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There's No Such Thing as Free Speech, and It's a Good Thing, Too

Nowadays the First Amendment is the First Refuge of Scoundrels.
—S. Johnson and S. Fish

Lately, many on the liberal and progressive left have been disconcerted to find that words, phrases, and concepts thought to be their property and generative of their politics have been appropriated by the forces of neoconservatism. This is particularly true of the concept of free speech, for in recent years First Amendment rhetoric has been used to justify policies and actions the left finds problematical if not abhorrent: pornography, sexist language, campus hate speech. How has this happened? The answer I shall give in this essay is that abstract concepts like free speech do not have any "natural" content but are filled with whatever content and direction one can manage to put into them. "Free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors *that* name when we can, when we have the power to do so, because in the rhetoric of American life, the label "free speech" is the one you want your favorites to wear. Free speech, in short, is not an independent value but a political prize, and if that prize has been captured by a politics opposed to yours, it can no longer be invoked in ways that further your purposes, for it is now an obstacle to those purposes. This is something that the liberal left has yet to understand, and what follows is an attempt to pry its members loose from a vocabulary that may now be a disservice to them.

Not far from the end of his *Areopagitica,* and after having celebrated

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the virtues of toleration and unregulated publication in passages that find their way into every discussion of free speech and the First Amendment, John Milton catches himself up short and says, of course I didn't mean Catholics, them we exterminate:

> I mean not tolerated popery, and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit that intends not to unlaw itself.

Notice that Milton is not simply stipulating a single exception to a rule generally in place; the kinds of utterance that might be regulated and even prohibited on pain of trial and punishment constitute an open set; popery is named only as a particularly perspicuous instance of the advocacy that cannot be tolerated. No doubt there are other forms of speech and action that might be categorized as "open superstitions" or as subversive of piety, faith, and manners, and presumably these too would be candidates for "extirpation." Nor would Milton think himself culpable for having failed to provide a list of unprotected utterances. The list will fill itself out as utterances are put to the test implied by his formulation: would this form of speech or advocacy, if permitted to flourish, tend to undermine the very purposes for which our society is constituted? One cannot answer this question with respect to a particular utterance in advance of its emergence on the world's stage; rather, one must wait and ask the question in the full context of its production and (possible) dissemination. It might appear that the result would be ad hoc and unprincipled, but for Milton the principle inheres in the core values in whose name individuals of like mind came together in the first place. Those values, which include the search for truth and the promotion of virtue, are capacious enough to accommodate a diversity of views. But at some point—again impossible of advance specification—capaciousness will threaten to become shapelessness, and at that point fidelity to the original values will demand acts of extirpation.

I want to say that all affirmations of freedom of expression are like Milton's, dependent for their force on an exception that literally carves out the space in which expression can then emerge. I do not mean that expression (saying something) is a realm whose integrity is sometimes compromised by certain restrictions but that restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without restriction, without an inbuilt sense of what it would be meaningless to say or wrong to say, there could be no assertion and no reason for asserting it. The exception to unregulated expression is not a negative restriction but a positive hollowing

out of value—we are for *this,* which means we are against *that*—in relation to which meaningful assertion can then occur. It is in reference to that value—constituted as all values are by an act of exclusion—that some forms of speech will be heard as (quite literally) intolerable. Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict. When the pinch comes (and sooner or later it will always come) and the institution (be it church, state, or university) is confronted by behavior subversive of its core rationale, it will respond by declaring "of course we mean not tolerated ———, that we extirpate," not because an exception to a general freedom has suddenly and contradictorily been announced, but because the freedom has never been general and has always been understood against the background of an originary exclusion that gives it meaning.

This is a large thesis, but before tackling it directly I want to buttress my case with another example, taken not from the seventeenth century but from the charter and case law of Canada. Canadian thinking about freedom of expression departs from the line usually taken in the United States in ways that bring that country very close to the *Areopagitica* as I have expounded it. The differences are fully on display in a recent landmark case, *R. v. Keegstra.* James Keegstra was a high school teacher in Alberta who, it was established by evidence, "systematically denigrated Jews and Judaism in his classes." He described Jews as treacherous, subversive, sadistic, money loving, power hungry, and child killers. He declared them "responsible for depressions, anarchy, chaos, wars and revolution" and required his students "to regurgitate these notions in essays and examinations." Keegstra was indicted under Section 319(2) of the Criminal Code and convicted. The Court of Appeal reversed, and the Crown appealed to the Supreme Court, which reinstated the lower court's verdict.

Section 319(2) reads in part, "Every one who, by communicating statements other than in private conversation, willfully promotes hatred against any identifiable group is guilty of . . . an indictable offense and is liable to imprisonment for a term not exceeding two years." In the United States, this provision of the code would almost certainly be struck down because, under the First Amendment, restrictions on speech are apparently prohibited without qualification. To be sure, the Canadian charter has its own version of the First Amendment, in Section 2(b): "Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication." But Section 2(b), like every other section of the charter, is qualified by Section 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society." Or in other words, every right and freedom herein granted can be trumped if its exercise is found to be in conflict with the principles that underwrite the society.

This is what happens in *Keegstra* as the majority finds that Section 319(2) of the Criminal Code does in fact violate the right of freedom of expression guaranteed by the charter but is nevertheless a *permissible* restriction because it accords with the principles proclaimed in Section 1. There is, of course, a dissent that reaches the conclusion that would have been reached by most, if not all, U.S. courts; but even in dissent the minority is faithful to Canadian ways of reasoning. "The question," it declares, "is always one of balance," and thus even when a particular infringement of the charter's Section 2(b) has been declared unconstitutional, as it would have been by the minority, the question remains open with respect to the next case. In the United States the question is presumed closed and can only be pried open by special tools. In our legal culture as it is now constituted, if one yells "free speech" in a crowded courtroom and makes it stick, the case is over.

Of course, it is not that simple. Despite the apparent absoluteness of the First Amendment, there are any number of ways of getting around it, ways that are known to every student of the law. In general, the preferred strategy is to manipulate the distinction, essential to First Amendment jurisprudence, between speech and action. The distinction is essential because no one would think to frame a First Amendment that began "Congress shall make no law abridging freedom of action," for that would amount to saying "Congress shall make no law," which would amount to saying "There shall be no law," only actions uninhibited and unregulated. If the First Amendment is to make any sense, have any bite, speech must be declared not to be a species of action, or to be a special form of action lacking the aspects of action that cause it to be the object of regulation. The latter strategy is the favored one and usually involves the separation of speech from consequences. This is what Archibald Cox does when he assigns to the First Amendment the job of protecting "expressions separable from conduct harmful to other individuals and the community." The difficulty of managing this segregation is well known: speech always seems to be crossing the line into action, where it becomes, at least potentially, consequential. In the face of this categorical instability, First Amendment theorists and jurists fashion a distinction within the speech/action distinction: some forms of speech are not really speech because their purpose is to incite violence or because they are, as the court declares in *Chaplinsky v. New Hampshire* (1942), "fighting words," words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."

The trouble with this definition is that it distinguishes not between fighting words and words that remain safely and merely expressive but between words that are provocative to one group (the group that falls under the rubric "average person") and words that might be provocative to other groups, groups of persons not now considered average. And if you ask what words are likely to be provocative to those nonaverage groups, what are likely to be *their* fighting words, the answer is anything and everything, for as Justice Holmes said long ago (in *Gitlow v. New York*), every idea is an incitement to somebody, and since ideas come packaged in sentences, in words, every sentence is potentially, in some situation that might occur tomorrow, a fighting word and therefore a candidate for regulation.

This insight cuts two ways. One could conclude from it that the fighting words exception is a bad idea because there is no way to prevent clever and unscrupulous advocates from shoveling so many forms of speech into the excepted category that the zone of constitutionally protected speech shrinks to nothing and is finally without inhabitants. Or, alternatively, one could conclude that there was never anything in the zone in the first place and that the difficulty of limiting the fighting words exception is merely a particular instance of the general difficulty of separating speech from action. And if one opts for this second conclusion, as I do, then a further conclusion is inescapable: insofar as the point of the First Amendment is to identify speech separable from conduct and from the consequences that come in conduct's wake, there is no such speech and therefore nothing for the First Amendment to protect. Or, to make the point from the other direction, when a court invalidates legislation because it infringes on protected speech, it is not because the speech in question is without consequences but because the consequences have been discounted in relation to a good that is judged to outweigh them. Despite what they say, courts are never in the business of protecting speech per se, "mere" speech (a nonexistent animal); rather, they are in the business of classifying speech (as protected or regulatable) in relation to a value—the health of the republic, the vigor of the economy, the maintenance of the status quo, the undoing of the status quo—that is the true, if unacknowledged, object of their protection.

But if this is the case, a First Amendment purist might reply, why not drop the charade along with the malleable distinctions that make it possible, and declare up front that total freedom of speech is our primary value and trumps anything else, no matter what? The answer is that freedom of expression would only be a primary value if it didn't matter what was said, didn't matter in the sense that no one gave a damn but just liked to hear talk. There are contexts like that, a Hyde Park corner or a call-in talk show where people get to sound off for the sheer fun of it. These, however, are special contexts, artificially bounded spaces designed to assure that talking

is not taken seriously. In ordinary contexts, talk is produced with the goal of trying to move the world in one direction rather than another. In these contexts—the contexts of everyday life—you go to the trouble of asserting that X is Y only because you suspect that some people are wrongly asserting that X is Z or that X doesn't exist. You assert, in short, because you give a damn, not about assertion—as if it were a value in and of itself—but about what your assertion is about. It may seem paradoxical, but free expression could only be a primary value if what you are valuing is the right to make noise; but if you are engaged in some purposive activity in the course of which speech happens to be produced, sooner or later you will come to a point when you decide that some forms of speech do not further but endanger that purpose.

Take the case of universities and colleges. Could it be the purpose of such places to encourage free expression? If the answer were "yes," it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines, or libraries, since freedom of expression requires nothing but a soapbox or an open telephone line. The very fact of the university's machinery—of the events, rituals, and procedures that fill its calendar—argues for some other, more substantive purpose. In relation to that purpose (which will be realized differently in different kinds of institutions), the flourishing of free expression will in almost all circumstances be an obvious good; but in some circumstances, freedom of expression may pose a threat to that purpose, and at that point it may be necessary to discipline or regulate speech, lest, to paraphrase Milton, the institution sacrifice itself to one of its *accidental* features.

Interestingly enough, the same conclusion is reached (inadvertently) by Congressman Henry Hyde, who is addressing these very issues in a recently offered amendment to Title VI of the Civil Rights Act. The first section of the amendment states its purpose, to protect "the free speech rights of college students" by prohibiting private as well as public educational institutions from "subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech." The second section enumerates the remedies available to students whose speech rights may have been abridged; and the third, which is to my mind the nub of the matter, declares as an exception to the amendment's jurisdiction any "educational institution that is controlled by a religious organization," on the reasoning that the application of the amendment to such institutions "would not be consistent with the religious tenets of such organizations." In effect, what Congressman Hyde is saying is that at the heart of these colleges and universities is a set of beliefs, and it would be wrong to require them to tolerate behavior, including speech behavior, inimical to those beliefs. But insofar as this logic is persuasive, it applies across the board, for all educational institu-

tions rest on some set of beliefs—no institution is "just there" independent of any purpose—and it is hard to see why the rights of an institution to protect and preserve its basic "tenets" should be restricted only to those that are religiously controlled. Read strongly, the third section of the amendment undoes sections one and two—the exception becomes, as it always was, the rule—and points us to a balancing test very much like that employed in Canadian law: given that any college or university is informed by a core rationale, an administrator faced with complaints about offensive speech should ask whether damage to the core would be greater if the speech were tolerated or regulated.

The objection to this line of reasoning is well known and has recently been reformulated by Benno Schmidt, former president of Yale University. According to Schmidt, speech codes on campuses constitute "well intentioned but misguided efforts to give values of community and harmony a higher place than freedom" (*Wall Street Journal,* May 6, 1991). "When the goals of harmony collide with freedom of expression," he continues, "freedom must be the paramount obligation of an academic community." The flaw in this logic is on display in the phrase "academic community," for the phrase recognizes what Schmidt would deny, that expression only occurs in communities—if not in an academic community, then in a shopping mall community or a dinner party community or an airplane ride community or an office community. In these communities and in any others that could be imagined (with the possible exception of a community of major league baseball fans), limitations on speech in relation to a defining and deeply assumed purpose are inseparable from community membership.

Indeed, "limitations" is the wrong word because it suggests that expression, as an activity and a value, has a pure form that is always in danger of being compromised by the urgings of special interest communities; but independently of a community context informed by interest (that is, purpose), expression would be at once inconceivable and unintelligible. Rather than being a value that is threatened by limitations and constraints, expression, in any form worth worrying about, is a *product* of limitations and constraints, of the already-in-place presuppositions that give assertions their very particular point. Indeed, the very act of thinking of something to say (whether or not it is subsequently regulated) is already constrained—rendered impure, and because impure, communicable—by the background context within which the thought takes its shape. (The analysis holds too for "freedom," which in Schmidt's vision is an entirely empty concept referring to an urge without direction. But like expression, freedom is a coherent notion only in relation to a goal or good that limits and, by limiting, shapes its exercise.)

Arguments like Schmidt's only get their purchase by first imagining speech

as occurring in no context whatsoever, and then stripping particular speech acts of the properties conferred on them by contexts. The trick is nicely illustrated when Schmidt urges protection for speech "no matter how obnoxious in content." "Obnoxious" at once acknowledges the reality of speech-related harms and trivializes them by suggesting that they are *surface* injuries that any large-minded ("liberated and humane") person should be able to bear. The possibility that speech-related injuries may be grievous and *deeply* wounding is carefully kept out of sight, and because it is kept out of sight, the fiction of a world of weightless verbal exchange can be maintained, at least within the confines of Schmidt's carefully denatured discourse.

To this Schmidt would no doubt reply, as he does in his essay, that harmful speech should be answered not by regulation but by more speech; but that would make sense only if the effects of speech could be canceled out by additional speech, only if the pain and humiliation caused by racial or religious epithets could be ameliorated by saying something like "So's your old man." What Schmidt fails to realize at every level of his argument is that expression is more than a matter of proffering and receiving propositions, that words do work in the world of a kind that cannot be confined to a purely cognitive realm of "mere" ideas.

It could be said, however, that I myself mistake the nature of the work done by freely tolerated speech because I am too focused on short-run outcomes and fail to understand that the good effects of speech will be realized, not in the present, but in a future whose emergence regulation could only inhibit. This line of reasoning would also weaken one of my key points, that speech in and of itself cannot be a value and is only worth worrying about if it is in the service of something with which it cannot be identical. My mistake, one could argue, is to equate the something in whose service speech is with some locally espoused value (e.g., the end of racism, the empowerment of disadvantaged minorities), whereas in fact we should think of that something as a now-inchoate shape that will be given firm lines only by time's pencil. That is why the shape now receives such indeterminate characterizations (e.g., true self-fulfillment, a more perfect polity, a more capable citizenry, a less partial truth); we cannot now know it, and therefore we must not prematurely fix it in ways that will bind successive generations to error.