

Comm 3220-301-2022A History and Theory of Freedom of Expression

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Spring 2023

What Speech Does Democracy Require?

1. (Jan. 17)

What four functions does Emerson believe speech serves in a democracy? What institutions are charged to uphold freedom of expression? What categories of speech are excluded from the Constitutional ultimatum that "Congress shall make no law...abridging the freedom of speech"? Does the First Amendment protect hate speech? How do public and private actors differ in their speech regulating powers?

Is censorship a refuge of the weak, as the *New York Times* says, or is it just pretty to think so, as Hemingway says.

In 2014 The University of Chicago published a widely admired statement of standards for regulating campus speech. Do you question or find concerning any of its principles?

Read Penn's Open Expression Guidelines, Section 1 on "Principles" and Section III, Part B with its exemplary violations. Then read the *Philly Voice's* account of the incident delaying Penn's Homecoming Game last fall, including Penn's public statement. Finally, read the DP letter from graduate student Jane Robbins Mize. Whether you agree with the substance of the students' demands, did they violate Open Expression guidelines? What's the reason for your conclusion? Do you agree with Penn's public statement?

Thomas Emerson, [The System of Freedom of Expression, pp. 6-bottom of 13.](#)

Editorial Board, "Censorship is the Refuge of the Weak," *New York Times*, Sept. 10, 2022
<https://www.nytimes.com/2022/09/10/opinion/schools-banned-books.html?searchResultPosition=1>

Text of the Chicago Principles: ["The Chicago Principles," Report of the Committee on Freedom of Expression, University of Chicago, 2014](#)

University of Pennsylvania Open Expression Guidelines
<https://catalog.upenn.edu/pennbook/open-expression/>

University of Pennsylvania Football sit-in Statement*

“Student protesters who interrupted say they’re facing trespassing citations, disciplinary actions,” *Philly Voice*, October 24, 2022 <https://www.phillyvoice.com/penn-protest-football-game-climate-change-divestment/https://www.youtube.com/watch?v=mxinAxWxXo8>

Jane Robbins Mize, “As an environmental justice scholar, I’m ashamed to represent Penn,” *Daily Pennsylvanian*, Nov. 10, 2022. <http://www.thedp.com/article/2022/11/penns-response-to-protestors-was-a-betrayal>

2. (Jan. 19)

What two political revolutions did Benjamin Constant get to observe in his lifetime? In “The Liberty of the Ancients Compared,” how does he distinguish the *liberty of the moderns* and the *liberty of the ancients*? What is the difference between *political* and *civil* liberty? Which kind of liberty regime does cancel culture belong to? Why does Dewey mean by saying democracy is “personal”? How does Dewey echo Constant in his understanding of political liberty? Does Dewey favor ancient or modern liberties more?

Benjamin Constant, [“The Liberty of Ancients Compared with that of Moderns,”](#) 1819 (edited file)

John Dewey, “Creative Democracy--The Task Before Us,” [The Philosopher of the Common Man,](#) pp. 220-228.

3. (Jan. 24)

According to Siebert's [Four Theories of the Press](#), what social role do authoritarian states envision for speech? Is the Catholic Church authoritarian according to this logic? What are Plato’s justifications for censoring literature? In 1978, long before the “United the Right” rally in Charlottesville, there was an infamous neo-Nazi effort to march in Skokie, Illinois. How does George Will channel Plato to argue that government could have constitutionally stopped neo-Nazis from marching in Skokie? How do you think Dewey and Plato would each treat white nationalist speech?

(Note: You don’t have to read all the pages on display in Canvas, only those assigned) Siebert, Peterson, Schramm, [Four Theories of the Press](#), [“The Authoritarian Theory,”](#) pp. 9-12,18.

Plato, [The Republic, Book II,](#) pp. 624-625, 630-636.

George Will, [“Nazis in Skokie are Confusing,”](#) February 7, 1978

4. (Jan. 26)

What does Kant mean by Enlightenment? What is its opposite? Is it an individual or a collective achievement? Is the capacity for Enlightenment intrinsic to human nature or an attribute only of superior individuals? What are the obstacles to its attainment? Is Kant a rugged individualist? Are there proper limits to “the public use of reason”? What is the obligation of the enlightened clergyman? The enlightened monarch?

What do classical liberals take to be the core attributes of human nature? How is autonomy defined in the social compact described by Hallowell? Why should it be respected in law? How does autonomous man discover truth? What theological beliefs have been imported into classical liberalism? What does a classical liberal mean by *reason, conscience, natural rights, freedom, society, natural harmony of interests, positive law, natural law*.

Immanuel Kant, “What is Enlightenment?”

[file:///C:/Users/Carolyn%20Marvin/Downloads/Kant_What_is_Enlightenment%20\(1\).pdf](file:///C:/Users/Carolyn%20Marvin/Downloads/Kant_What_is_Enlightenment%20(1).pdf)

John Hallowell, Main Currents in Modern Political Thought, "The Rise of Liberalism," pp. 84-92, pp.110-115.pp.142-147

5. (Jan. 31)

Besides Kant, champion of independent reason, we can learn from two other foundational classical liberal thinkers: Adam Smith, for whom unregulated markets were engines for individual and national prosperity, and John Locke, who proposed principles for governing a just political society.

What is the mechanism by which the market regulates the economy to create prosperity for everyone, according to Adam Smith? What classical liberal notions inform Adam Smith's economic ideas?

According to Locke, what is the condition of men in the state of nature? Who enforces the law of nature? Is the state of nature a state of war? In the state of nature, what punishment is proper for a thief? What distinguishes natural liberty from slavery? What anchors the right of property? For Locke, is there an ethical limit to how much property a man should own? What is the purpose of the social compact? How do men create a commonwealth (Locke's term for a politically legitimate state)? What are its rightful powers? What terminates the social compact? Compare the freedoms of men in a commonwealth to the freedoms of men in a state of nature.

Adam Smith, Wealth of Nations, 1776, excerpts from "The Division of Labor," pp. 507-514.

John Locke, Second Treatise of Government , 1690, excerpts from "An Essay Concerning the True Original Extent and End of Civil Government" :

["Of the State of Nature," paragraphs 4-15.](#)

["Of the State of War," paragraphs 16-21.](#)

["Of Slavery," paragraphs 22-23.](#)

["Of Property," paragraphs 25-36.](#)

["Of the Beginning of Political Societies," paragraphs 95-98.](#)

["Of the Ends of Political society and Government," paragraphs 123-131.](#)

["Of the Dissolution of Government," paragraphs 211-212.](#)

6. (Feb. 2)

Analyze the Declaration of Independence as a model of classical liberal exposition. Consider every single phrase. What language and concepts in the Declaration show the Founders were reading Locke? Read Roger Cohen's essay. Is the Declaration diminished by the ethical failings of the founders? What do you think?

[Declaration of Independence \(Links to an external site.\)](#)

Roger Cohen, "The Tenacity of the Franco-American Ideal," *New York Times*, July 20, 2020.
<https://www.nytimes.com/2020/07/17/opinion/france-america-thomas-jefferson-race.html?searchResultPosition=1>

Since the Declaration is relatively short, begin now reading *Areopagitica* for discussion next time. Though this version of *Areopagitica* is shortened and edited for 21st century readers, the diction of 17th century English does not lend itself to last minute reading.

7. (Feb. 7, Feb. 9)

In Milton's view, who invented licensing (requiring advance permission for legal publication) in the first place? To understand why *Areopagitica* is a landmark defense of free speech, we will drill down to the two foundational assertions its audience must accept to agree with Milton that censorship is a fundamental evil. Are these religious or secular assertions? Milton's subsidiary arguments and examples are meant support these major assertions. What are some of them? What fears of lifting censorship does Milton address directly? How does he refute them? How does Milton make the character of the English people a part of his argument? Why does he believe sectarian conflict will not destabilize society? At the end of *Areopagitica*, what limits on speech is happy to impose after all? Are these limits consistent with *his* principled arguments against licensing?

Name four kinds of speech crime included under the term "libel" (speech that is false and dangerous). Which of these speech crimes survive today in similar form?

A century after Milton, William Blackstone codified English law. Even two centuries later, his *Commentaries* are still referenced by the U.S. Supreme Court. What speech does Blackstone define as criminal? What feature of Blackstone’s “liberty of the press” is explicitly classical liberal? What feature is authoritarian? How did the British justify punishing seditious libel? Private libel? Does Blackstone believe speech that tells the truth (“truth as a defense”) exonerates a defendant charged with libel? Should we revive Blackstone as a useful model for limits on false and scurrilous social media speech? What do you think?

What would have been the 16th century punishment for Kathy Griffin’s video of a beheaded Donald Trump doll? How was Kathy Griffin punished? Did she deserve it?

John Milton, [Areopagitica: A Speech for the Liberty of Unlicensed Printing](#) (edited version)

Leonard Levy, *Emergence of a Free Press* (Oxford, 1985) last graf, pp. 93-first graf on 95.

Levy), pp. 5-first graph on p. 6, pp. 7-9, pp. 12-13.

TMZ, “Kathy Griffin Beheads Trump: I Support Gore,” May 30, 2017.

<http://www.tMZ.com/2017/05/30/kathy-griffin-beheads-donald-trump-photo-tyler-shields/>

8. (Feb. 14)

What two categories of “rights” did the Founders recognize, according to Campbell? What was the scope of each? What two kinds of restrictions on natural liberty does social-contract theory permit positive laws (those passed by legislatures) to impose? Where positive law limits natural rights, what opposing notions of “the public good” did Federalists (Madisonians) and Democratic-Republicans (Jeffersonians) embrace? Which vision is more faithful to Blackstone? What does Campbell suggest we have lost in the transition from legislative boundaries on speech to judicial ones? e

What were the anti-Federalist arguments for and the Federalist arguments against a Bill of Rights? Did they mean to restrain only the federal government from restricting speech, or the states as well? What speech does Levy think the Founders meant the First Amendment to protect? Why does he think this? What features of the Sedition Act passed by the Adams administration in 1798 made it a model of progressive classical liberalism in its time?

Jud Campbell, “What Did the First Amendment Originally Mean?” *University of Richmond Scholarship Depository* (2018), pp. 19-22

<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2496&context=law-faculty-publications>

Rodney A. Smolla, *Free Speech in an Open Society* (1993), pp. 30-first paragraph, 38.*

Leonard Levy, *Emergence of a Free Press* (Oxford, 1985), pp. 220-top two lines, p. 226, middle of 234-first graph on 235, pp. 266-middle of 269, p. 297.

Order v. Liberty: The Limits of Dissent

9. (Feb. 16)

The Supreme Court had little to say about freedom of expression before *Schenck v. the United States* (1919). This case and *Abrams v. United States*, decided the same year, established a standard for deciding when speech is illegally seditious. What is the *Schenck* standard? Do the facts in *Schenck* match its stated requirements?

In *Abrams* Justice Holmes dissented from the majority opinion. He did not think the defendants were guilty of seditious libel according to a standard he refined and elaborated in his dissent. What is the elaborated standard?

Compare all the majority and minority opinions in *Schenck* and *Abrams*. Which of the *three* verdicts (unanimous in one case, one majority opinion and one minority opinion in the second case) most closely follows the Blackstone standard? Which opinion is farthest from that standard? What is the difference between ‘bad tendency’ and ‘clear and present danger’? What classical liberal echoes do you hear in Holmes' dissent in *Abrams*?

Schenck v. United States (1919) Syllabus:

Opinion by Justice Holmes:

http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0249_0047_ZO.html

Abrams v. United States (1919)

Opinion by Justice Clarke:

http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0250_0616_ZO.html

Dissent by Justice Holmes:

http://www.law.cornell.edu/supremecourt/text/250/616#writing-USSC_CR_0250_0616_ZD

[The following optional article is a short primer on how to read legal opinions, of which there will be several this semester. It explains the parts of an opinion, relevant legal terms, and what reading an opinion tells you.]

Orin S. Kerr, "How To Read A Legal Opinion," Green Bag: An Entertaining Journal of Law 2nd series, vol. 11, no. 1 (Autumn, 2007). [Click for pdf |](#)

10. (Feb. 21)

In 1989 the Supreme Court split 5-4 on whether flag burning is protected speech. What arguments does the majority put forward to protect flag burning as legal speech? Does the minority treat flag burning as seditious libel? Is flag burning action or expression? What is the 'message' of flag burning? Could this message be expressed as well or better in some way besides flag burning? If so, is this a sufficient reason to criminalize flag burning? Why or why not? What is the strongest argument from the dissenting justices that flag burning constitutes a criminal offense? What was the message of kneeling during the national anthem (a song about the flag to accompany ceremonial flag honor) sent by Colin Kaepernick and other football players? Could that message have been expressed better some other way? If flag burning is protected speech, why can the NFL discipline players who kneel while the anthem is played?

Texas v. Gregory Lee Johnson (1989), pp. 343-376.

Optional reading: Carolyn Marvin, "[Bad Attitudes, Unnatural Acts.](#)"

Cracks in Classical Liberalism

11. (Feb. 23)

What "two hypotheses" does Mill take up in Ch. 2. Why is experience (action) as important for him as speech? Compare Mill's four arguments for freedom of expression to Milton's. What major Miltonian argument does Mill disavow? Is his objection a knife to the heart of classical liberalism? What are the real abuses of expression and debate for Mill? Does he favor punishing "intemperate" discussion? Why or why not?

In Ch. 3, how does Mill sort out allowed and disallowed speech? Is his logic grounded in classical liberalism? What model of human nature does Mill embrace? What model does he reject? What is the 'despotism of custom'? How does Mill echo Kant before him?

Was Pauli Murray's argument for bringing the arch segregationist Gov. George Wallace to speak at Yale a Millian one? If George Wallace had spoken at Yale, would it have been an enrichment or an impoverishment of public debate?

John Mill, On Liberty (1859), [ch2](#) AND [ch3](#) <https://www.gutenberg.org/files/34901/34901-h/34901-h.htm>

Peter Salovey, "Free Speech Personified," *New York Times*, Nov. 26, 2017.
<https://www.nytimes.com/2017/11/26/opinion/free-speech-yale-civil-rights.html?searchResultPosition=1>

Optional but interesting short doc on accomplished civil rights activist Murray:
<https://www.youtube.com/watch?v=L3u98p8PDlc> (also on Amazon Prime Video)

12. (Feb. 28)

What does Tocqueville believe most Americans will think of his ideas? What attributes does he claim are intrinsic to American civic character? Are these attributes that classical liberals admire? How does he say truth is arrived at in a democracy? What is the 'tyranny of the majority'? In his view, what is the fate of thought where the principle of equality is strong? Why do citizens in a democracy think less independently than citizens in an aristocracy? Are Twitter mobs the tyranny of the majority come to life?

Alexis de Tocqueville, *Democracy in America*, (Harper & Row edition) "[The Principal Source of Beliefs Among Democratic Peoples](#)," pp. 398-401, and "[The Omnipotence of the Majority](#)," pp. 231-240.

Renée Diresta, "Why Online Mobs Behave Like Flocks of Birds," *Noema*, Nov. 22, 2022
<https://www.noemamag.com/how-online-mobs-act-like-flocks-of-birds/>

13. (Mar. 2) **MID TERM PAPER DUE IN CLASS.**

Lecture: Introduction to Romanticism

SPRING BREAK (Mar. 4-12)

14. (Mar. 14)

What is the difference between 'relations of ideas' and 'matters of fact'? How do we arrive at our knowledge of the world? Does Hume's account of knowledge reinforce or challenge classical liberal notions about our autonomous capacity to discern truth? Is experience the same as truth?

David Hume, *Inquiry Concerning Human Understanding*, pp. [pages 40 middle of 45](#); [56-top of 59](#), 6971.

Equality v. Freedom: The Romantic Challenge to Classical Liberalism

15. (Mar 16)

What sacred cows of classical liberalism does Rousseau attack? Compare Rousseau's to John Locke's origin story of civil society. (Remind yourself of Mill's account of Rousseau's noble savage (second half of Ch. 2, On Liberty). Does Mill buy it?) What attribute of human nature does Rousseau most admire? What does Rousseau say is the root cause of inequality? Is he correct?

Jean-Jacques Rousseau, "A Discourse: What is the Origin of Inequality Among Men?" from The First and Second Discourses, Roger D. Masters, ed. (St. Martin's, 1964),

pp. 101-4, last sentence 109-bottom of 110. Bottom of 114-middle of 116, last paragraph 126-134, bottom of 141-bottom of 154, middle of 150-top of 152, 154-16.

16. (March 21)

What is the purpose of the "social contract?" What are its provisions? What is the general will and how do we recognize it? What is the status of private will in relation to the general will? Does the general will ever err? If individuals refuse to obey the general will, can the social contract survive? How is the social contract enforced? What is the task of the 'censorship'? Is the general will the same as public opinion? Does the social contract embody ancient liberties or modern ones? (Look back at Constant if you've forgotten!)

Rousseau, The Social Contract (Penguin, 1968), [pp. 59-65, 72-75, 148-151, 174-175](#)

17. (Mar. 23)

What is the role of Reason in a Hegelian world? What is the goal of the World Spirit? What is Hegel claim is the social unit of historical change? How does historical change come about? What are the moral obligations of a citizen? Why does Hegel think of men as "means" rather than "ends"? Does happiness measure the success of a civilization? Why or why not? What does Hegel mean when he says the world-historical individual has passion? Is the world-historical individual equal to other individuals? What concern does Hegel want us to feel for examples of injustice and misfortune? What similarities do you see between Hegel and Rousseau? Is Hegel's Reason a religious or secular concept?

Georg F. W. Hegel, Reason in History (Bobbs-Merrill, 1953), [pp. 11-15; pp. 37-39; pp. 40-47.](#)

18. (Mar. 28)

What does Marcuse say is the historical role of tolerance? What is the work of ‘abstract’ or ‘pure’ tolerance in contemporary media? How does he answer the classical liberal who argues that tolerance is preferable to violence? How does historical progress unfold for Marcuse? What ideas does he borrow from Hegel? What is the ‘neutralization of the opposites,’ and how does it shape the process of discovering truth? What is ‘discriminating tolerance’? Is this an ancient or modern liberty? How does Marcuse’s analysis of media resemble Plato’s myth of the cave? For Marcuse, what will it take to produce a truly democratic diversity of ideas?

What sort of tolerance is or is not being practiced by students opposed to Phoebe Gloeckner’s classroom instruction and performance? Watch the 23-min video interview with Crumb. Is he an example of what Kant means by an enlightened individual? Or not. What would Catherine MacKinnon say about him. What do you think of his defense of the gender and racial offensiveness of his work?

Herbert Marcuse, "Repressive Tolerance," in Robert Wolff et al., *A Critique of Pure Tolerance*, pp. 81-123.

Walter Lippmann, *Foreword to Public Opinion*, (Free Press, 1965), pp. vii.

Phoebe Gloeckner, “My Cartoonish Cancellation,” *The Chronicle of Higher Education*, Nov. 10, 2022.*

Robert R. Crumb interview, “It was just too disturbing for most people to watch...” (23 min video)

https://www.youtube.com/watch?v=_2ZWrwmyA0

Are Equality and Freedom Incommensurable?

19. (Mar. 30)

What does Catherine MacKinnon say is the essence of pornography? How does her view challenge the modern-liberty claim that individuals require an inviolable sphere of private life uncontrolled by government? How does she view the classical liberal bright line between action and speech? How does her notion of harm differ from classical liberal notions of harm? MacKinnon says the First Amendment rests on assumptions that fail to take into account the situation of women. What assumptions and what situation? What images of sexual arousal would MacKinnon consider *not to be* pornographic? Are sculptures and paintings of nude women in museums pornographic according to MacKinnon’s logic? What similarities exist

between Marcuse's analysis of 'pure tolerance,' 'discriminating tolerance,' and MacKinnon's view of pornography?

[Confucius, no title.](#)

Catharine MacKinnon, "[Not a Moral Issue](#)," *Yale Law Review*, October, 1984, pp.321-345.

Scott MacDonald, "[Confessions of a Feminist Porn Watcher](#)," *Film Quarterly*, Spring, 1983, pp. 10-16. (G)

20. (Apr 4, 6)

What is the purpose of the 'bright line' the justices draw in *Brandenburg v. Ohio* (1969)? What are its elements? What was Brandenburg charged with? What did he and his associates threaten to do and to whom? Why did their speech fail the *Brandenburg* test? Compare Ryder Winegar's speech to Brandenburg's speech. What elements are different? What does Kalmoe report about the broad effects of diffuse but repeated rhetorical violence? Can the *Brandenburg* standard address "stochastic terrorism," a statistical correlation linking increased levels of atmospheric rhetoric to violent deeds but not easily traceable to a discrete instigation? Should there be legal restrictions on speech that contributes to stochastic terrorism?

In states that allow carrying guns publicly (open carry), though the Supreme Court has said that regulations may exclude them from "sensitive spaces," should public display of firearms at political rallies and similar gatherings count as symbolic speech protected by the First Amendment? Are guns publicly displayed at a rally functionally identical to burning crosses, liberty poles, Nativity scenes, menorahs, flags, gallows, or Philadelphia Phillies hats that are presumed to carry messages. Or are they a different category of artifact not subject to First Amendment protection in any context? What is the message of guns publicly displayed in this fashion?

Brandenburg v. Ohio ([1969](#))

Gina Hawkins, "A man said he'd hang 6 members of Congress who didn't 'get behind' Trump, feds say. He got 33 months in Prison," *Washington Post*, Dec. 2, 2021.

<https://www.washingtonpost.com/nation/2021/12/02/ryder-winegar-sentenced-threatening-voicemails-members-congress/>

Nathan Kalmoe, "Speech Causes Political Violence," *Politico*, Oct. 30, 2018

<https://www.politico.com/magazine/story/2018/10/30/yes-political-rhetoric-can-ignite-violence-222019>

Max Fisher, "Troubled Loner? Political Terrorist? Both? It's Often Hard to Say," *New York Times*, Nov.3, 2022

<https://www.nytimes.com/2022/11/03/world/americas/pelosi-attack-interpret.html?searchResultPosition=1>

Mike McIntire, “At Protests, Guns Are Doing the Talking,” *New York Times*, Nov. 26, 2022.
<https://www.nytimes.com/2022/11/26/us/guns-protests-open-carry.html>

21. (Apr. 11)

What are the failures of classical liberalism, according to Matsuda? What harms does she attribute to racist speech? What is her 3-prong test for legal punishment of racist speech? How would the law identify which groups are historically oppressed? When does Matsuda favor legal exemptions for victim group members who use racist speech to target other victim group members? Where do you think a 21st century John Stuart Mill would stand on prosecuting racist speech? Quote specific language and concepts to support your position.

Mari J. Matsuda, "[Public Response to Racist Speech: Considering the Victim's Story](#)," *Michigan Law Review*, Aug. 1989, pp. 2320-2322, 2323-2342, 2345-2348, 2353-2374, 2376-2378 (see strikethroughs in the text). (less than 44 pp. total).

22. (Apr. 13)

What familiar critique of the use of identity claims to punish racist and other disfavored expression does Zhang reject? What does she mean by identity fraud? What are the shortcomings of ‘the personal is the political’ as a justice strategy for Táiwò, Zhang and Hitchens? Who do “identity fraudsters” exploit? What are the perils of standpoint epistemology in elite spaces? Would Marcuse agree with Zhang’s argument? Tocqueville? What are the implications of collapsing diversity into optics? What is Zhang’s view of the optimism of cultural trickle-down theory? Is Hitchens too harsh? Compare his position to Taiwo’s.

Olúfemi Táiwò, “Being-in-the-Room Privilege: Elite Capture and Epistemic Deference,” *The Philosopher*, n.d.
<https://www.thephilosopher1923.org/post/being-in-the-room-privilege-elite-capture-and-epistemic-deference>

Jenny G. Zhang, “Identity Fraud,” *Gawker*, Oct. 7, 2021
<https://www.gawker.com/culture/identity-fraud>

Sarah McCulloch, “‘The personal is the political’--some thoughts from Christopher Hitchens,” *With Strength and Spirit*, June 19, 2010
<https://www.sarahmcculloch.com/extracts/2010/the-personal-is-political-some-thoughts-from-christopher-hitchens/>

23. (Apr. 18)

Are children harmed by hearing profanity? What arguments does the majority use to affirm the FCC's reprimand of *Pacifica* radio station? What is the minority's argument that this analysis is flawed?

Transcript, "George Carlin's Seven Dirty Words",

<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/filthywords.html> (Links to an external site.)

[Links to an external site.](#)

[FCC v. Pacifica \(1977\) \(edited version\)](#)  

24. (Apr. 18)

Is substituting a euphemism for a taboo word morally different from speaking directly the word it stands for? What gives words taboo power? How do euphemisms sanitize them? How do Matsuda and Kennedy differ about how power deployed around racial epithets? Do they differ about using racial slurs for pedagogical purposes? Apart from copyright, a recognized legal property in specific arrangements of words, on what grounds do groups assert property rights in words that no one but authorized users have permission to trespass on? Is this an ideological privatization of common language?

How often has the taboo had repercussions for speakers who transgressed it? What reasons do people offer in defense of it? What arguments do Kennedy and Marshall marshal against these reasons?

Randall Kennedy, "Is It Ever OK to Enunciate a Slur in the Classroom," *Chronicle of Higher Education*, Sept. 10, 2021 <https://www.chronicle.com/article/is-is-ever-ok-to-enunciate-a-slur-in-the-classroom>

Randall Kennedy and Eugene Volokh, "The New Taboo: Quoting Epithets in the Classroom and Beyond," *Capital University Law Review* 49 (1), pp. 1-66 [edited version]

25. (Apr. 20)

From time to time it is useful to challenge or at least clarify settled principles of First Amendment law. It is settled law that the government may not compel individual speech, since this would be an assault on personal conscience and autonomy. Employers, by contrast, may compel employee speech in the workplace, except when, broadly speaking, an employee is speaking about matters of general public concern. What justifies this public-private distinction? What are matters of public concern? Should people be compelled to renounce, as a condition of employment, personal but deeply unpopular beliefs, even when they have expressed them outside work? Should they be investigated or fired for outside work associations with

objectionable others despite breaking no laws in the process? Should people whose religious beliefs are at odds with company policies be compelled to conform to company policy?

If Kyrlie Irving had posted a Tweet link to a website criticizing transgenderism as a mass delusion, or declaring that climate change is a hoax spread by nefarious globalists, or that homosexuals transgress God’s will, would the Nets be right to compel him to take it back and say what he doesn’t believe, on pain of firing? Where would our previous thinkers, classical liberal and Romantic, come down on this?

When teachers (Vlaming, below) or therapists (Mackereth) refuse to use transgender pronouns preferred by their students or clients on religious grounds, should there be an accommodation for them on the grounds of religious liberty?

Ben Golliver, “Kyrie Irving apologizes after Nets suspend him for refusing to disavow antisemitism,” *Washington Post*, Nov. 4, 2022.

<https://www.washingtonpost.com/sports/2022/11/03/nets-suspend-kyrie-irving/>

Tania Ganguli and Sopan Deb, “What to Know About Irving’s Antisemitic Post and the Fallout,” *New York Times*, Nov. 21, 2022

<https://www.nytimes.com/article/kyrie-irving-antisemitic.html>

Macon Atkinson, “Furman University professor under investigation for ‘Unite the Right’ rally participation,” *Greenville News*, Oct. 3, 2022.

<https://www.greenvilleonline.com/story/news/local/2022/10/03/furman-university-greenville-sc-professor-allegedly-attended-unite-the-right-rally/69535260007/>

Sabrina Conza, “Furman University violates faculty free expression, investigates professor for attending United the Right rally,” *thefire.org*, Nov. 21, 2022.

[Furman University violates faculty free expression, investigates professor for attending Unite the Right rally | The Foundation for Individual Rights and Expression \(thefire.org\)](https://www.thefire.org/furman-university-violates-faculty-free-expression-investigates-professor-for-attending-unite-the-right-rally/)

ACLU, *Vlaming v. West Point School District*, Nov. 10, 2022

<https://www.aclu.org/cases/vlaming-v-west-point-school-district> (scroll down to read the short article)

Iliana Magra, “He Opposed Using Transgender Clients’ Pronouns. It Became a Legal Battle,” *New York Times*, Oct. 13, 2019.

<https://www.nytimes.com/2019/10/03/world/europe/christian-transgender-uk.html>

26. (Apr. 25)

What are the risks of street protest in China, Iran and Saudi Arabia? Could you imagine taking the same risks to protest your own government’s policies? Why protest if the state has soldiers, laws, and guns aplenty to quash such protests and severely punish protesters who have no judicial recourse? How should U.S. universities respond to efforts by a foreign power to

intimidate Chinese college students through Chinese consulates in the United States? How should they respond to efforts by Chinese students themselves to denounce other Chinese students and on-campus allies who protest China policies on the grounds that these protests attack their identities and promote anti-Asian prejudice?

Timothy Garton Ash, “Courage and Free Speech,” *Aeon*, September 29, 2016
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