to be. Today’s progressive repression represents changing attitudes among future leaders that may well have enduring consequences beyond the current divisiveness resulting from the Trump presidency.

**THE TRUMP FACTOR**

**D**onald Trump himself bears some of the responsibility for stimulating the recent censorial over-reaction. Trump pushed the First Amendment to its limits—some believe beyond its limits—with his speech before the attack on the Capitol Building, his remarks following the Charlottesville demonstration,

and other provocative statements that many regarded as dog whistles. Although some of what he said was reported out of context and without the qualifications he actually added, his words led many—including the

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American Civil Liberties Union—to demand limitations on his free speech rights. Once limitations are accepted and imposed on anyone’s freedom of expression, a dangerous precedent is established for extending these limitations to unpopular speech by other leaders and ordinary citizens. We are already seeing that happen with efforts to punish members of Congress, lawyers, professors, and ordinary citizens for speeches and statements that were deemed supportive of Trump.

Trump was seen by many on the left, and even some in the center right, as a uniquely dangerous and evil president, whose actions justified extraordinary measures, even measures that compromised constitutional rights and values. The “noble” end of silencing and defeating Trump justified any ignoble means, including denying him and his supporters and enablers the right of free speech, especially on social media.

**S**ome supporters of unconstitutional means seek to justify their censorship and other repressive measures by distorting the Constitution and turning it into a partisan weapon that would have made Thomas Jefferson and James Madison cringe. Others simply ignore the Constitution and civil liberties in what they honestly believe is a higher calling—namely, to rid us now of Trump and prevent him from running again at any cost, and without regard to long-term dangers to our liberty.

*Donald Trump himself bears some of the responsibility for stimulating the recent censorial over-reaction.*

For some of Trump’s liberal opponents, this short-term approach posed a conflict with their commitment to civil liberties for everyone, even those whom they despise and fear. Far too few resolved that conflict in favor of our basic liberties. Those of us who did were accused of being Trump enablers, thus deterring many others from incurring that opprobrium. It became dangerous to careers, friendships, and civil discourse to come down on the side of constitutional rights and civil liberties when those rights and liberties happen to support Trump.

**COMPARISONS TO MCCARTHYISM**

**T** rue civil libertarians—even those who despised Communism—opposed the McCarthyite reprisals, arguing that American lawyers, and ordinary citizens, must remain free to

criticize all aspects of our system of governance, including our Constitution and our democratic institutions, as many radicals have done throughout history.

The new progressive censors must understand this history if it is not to be turned against them in the future. Precedents established today against the right to free speech will lie about like loaded weapons to be deployed against the left tomorrow. Indeed, repression in the United States has been directed at the left more often than against the right. Past may become prologue when it comes to repression.

**I**n the late 1940s and early 1950s, it was the fear of Communism that fueled the censorship of the McCarthyite right. Over the past four years, it was the fear of Trumpism—and of Trump himself—that escalated and energized a nascent left-wing movement toward censorship and cancelation of many on the right and even in the center. Too few civil libertarians have risen to the challenge of defending the rights of Americans accused of supporting Trump. In some civil liberties circles, it is more acceptable to defend the rights of Neo-Nazis to march through Jewish neighborhoods and hold anti-Semitic signs than it is to defend Trump’s freedom of speech.

I came of age during the era of McCarthyism, but I never understood until now how decent people—friends and relatives I admired—could support suppression of free speech and due process and other denials of basic liberties.

Some of my professors at Brooklyn College supported McCarthyism. These included such distinguished scholars as Professor Eugene Scalia, father of Justice Scalia, as well as several professors who had emigrated to America from Hungary, Czechoslovakia, and other countries under the thrall of Communism.

In all other respects, these were decent, sensitive, and liberty-loving people who had one significant flaw: their support for repressive McCarthyism. Their experience with Communist oppression gave them a blind spot with regard to the rights of those suspected of Communist affiliation. I simply could not understand it, because I viewed McCarthyism as totally and unequivocally evil—just as I viewed Communism. I could not understand how good people could support such a bad policy. I hated Communism, but I didn't personally fear it. It never occurred to me that Communists could ever get a foothold in the United States. I personally knew

no Communists, except for the occasional oddball who would hand out leaflets in the neighborhood. To me Communism was a hollow threat—a straw man—that was being used as an excuse for repression. I simply could

not identify with anyone who would suppress the rights of individuals accused of Communism or communist affiliation.

Now that I see good and decent people demanding censorship and denial of due process for those who collaborated with Trump, I have a better

understanding of what I grew up with. These modern day McCarthyites of the left were genuinely afraid of Trump and what he stood for. They really believed, as did some of the McCarthyites I knew during the 1950s, that giving free speech rights to those who they feared would bring about catastrophe. For them, both then and now, the noble end of preventing the victory of Communism or Trumpism justified any means, including even the most ignoble and repressive.

I recall being asked by some supporters of McCarthyism as a student at Brooklyn College how I could defend the rights of Communists, who, if they came to power, would deny me my

*The essence of democracy is assuring rights even to those who would deny them to you. The U.S. Constitution is not a suicide pact, but nor is it a license to deny liberty in response to any perceived threat to safety.*

rights of free speech. I was asked similar questions by friends who saw my support for Trump's constitutional rights as enabling a president who would deny those basic rights to others. The similarities are striking and frightening. The essence of democracy is assuring rights even to those who would deny them to you. The U.S. Constitution is not a suicide pact, but nor is it a license to deny liberty in response to any perceived threat to safety.

As Benjamin Franklin cautioned: "Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." We must sometimes compromise safety in the short-term to protect liberty in the long term. In extreme situations, we may even have to compromise some liberties in order to protect ourselves. But freedom of speech—freedom to criticize governments and other institutions—should never be among them.

#### THE BRANDENBURG PRINCIPLE

As an American constitutional lawyer who has litigated some of the most important First Amendment cases in the last half century—including the Pentagon Papers and Wikileaks—I am relatively confident that the Supreme Court would find Trump's ill-advised and justly condemnable January 6<sup>th</sup>, 2021, speech to be fully protected under the "Brandenburg principle" derived from the U.S. Supreme Court

decision in *Brandenburg v. Ohio* (1969), which distinguishes between advocacy and incitement to violence.

Trump's words were provocative, but they included a plea for his listeners to protest "peacefully and patriotically." Compared to the speech made by Clarence Brandenburg—a neo-Nazi Klansman surrounded by armed men with crosses—Trump's speech was pabulum. It was typical of rousing speeches made by radicals, union leaders, suffragettes, and some Democratic politicians in our nation's capital and elsewhere. It was far less incendiary than the speeches made by anti-war activists during the Democratic national convention of 1968 (the Chicago Seven).

Admittedly, it is certainly possible that Trump's exercise of his freedom of speech may have had an impact, even if unintended, on some who subsequently engaged in violence. It is also possible that some left-wing agitators may have inspired violence among some of their followers. That is a price we pay for freedom of speech, and we should acknowledge its cost and argue that it is worth it.

Freedom of speech should be protected not because the marketplace of ideas *assures* that the good will drive out the bad, but despite the reality that the bad will *sometimes* prevail. The same is true of free elections, which

are the truest marketplace of political choice. Hitler received the most votes in the German free election of 1932, and other terrible candidates have beaten far better candidates in free elections. But ending free elections is not the answer to bad results. Free speech should also be permitted despite its occasional bad results, because the alternative is more dangerous. Any system of censorship must either be pervasive or selective. There can never be just “a little” censorship.

The choice is between what I call “the taxicab theory of free speech” and a “system of censorship.” Just as a taxicab must accept all law-abiding passengers who can pay the fare, without discriminating on the basis of where they were going or why they are going there, so, too, a government or a university should not pick and choose between what speeches, books, or magazines may be offensive. Once it gets into the business of picking and choosing among viewpoints, then it must create a fair and equitable system of censorship based on articulated principles. If it decides that items offensive to some women can be banned, then it will have difficulty rejecting the claims of offensiveness made by African-

Americans, Jews, homosexuals, fundamentalist Christians, atheists, vegetarians, anti-fur proponents, and other politically correct and incorrect groups. I call this “-ism equity.” Both alternatives—pervasive censorship and -ism equity—produce less freedom of expression.

### SOCIAL MEDIA CENSORSHIP

The social media are facing precisely this dilemma now. In addition to demands for equal treatment, any institution that edits selectively on the basis of the alleged *falsity* of the censored material faces the following conundrum: if Facebook, Twitter,

and YouTube take down content which they deem to be *untrue*, then at least some viewers may come to believe that content that is not taken down must have passed the test of *truthfulness*. That is surely misleading at best, since the vast majority of untrue content is *not* taken down. So, when social media get into the business of selectively censoring some untruths, it is *they* who may be promoting false belief in the alleged truth of the untruths they do not censor. It is a no-win situation.

An analogy from governmental regulation of speech may be instructive.

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There are but two pure models of the role of the state in relation to offensive speech. Under the first—whose paradigm was the former Soviet Union—the state must literally approve everything that is officially published (hence the term *samizdat*—illegally self-published without approval of the state). Everything that is published thus reflects affirmative government policy. Everything turned down for publication is against governmental policy. There are no neutral publications that are neither approved nor disapproved by the state but merely tolerated. There are no gray zones. No Soviet high official was ever heard to say to an author, “I disagree with what you are saying, but I will defend your right to say it.”

The second pure model is one that no nation in history has ever achieved. But ours comes closest to it, at least at times. The model is one of complete content neutrality. The state neither approves nor disapproves of what is published in the newspapers, magazines, TV, or the internet. Indeed, it does not even learn what is being published until after it has hit the streets or the internet (hence the importance of the prohibition against prior restraint). When an offensive item is published, the government can—and should—disclaim all responsibility for its content. The content, simply put, is none of the government’s business: the government has neither approved it nor disapproved it.

Once the government gets into the business of disapproving of content on grounds of offensiveness, it has lost its claim to neutrality, and the trouble begins.

Assume that a group of militant feminists argues to a local government that a particular pornographic film—say, “Deep Throat” (1972)—is so offensive to women that it should be banned. Officials view the film, agree with the feminists, and ban it from their city. The next week, a group of blacks argues that the film “The Birth of a Nation” (1915) is at least as offensive to blacks as “Deep Throat” is to women; a group of Jews will argue that the Nazi films of Leni Riefenstahl are at least as offensive as “Birth of a Nation” and “Deep Throat”; a group of gays will make the same claim about the film “Cruising” (1980).

If there is one thing that is clear about offensiveness, it is that there is no objective basis for comparison. If obscenity is in the eye of the beholder—or, as Justice William O. Douglas once quipped, “in the crotch of the beholder”—then offensiveness lies deep in the history and psyche of those who feel it. Can anyone—especially a government—make any comparative assessment of the offensiveness felt by a concentration camp survivor seeing a swastika, a descendant of a slave seeing a burning cross, a woman who has been raped seeing the horrible portrayal of sexual brutalization? If the

government is to ban one, it must ban all. If it is to refuse to ban any, it must refuse to ban all.

Let me tell you a story from my own experience. I once represented Soviet dissidents at a Helsinki Human Rights conference. During a meeting with Soviet officials, I complained about the recent publication of certain blatantly anti-Semitic material. The official responded—quite expectedly—by telling me that worse material was published in the United States. I agreed and took out copies of some horrible anti-Semitic material published here and showed them to him. I also showed him some of the copies of the material published in the Soviet Union. I asked him to look at both and tell me the difference. He understood immediately: The Soviet material bore a stamp signifying that it had been approved by Glavlit, the official censorship agency of the Soviet Union. The American material had been approved by no one except the National Socialist White People's party—whose stamp it bore. The Soviet material was awful; the American material was worse. But the Soviet material carried the imprimatur of its government—a government that will not allow the publication of material deemed offensive by *favored* groups

but will encourage the publication of material deemed offensive to *disfavored* groups. Therein lies the difference—and a critical difference it is.

**W**hat does all this have to do with social media? Social media is not government, but it, too, must have a policy in relation to offensive material. And although there are considerable differences between government and social media, the latter can learn a great deal from the mistakes of governments.

*The social media will continue to live in a twilight zone—a gray area—of censorship. Is it possible to live within that gray area and still maintain a considerable amount of freedom and integrity?*

The major social media began with a model of neutrality, but have now largely abandoned, or at least compromised, that model. They have censored content on grounds of offensiveness or untruthfulness. They cannot now claim that they never succumb to pressure from offended groups. The best they can do is point to certain instances where they have resisted pressures. But they must then acknowledge that they have also succumbed and compromised on other occasions.

The social media can point out that they are less monolithic than governments, that their content is neither approved nor disapproved by a single centralized authority. Approval and dis-

approval decisions are made by groups of individual and algorithms coded by individuals.

But nor can it be said, in fairness, that the social media have come close to the Soviet model of total approval or disapproval. There are gray areas where potential censors have said, “We disagree with your decision, but we will defend your right to stand by it.”

**T**he social media will continue to live in a twilight zone—a gray area—of censorship. Is it possible to live within that gray area and still maintain a considerable amount of freedom and integrity? I believe the answer is a qualified yes—if the right steps are taken in advance.

The two starting points—really poles—in any intelligent discussion of censorship based on offensiveness or untruth are, one, the government should not engage in content censorship based on offensiveness or untruth; and two, private individuals and groups are absolutely entitled to express objections to speech that they find offensive or false. Indeed, the open marketplace of ideas presupposes vigorous response—and objection—to offensive or false speech. As William Safire once juxtaposed these two points, “Every American has the right to complain about the trash on TV—except Uncle Sam.”

## ECONOMIC CENSORSHIP

**B**ut these two poles do not provide answers to the really hard questions, such as: To what extent is it appropriate—put aside legal—for a group that feels strongly about certain speech to express their objections through concerted economic pressures? Economic pressures surely cannot be ignored in any discussion of free speech. For if, to paraphrase George Bernard Shaw, assassination is the ultimate form of censorship, then bankruptcy is surely a penultimate form of censorship in a profit-motivated society. The website Gawker was put out of business by a lawsuit financed by a wealthy critic.

Most people answer the economic question differently, depending on which side of the dispute they happen to fall on. I know many feminists who were adamantly opposed to the McCarthyite Hollywood blacklist, but who strongly favor boycotting general bookstores that include allegedly sexist material (such as Penthouse, Playboy, and Hustler) among their fare.

Are there really any principled distinctions? Would they justify, as an exercise of free speech, an organized boycott by “pro-lifers” against a small-town bookstore that sold books advocating abortion or birth control? Would the African American or Jew who boycotts a general bookstore selling Nazi and Klan material justify the boycott



of a store selling evolutionary or anti-gun-control tracts? What would be left for the bookstore to sell if every group that objected to particular books boycotted the store? We used to be able to say that the store would be selling only books like *Mary Poppins* or *Harry Potter*, but even those books have recently been subject to censorial efforts.

Is it possible to articulate general rules—rules of civility, rules of morality, rules of law, rules of constitutionality—that do not depend on whose ox is being gored or which group is being insulted? I have never seen it done.

What about organized boycotts of advertisers who sponsor content deemed deeply offensive to certain groups? Can we devise neutral rules for when such boycotts for legitimate and when they're illegitimate? Again, we can begin at the extremes. Surely it is more appropriate to boycott an advertiser who plays an active role in determining content than one who plays no role. If, for example, a sponsor was to say, "I'll advertise on this platform only if it puts down gays, or Blacks, or Jews," then the propriety of an economic boycott becomes more obvious. But if the sponsor merely declines to remove his ad from objection-

able content, the propriety of a general product boycott becomes more questionable. A boycott against a sponsor because of the nature of that sponsor's own advertisements is easier to justify than a boycott of a sponsor because of

the content of what is sponsored. A boycott of a specific video is more justifiable than a boycott of an entire platform.

We must persuade the American public that although most boycotts are constitutionally protected, some of them are morally wrong.

There is, of course, no inconsistency between an expression of speech being both constitutionally protected and morally wrong. Hooting down a speaker, hurling racial epithets, and marching through Skokie with Nazi symbols are all examples of constitutionally protected but morally wrong speech. More recently, Trump's speech that encouraged listeners to march on the Capital "peacefully and patriotically" was constitutionally protected, but reasonable people may conclude that it was morally wrong.

It is morally wrong to exercise your freedom of speech—and freedom of purchase—to restrict the freedom of others to speak and learn what they choose. It is morally wrong—and inconsistent with the premises underlying the First

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Amendment—to try to shut down a stall in the marketplace of ideas because that stall is selling ideas that are objectionable to you. Set up your own stall and sell better ideas. That is what some new social media are doing by creating platforms that do not censor political speech based on content. I applaud that.

### DANGEROUS SPEECH

A powerful case for freedom of speech must acknowledge that speech can be dangerous, that it can cause harmful acts, that the marketplace of ideas is not guarantee of safety. There are no guarantees, except that the costs of imposing a regime of censorship outweigh the costs of tolerating dangerous speech and its consequences. Thomas Jefferson famously made a "marketplace of ideas" argument that would have been strengthened if he had said that we have less to fear from the expression of ideas than we do from their suppression, rather than categorically stating that we have nothing to fear, so long as "others are left free to demonstrate their errors."

Freedom of speech, especially on unregulated social media, can be dangerous and harmful, in part because many people believe Jefferson's wrong-headed assumption that the marketplace of ideas is a guarantee of safety.

In an ideal world of rational thinkers, Jefferson may well be right. He lived in

a world closer to that ideal than we do today. I'm afraid the world we live in today—a world dominated by shouting talk show hosts, nonsensical tweets, conspiratorial websites, cynical image makers, crass opportunists, political pollsters, and leaders who govern by following the polls—is a far cry from the New England town meetings, the Virginia salons, or the Greek amphitheaters where democracy took root. And even in Athens, the ideas expressed by Socrates were greeted not by immediate acceptance but by hemlock. The marketplace of ideas—limited as it may have been in ancient Greece—did not protect Socrates, although his good ideas, or at least those that survived, have been accepted by the marketplace of history.

Consider, however, how many good ideas died along with their authors—in the Crusades, the Inquisition, the slave trade, as well as in genocides that have occurred since Jefferson wrote, including the Holocaust, the Stalinist purges in the Soviet Union, genocides in Africa, Cambodia, and Armenia, the Chinese "cultural revolution," and other mass slaughters.

Several years ago, during a speech to hundreds of lawyers in Hamburg, I asked the audience how many of them were victims of the Holocaust. A dozen hands were raised. I then asked how many had lost friends or relatives to

cancer, heart attacks, and other illnesses. Every hand went up. I then asked rhetorically, “How can you be sure that the cures for those illnesses did not go up in the smoke of Auschwitz?”

The ideas that survived the skewed marketplace may well constitute but a fraction of those devised by the minds of creative men and women over time. The marketplace of ideas is the best option for a democracy not because it always produces the best ideas, but because like democracy itself, the alternatives are far worse. What Winston Churchill famously said of democracy—“the worst form of government, except for all those other forms that have been tried”—might also be said about the marketplace of ideas. The parallel should not be surprising, since without freedom of speech, democracy cannot survive.

### MILL'S ARGUMENT FOR FREEDOM OF SPEECH

The great nineteenth century libertarian philosopher John Stuart Mill also made the case for the open marketplace of ideas, while at the same time rejecting Jefferson's naïve view that we have nothing to fear from freedom of speech.

In his ringing defense of free speech, Mill disputes Jefferson's argument that “the marketplace of ideas” will inevitably produce truth: “The dictum that truth always triumphs over persecution, is one of those pleasant falsehoods

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which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution.”

Mill offers this observation in refutation of the empirical claim that “truth may justifiably be persecuted because persecution cannot possibly do it any

harm.” Persecution can, in fact, destroy truths, not only in the short run, but forever, as we have seen with the earlier examples I have cited.

Truth is not a piece of matter or a unit of energy that will survive pummeling and emerge unscathed in one form or another at one time or another. It is a fragile and ethereal aspiration, easily buried, difficult to retrieve, and capable of being lost forever. That is why every time an idea is censored, a person with an idea killed, or a culture destroyed, we risk permanent injury to the corpus of human knowledge. And that is why it is always better to err on the side of

more speech, more expression, more advocacy—even when the benefits seem distant and the costs immediate. American jurisprudence and Mill's philosophy reach the same conclusion about the benefits of unfettered exchange, though by somewhat different routes.

Mill argued persuasively even for the freedom to err—the right to be wrong. He offered a utilitarian justification for encouraging false arguments against the received wisdom, because “teachers and learners go to sleep at their post, as soon as there is no enemy in the field.”

One of Mill's most compelling arguments has particular applications to the debate over social media censorship, speech codes, identity politics, and political correctness – especially on contemporary college and university campuses. Mill understood more than a century ago what many proponents of speech codes seem to ignore today: namely, that censorship is almost never content-neutral. Codes that purport to ban “offensive” or “untruthful” words are inevitably invoked selectively against politically incorrect words. Censorship is a weapon wielded by those in power against those who are not. On college and university campuses, those in power—or those who can influence those in power—may be very different from those in power in the outside world, but Mill's point remains persuasive:

With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but “it is only desired to restrain the employment of them against the prevailing opinion: against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation.

Mill would argue, of course, that even if we could create what I have called “a symmetrical circle of civility” or “-ism equity”—namely, the identical rules of discourse for all, regardless of the content of their views—it would still be wrong to restrict speech based on factors such as offensiveness, incivility, rudeness, or falsity.

The hard question for Mill—indeed, for any utilitarian advocate of free speech – is what should happen when freedom of speech clashes with Mill's other important principle: The authorization of state compulsion “to prevent harm to others.” Here Mill is not at his best as a thinker:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity,



when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely required to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.

Mill's last sentence—that a speaker may not “make himself a nuisance to other people”—contains the seeds of a system of pervasive censorship. Mill probably intended the concept nuisance to be construed in the narrowest possible way, say, by reference to his prior example of inciting an excited mob. But it is surely capable of being applied to almost any manner of offensive speech, ranging from religious proselytization, to hate speech, to pornography, to the dog whistles of a controversial president.

Mill's narrow, utilitarian argument for some censorship is, in my view, shortsighted. A larger view would prefer—as the First Amendment to the United States Constitution prefers and as Mill himself seems to prefer elsewhere—the benefits of relatively unabridged speech over the “inconvenience” of tolerating nuisances, even deeply offensive nuisances. One need not agree with the ditty we all learned on the streets—“Sticks and stone may break my bones, but names will never harm me”—to accept the important distinction between the state regulation of “sticks and stones,” on the one hand, and of “names” on the other forms of speech, on the other.

Justice Louis Brandies provided wiser counsel than Mill when he argued, in a case involving socialists who trespassed on private property as part of a protest against capitalism, that a free and open society should tolerate a certain degree of nuisance as a price worth paying for free and untrammelled expression. We should have different rules for regulating non-expressive actions that pose dangers to others and for censoring expressive speech that poses comparable dangers. A single utilitarian calculus simply will not do in a society that values freedom of expression more highly than freedom of action. Our society is committed to the proposition that freedom of expression is the best guarantor of freedom of action. Our First Amendment expresses a far

different calculus for regulating speech than for regulating non-expressive conduct, and that is as it should be. Your right to swing your fist should end at the tip of my nose, but your right to express your ideas should not necessarily end at the lobes of my ears.

The marketplace of ideas is a raucous bazaar, in which a bit of discomfort or nuisance is a small price

to pay for the benefits of preserving freedom of expression from the voracious and not easily satisfied appetite of the censor.

#### **BENEVOLENT CENSORSHIP BY THE GOOD GUYS**

An example of what can happen when the marketplace of ideas is replaced by the stamp of the censor occurred during McCarthyism. But back then brave civil libertarians stood up against the obvious danger to liberty represented by Senator Joseph McCarthy. Back then, the issue was widely seen as one of evil versus good. McCarthyism was evil. McCarthy himself was evil. Those standing against him—like the great lawyer Joseph Welch, who rhetorically asked him: “At long last, have you left no sense of decency?” – were the good guys.

That is not the case with the current attack on free speech that is being

supported by many who claim the mantle of civil liberties, including the American Civil Liberties Union. Because today's attack on free speech is being urged by progressives—by our friends, children, colleagues and others we re-

*Our society is committed to the proposition that freedom of expression is the best guarantor of freedom of action.*

spect and admire—many civil libertarians are conflicted and remain silent, or prioritize politics over principles, the liberal agenda over civil liberties.

Some of these new censors act as if they have just invented the wheel. They shout “eureka” as they proclaim that they have just made a remarkable discovery: namely, that hate speech, malicious lies, attacks on democracy and other forms of expression are really dangerous and can cause considerable harm. There is, of course, nothing new about this insight.

Mill said it a century and a half ago. Honest civil libertarians have long acknowledged it. We are seeing it happening in real time today. What is new is the conclusion some of these current censors have drawn from the old insight: namely, that selective censorship is the answer. This, too, is as old as the Sedition Act of 1798, which one of the new censors actually cites as a model response to the “crisis of misinformation and its potential to undermine trust in elected officials.

**NON-GOVERNMENTAL CENSORSHIP**

Because the current attacks against freedom of speech are coming in large part from powerful non-governmental institutions—such as social and other media, universities, publishers, lawyers, bar associations, and other private “influencers” and shapers of public opinion—they cannot be fought exclusively in the courts of law or in legislative assemblies. They must be fought primarily in the courts of public opinion. Private parties who would deny freedom of speech to others have their own freedom of speech, which includes the right to advocate and even impose censorship, as long as they don’t employ state action—governmental assistance—in doing so.

That is why the selective censorship currently being imposed by Facebook, Twitter, YouTube, and other giant social and print media is so difficult to combat. The last thing principled supporters of free speech want to see is governmental control over private media companies. We want these companies to remain free to exercise their First Amendment rights and decide what to publish and not publish. We just don’t like the way they are exercising their First Amendment rights to selectively censor others. We must oppose them in the marketplace of ideas and persuade

them that they are violating the spirit of the First Amendment while hiding behind its legitimate protections.

There are some judicial and legislative initiatives that can be helpful in protecting freedom of speech on social media. There are also private efforts by

*Censorship is a weapon wielded by those in power against those who are not.*

non-government actors to address the problems faced by internet platforms that are understandably concerned

about becoming facilitators of hate speech, dangerous falsehoods, and violence. Recently, Facebook announced that in an effort to create objective, neutral and consistent standards, it would appoint a panel of experts from around the world to assess its criteria for allowing or censoring speech on its platform. The panel includes winners of prestigious awards, former judges, law professors, literary figures, and others with valued reputations.

This bevy of platonic guardians would decide whether something could be posted, whether it should be accompanied with a cautionary label, or whether it should be totally banned.

It’s an interesting idea, and a potentially constructive component of any approach to addressing the accusations that Facebook and other social media are biased against conservatives and in favor of liberals and progressives. But it is a double-edged sword.

The positive edge is that it places the decisionmaking in the hands of a more diverse, politically balanced, and presumably objective group of wise men and women, who will assure that any censorship is based on neutral standards of general applicability across the political and ideological spectrum—“-ism equity.”

The negative edge of the sword is that it legitimates a regime of private censorship, even if benign, by social media platforms. Because it will likely reduce the likelihood of overtly partisan

censorship, this process makes subtler forms of nuanced censorship seem acceptable. Moreover, it sets a dangerous precedent. Today’s guardians may be neutral—though at least one of them who I know is a zealous anti-Trump partisan. But in the future, these guardians may shift right or left. Or they may have hidden biases based on identity politics and other forms of political correctness. Once the concept of a board of censors is approved and widely accepted, it can become a model for other social media, as well as for a wide array of other institutions. The very idea of platonic guardians telling us what is “truth,” what is “falsehood,” what we can be trusted to read without commentary, and what is too dangerous for us to be exposed to, is

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a potential prescription for Big Brother, Big Sister, or at the very least small siblings who may grow into big censors.

This is not to say that we should discourage innovative private, as well as

public, efforts to ameliorate the problems of today’s media censorship. It is to say that we should be cautious about approving short-term solutions that pose long term dangers.

**THE SPIRIT OF LIBERTY**

In the end, the spirit of liberty—as Justice Learned Hand wisely observed – “lies in the hearts of men and women.” And when “It dies there, no constitution, no law, no court” can do much to save it. During the past several years, the spirit of liberty has been weakened by a growing acceptance of censorship, especially among young people on the left. It must not be allowed to die, or be killed by men and women “of zeal, well meaning, but without understanding.”

The important question is not so much whether one supports freedom of speech in the abstract—most Americans do. The question is whether one prioritizes free speech over other values when they come in conflict, as they often do. The American Civil Liberties

Union used to prioritize free speech, but in recent years, they have placed a higher value on other progressive causes, such as a woman's right to choose, racial, gender, and sexual-orientation equality, immigration, the environment and other progressive values, and especially opposition to Trump (which has increased their contributions dramatically). They fail to understand that if freedom of speech is compromised in the interest of promoting these other values, those values will suffer as well. The open marketplace of ideas is an essential prerequisite to advocating the progressive agenda (as well as the regressive agenda).

**W**e must struggle to protect our freedoms by persuading our fellow Americans that censorship against anyone inevitably leads to censorship against everyone. Free speech for me but not for thee is the first step down the road to free speech for neither me nor thee. We must heed the classic message of the anti-Nazi Lutheran Minister Martin Niemöller: "First they came for the socialists, and I did not speak out—because I was not a socialist. Then they came for the trade unionists, and I did not speak out—because I was not a trade unionist. Then they came for the Jews, and I did not speak out because I was not a

Jew. Then they came for me, and there was no one left to speak for me."

The great iconoclast H.L. Mencken put it more pithily: "The trouble about fighting for human freedom is that you have to spend much of your life defending sons of bitches: for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all."

We must defend the rights of others if we want others to defend our rights—and even if others refuse to defend our rights. Because their rights are our rights!

The struggle for free speech never stays won. It must be fought every day and against every enemy—right, left, and center—in the court of public opinion.

**E**ver since the rejection of the Sedition Act by President Thomas Jefferson, Americans have shown rhetorical support for freedom of speech pursuant to the First Amendment. Not all Americans have always practiced what they preach with regard to freedom of speech. Over the generations, many have found justifications—excuses—for accepting free speech for me but not for thee. But until the last decade, there have

*The struggle for free speech never stays won. It must be fought every day and against every enemy—right, left, and center—in the court of public opinion.*

*The marketplace of ideas is the best option for a democracy not because it always produces the best ideas, but because like democracy itself, the alternatives are far worse.*

been few attacks on the very concept of free speech itself. Now some on the hard left seek to justify—indeed to proclaim—the virtue of selective censorship in the interest of higher values, such as anti-racism, anti-sexism, and other progressive agendas. The voices of these censors must not be silenced. They, too, must be heard.

Those of us who defend free speech must not censor the censors. We must not accept their approach to closing down the marketplace of ideas. Nor should we become disagreeable about our disagreements. They make an important point when they protest against racism, hate, and untruth. We make an even more important point when we defend freedom of speech against their short-sighted zealotry. We must respond to their well-intentioned but dangerous views on their merits and demerits. We must persuade open-minded people of the virtues of free speech and of the vices of selective censorship. We must defeat their ideas in the open marketplace. We must convince doubters that the road to censorship hell is paved with good intentions. We must lead them down a better road—a road with its own pitfalls, dangers, and harmful outcomes, but a road that is far better than the roadblocks of censorship.

**W**e must be prepared to respond to the new arguments of the new censors—the “good” censors—with our own new and better answers, rooted in old and enduring verities. We must enter the marketplace and engage.

Just as every generation has its own music, fashion, and tastes, so, too, does every generation have its own priorities based on its experiences. But the enduring value of freedom of expression—without which there will be no freedom to choose music or fashion—should not be a matter of generational taste or preference. To paraphrase Lillian Hellman's response to McCarthyism: We must not and should not cut our collective “conscience to fit this year's”—or this generation's—“fashions.” Ecclesiastes observed that “to everything there is a season,” but he also reminded us that some enduring values transcend generations and “abideth forever.” Freedom of expression must be among those enduring values.

In the end, our modest goal is to persuade the naysayers that freedom of speech, like democracy itself, is the least worst alternative in a world filled with risks and dangers on all sides. We must accept the burden of proving to a skeptical world that free speech is the lifeblood of democracy—that, without it, democracy cannot survive. ●