

Don't Use These Free-Speech Arguments Ever Again

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20-25 minutes

Most speech, hateful or not, is protected by the Constitution. To pretend otherwise is foolhardy.

Attorney and former federal prosecutor



A tattoo at a right-wing "Demand Free Speech" rally in Washington, D.C, on July 6, 2019Eric Thayer / Reuters

America is awash in ugly, hateful speech. White nationalists [march defiantly](#), and their [slogans are echoed in murderous rampages](#). Government officials revel in [disparaging](#) the [very people they patrol](#). Many people—and I'm one of them—argue that the president's rhetoric [encourages this grotesque and shameful state of affairs](#) even as he nominally condemns it. This has all led to more [discussion](#) about free speech and its [limits](#).

What speech *should* be protected by the First Amendment is open to debate. Americans can, and should, argue about what the law *ought to be*. That's what free people do. But while we're all entitled to our own opinions, we're not entitled to our own facts, even in 2019. In *fact*, the First Amendment is broad, robust, aggressively and consistently protected by the Supreme Court, and not subject to the many exceptions and qualifications that commentators seek to graft upon it. The majority of contemptible, bigoted speech is protected.

If you've read op-eds about free speech in America, or listened to talking heads on the news, you've almost certainly encountered empty, misleading, or simply false tropes about the First Amendment. Those tired tropes are barriers to serious discussions about free speech. Any useful discussion of what the law *should be* must be informed by an accurate view of what the law *is*.

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I've been trying for [years](#) to point out these tropes, with mixed success. Because hope prevails over experience, I'm trying again. Here are some misstatements, misconceptions, and bad arguments about the First Amendment you will encounter regularly in American media. Watch for them, and recognize how they distort the debate over speech.

“Not all speech is protected; there are exceptions to the First Amendment.”

It's true that the First Amendment has exceptions and doesn't protect all speech. That's an apt rebuttal if someone says “All speech is protected by the First Amendment.” But it's not helpful in deciding whether *particular* speech is outside of First Amendment protection.

First Amendment exceptions are few and well established. In a 2010 case about videos depicting animal cruelty, the United States Supreme Court [reaffirmed the “historic and traditional categories long familiar to the bar”](#) of speech outside First Amendment protection, including obscenity,

defamation, fraud, and incitement. Each of those categories, in turn, is narrowly and carefully defined through half a century of precedent.

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In that same 2010 case, the Court unambiguously [refused to create](#) new exceptions on demand. “Our decisions in [a child pornography case] and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”

That’s why “The First Amendment is not absolute” is usually empty rhetoric, and not a helpful response to the question “Can the government punish *this* speech?” The relevant question is “Does *this* speech fall into an established exception to the First Amendment, and if not, what does that mean?”

If I’m bitten by a snake on a hike and seek medical attention, and ask the doctor if the snake is venomous, I’m not looking for the doctor to assure me that “not all snakes are venomous.” I want the doctor to use her medical expertise to analyze whether *the snake that bit me* is venomous.

“This speech isn’t protected, because you can’t shout ‘Fire!’ in a crowded theater.”

This line, though ubiquitous, is just another way to convey that “not all speech is protected by the First Amendment.” As an argument, it is just as useless.

But the phrase is not just empty. It’s also a historically ignorant way to convey the point. It dates back to a 1919 [Supreme Court decision](#) allowing the imprisonment of Charles Schenck for urging resistance to the draft in World War I. Justice Oliver Wendell Holmes Jr. wrote that the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” This decision [led to a series](#)

of cases broadly endorsing the government's ability to suppress speech that questioned official policy. But for more than half a century *Schenck* has unequivocally and universally been acknowledged as bad law.

James Loeffler: An abandoned weapon in the fight against hate speech

Holmes himself repented of the decision—though he continued to indulge his taste for pithy phrases with lines like “Three generations of imbeciles are enough” to justify forcible government sterilization of the handicapped.

So when you smugly drop “You can’t shout ‘Fire!’ in a crowded theater” in a First Amendment debate, you’re misquoting an empty rhetorical device uttered by a career totalitarian in a long-overturned case about jailing draft protesters. This is not persuasive or helpful.

“Incitement and threats are not free speech.”

While technically true, not everything that might colloquially be called a “threat” is outside the protection of the First Amendment. Only “true threats” are unprotected—threats conveying “a serious expression of intent to an act of unlawful violence to a particular individual or group of individuals.” There’s some ambiguity about whether evaluating the seriousness of a threat is an objective question, or a subjective question, or both, something the Supreme Court recently failed to resolve. But most courts impose an objective test: A threat is “true” if a reasonable person hearing it would take it as a sincere expression of intent to do harm. That doesn’t cover most hyperbole and political invective.

We’re free, moreover, to attack the law, argue that breaking it is moral, and urge our fellow citizens to break it. We can even assert that violence is justified. Such advocacy is only unprotected when it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Imminent* is the key word here. Saying “Go beat up those protesters over there” probably qualifies; ugly rhetoric in general does not.

“Fighting words are not free speech.”

People in favor of restrictions on ugly speech often point to the “fighting words” doctrine—the idea, taken from the 1942 case [Chaplinsky v. New Hampshire](#), that the government can punish words “which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.” This argument ignores the past 80 years of First Amendment cases, which have dramatically narrowed the doctrine to the point that many commentators question whether it still survives. At most, the doctrine allows the government to punish [face-to-face insults likely to provoke an immediate violent reaction from the particular person addressed](#).

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Furthermore, like invoking “‘Fire!’ in a crowded theater,” dropping “fighting words” reveals a tin ear for history. As a Jehovah’s Witness, Walter Chaplinsky (of *Chaplinsky v. New Hampshire*) was a member of a religious minority subject to shocking abuse and injustice in the 1930s and ’40s. He was preaching on a street corner when a mob assaulted him; one man tried to impale him on a pole bearing the American flag. Police officers led him away rather than arresting his attackers, provoking him to call them fascists. [For that offense he was prosecuted](#). So when you cite the fighting-words doctrine to urge punishment of bigotry, you’re relying on a doctrine built on the subjugation of religious minorities. Mind the irony.

“Hate speech is not free speech.”

There is an admirable growing social consensus that it’s despicable to denigrate people based on ethnicity, religion, or sexuality. But most despicable speech is protected by the First Amendment. [Contrary to the popular slogan, there is no hate-speech exception to the First Amendment](#). Particular examples of hateful speech may satisfy the established tests for the true-threats or incitement exceptions, but they’re not unprotected just because they’re hateful.

“Stochastic terrorism is not free speech.”

In the past few months you may have heard the term *stochastic terrorism* to describe speech that, according to some advocates, [whips up hatred](#)

against groups and leads unbalanced people to commit violence against them, even if it doesn't explicitly call for violence. By definition, if stochastic terrorism doesn't call for violence, it doesn't fall outside the First Amendment, because it's not intended and likely to lead to imminent lawless action. It may be morally reprehensible, but, just like hate speech, it's protected.

“We must balance free speech with [social good].” / “There is a line between free speech and [social evil].”

It's common, in free-speech debates, to find people arguing that America must balance free speech and safety, or free speech and the right to be free of abuse. A related rhetorical trope is “line drawing”: the idea that we must draw lines between free speech and abusive speech.

In point of fact, however, American courts don't balance the benefits and harms of speech to decide whether it is protected—they look to whether that speech falls into the First Amendment exceptions noted above. As the Supreme Court [recently explained](#), the “First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”

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A related trope is “This isn't free speech; it's [x],” where x is bullying, or abuse, or some other social evil. But many social evils are protected by the First Amendment. “This isn't free speech; it's [x]” is empty rhetoric unless x is one of the established First Amendment exceptions.

“They do it in Europe!”

Many other countries allow substantially broader limits on free speech. That's relevant to what the law in America *should be*, but it has

nothing to do with what the law *is*.

“We talked to a professor and a litigator who said this is not protected speech.”

Commentators asserting that certain speech is outside First Amendment protections often cite professors and litigators who agree with them. This is entertaining, but it may not yield reliable information.

With the greatest respect, legal academics are notoriously bad at distinguishing between normative and descriptive statements about law. If I ask 10 physics professors what will happen if I drop my pencil and why, they will all say: “It will fall, because of gravity.” There is very little risk that they will say “Well, maybe it will fall or maybe it won’t” because they think gravity is unfair. But if I put 10 law or political-science professors on TV and ask them whether particular speech is protected by the First Amendment, there is a substantial chance that some of them will give responses based on what they think the law ought to be, not based on what it is.

Similarly, litigators are trained advocates. Our job is making confident, firm assertions about the law in service of our clients, even when the law is murky. It’s a hard habit to break, and some litigators will act as advocates, not experts, when asked about free-speech issues.

That doesn’t mean you should ignore professors or litigators when they talk about the First Amendment. It means you should approach their pronouncements with appropriate skepticism, and look carefully for signs that they are offering an argument and not a description.

“This speech may be protected right now, but the law is always changing.”

People arguing that particular speech should not be protected often concede that the law does not *currently* support them, but that it could change at any time. It’s true, on a facile level, that the Supreme Court changes its interpretation of the Constitution. We’ve seen astounding,

society-altering changes in our lifetimes. For instance, it took only 17 years for the Supreme Court to go from saying that the [government can criminalize same-sex relationships](#) to saying that [it cannot](#).

But such changes don't come out of the blue. The Supreme Court's initial decision on same-sex relationships was bitterly divided 5–4; the case overturning it was angrily divided 6–3. The potential for change was clear. Similarly, the Court's First Amendment decisions on [campaign-finance limitations](#) and [mandatory union dues](#) have featured 5–4 splits and passionate rhetoric. The Court's stance on those issues could easily change with a new justice or two.

[Read: It's time to stop using the 'fire in a crowded theater' quote](#)

Many free-speech issues that are controversial politically and culturally, by contrast, are utterly banal legally, and the Court has offered no signs of change. For instance, over the past generation the Court has issued a series of [unanimous](#) or [near-unanimous](#) decisions affirming that hateful and offensive speech is protected by the First Amendment.

The observation “The law changes all of the time” is, then, like the observation “Not all speech is protected by the First Amendment”—a truism that is of no use in evaluating whether specific speech is protected or likely to become unprotected.

It's great that Americans have strong opinions about free speech and the First Amendment. Engaged citizens make a stronger society. But good citizenship also requires a basic grasp of civics. Commentators and talking heads have an obligation to inform, not mislead, Americans on what their rights are, and citizens should train themselves to separate wishes about the law from accurate descriptions of it. Our national discussion of hateful speech is deadly serious, and calls for a serious approach, not empty rhetoric. The next time someone tells you that you can't shout “Fire!” in a crowded theater, tell him why he's not helping.

We want to hear what you think about this article. [Submit a letter](#) to the editor or write to letters@theatlantic.com.

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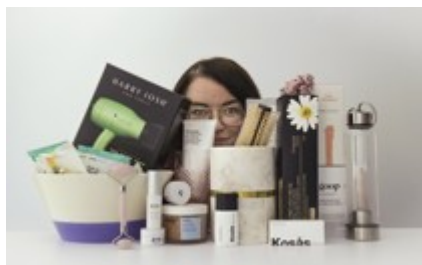
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