

The Price of Free Speech

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Introduction

This paper is less an argument than a reflection on the effects of how we balance democratic goods in the public square. Accordingly, I begin not with premises or an outline of an argument, but by recounting a story. On October 25, 2015, there was a forum on the campus of The University of Oklahoma, conducted in the aftermath of an incident of on-campus racial animus.¹ The incident involved a recording of fraternity members engaged in racist chants. Two of the participants were identifiable, and they were summarily expelled by the university president, David Boren. The fraternity was expelled from campus, and its house taken over for other university uses.

Now, since this was a significant event—because The University of Oklahoma is a state institution and such a response to the racist event could be seen as government violating the First Amendment—President Boren was in effect saying some forms of speech are intolerable and will not be tolerated. For this, he and the university were attacked by First Amendment fundamentalists who argued the university was in error, and students were being punished for “Constitutionally Protected Speech.”² In an article in the online newsletter of the Foundation for Individual Rights in Education (FIRE), Susan Kruth follows the common outline for protection of hate speech: (1) hate speech is protected by the First Amendment; (2) the public utterance of hate speech serves to remind us “something we need to know about the racial attitudes of at least some OU students;” (3) “censorship isn’t necessary for those who are confident of the truth of their views”; and ends with the conclusion that (4) “[T]he University of Oklahoma’s expulsion of two students...simply for their expression of racist sentiments is almost certainly unlawful and should be reversed.” I will return to this argument shortly, but first a story of the aftermath.

In the wake of the previously described events, the university held a campus forum about the display of racist symbols and use of racist speech. The subject of the forum was the display of the Confederate Battle Flag (CBF) and focussed on whether the display of this flag was an act of “Heritage or Hate” (the title of the forum). Furthermore, the question was posed, even if meant as a statement of racial animus, is it constitutionally protected as an example of free speech?

The forum opened with a statement by my colleague Dr. Kirsten Edwards, a gifted, young, Black, female member of the College of Education faculty. Asked to speak first, she said:

I have to admit. This was a very difficult talk for me to compose. Honestly, I've had my fill of calm, rational discussions about the validity of white male supremacy and systemic injustice; all the oppressive elements of our society that we are forced to take up as logical conversations because they are clothed in whiteness. Quite frankly, I'm sick of debating the legitimacy of hate maintained through state-sanctioned and institutionalized violence. From the jovial chant "Boomer Sooner" that celebrates the theft of indigenous lands and the forced displacement of native peoples, to the lack of commonsense gun legislation that has left 20 kindergarteners, six of their teachers (all women), and nine Black church congregants dead and unatoned for. Also not forgetting the ever-increasing number of victims of mass gun violence whose lives have become lost in nonsensical rhetoric, to the virtues of police officers that kill Black 12-year-olds in parks, reminding our children, as my colleague T. Elon Dancy often remarks, that it is dangerous to be Black and outside, to the same system of law enforcement that permits those who are supposed to protect and serve to snatch and drag Black girls by their hair and arms, reminding them that they live in a nation that does not see them as human or worthy of care and gentleness, to the assumption that Donald Trump is a legitimate presidential candidate, which doesn't require explanation, to the Confederate Flag that flew as a declaration to states' rights to enslave other human beings: a system of forced labor that was maintained through branding, beating, whipping, lynching, mutilation, rape, and all manner of torture, physical and psychological, necessary to strip humans of their humanity.

All of these ridiculous debates, communities of color are forced to endure because the issue is connected to white male supremacy. And not only are we forced to consider, we are also forced to engage as if they were rational topics of conversation. And that is the ultimate power of systemic, white-supremacist, capitalist patriarchy, that we must remain calm and composed as we debate the morality of our slow deaths. Or as Mother Zora Neale Hurston reminded, "If you are silent about your pain, they'll kill you and say you enjoyed it." One of the primary goals of white, male supremacy is to convince the oppressed that there is something wrong with us if we respond honestly to the pain of injustice. That we are being irrational if fear wells in the pit of our stomachs when trucks bearing the confederate flag drive by, or when white fraternities wave the flag proudly on their large-looming houses, ostentatious reflections of their power and

influence on supposedly diverse campuses. Instead we should continue to have calm, collected discussions about the validity of the oppressor's methods of torture. Apparently it's unreasonable for me to assume that the Confederate flag is a silent threat, a reminder of all of the lynchings, and bombings, and arsons that flag has presided over. A reminder of a world where I am only three-fifths of a human. A reminder of fellow citizens that long for the days when I was unrecognized by the law....

When Dr. Edwards finished, I was in tears. Having made this opening statement, she put on her academic hat, and the rest of her talk was more analytic. But the remainder of her talk was not what stayed with me. What struck me then and has stayed with me since was the pain caused by legitimizing the question of whether the CBF is indeed a symbol of white supremacy. Of course it is, and as such it is an existential threat to people of color in the U.S., but by the alchemy of “civil discourse” within a Constitutional framework, this symbol of hate and oppression instead becomes elevated to sacralized and Constitutionally protected “free speech.”

What Dr. Edwards made me viscerally experience is that by converting the discussion about the CBF from a discussion of white supremacy to a discussion of free speech as protected by the First Amendment, we already establish white supremacy as a legitimate normative system: a presumptive moral equivalence is established between an ideology of white supremacy and one of civic equality. Thus, the emphasis on the First Amendment and the right of free speech employs the full machinery of the U.S. Constitutional system and the weight given to the Bill of Rights against the civic membership of people of color. It turns what ought to be a rhetorical question—“Are people of color fully human and fully citizens?”—into a real question. This is a serious problem for a society with aspirations to be democratic.

To return to the argument developed by Kruth, we see here the falsity of her assumptions. Reaction to the assaultive speech of the fraternity was not shaped by a lack of confidence in the democratic ideology of civic equality. Rather, it was an affirmation of that ideology and a recognition that assaultive speech can and does serve to exclude and marginalize its targets. For these reasons alone, such speech ought not be tolerated on college campuses. Nor is tolerance of such assaultive speech justified by the fact it makes us aware of racial hatred on campus (and not just at OU, it goes without saying). To the contrary, our students and colleagues of color are all-too-frequently confronted with such assaultive speech, and if we really want to know about its pervasive and corrosive presence, all we need do is listen to the voices of its targets.

In this paper I first make a few comments on the nature of the Bill of Rights, the First Amendment in particular; briefly consider the nature and importance of civic norms and citizens who have acquired these norms; and then consider some of the implications of the situation in which we find ourselves. As a guide to the reader, I want to make clear my own positionality and developing perspective on this complex of issues. First of all, I am a 70-year-old, straight, white, cis male, which means that issues of white supremacy are very much my responsibility. I am inevitably part of the problem Dr. Edwards describes. This paper (as part of a larger project I have recently been working on) is part of my effort to come to terms with the responsibilities attendant to my privilege.

Second, there are some truths about the First Amendment that we have long ignored or forgotten.³ The first of these is that freedom of speech was not what the First Amendment was protecting: the formulation “Congress shall pass no law...” clearly protects the right of states to regulate speech free from interference from the federal government. Nothing in the First Amendment confers, creates, or affirms any basic right of citizens to be free from such regulation. A second point is that, given what the First Amendment was designed to do, we should avoid talk of how the founders gave us this right as part of the bedrock of democratic life; they did not do so, and they did not see speech in that light. While the myth is that First Amendment freedom of speech is one of our foundational freedoms, the reality is that the First Amendment did not function to protect free speech as a civil right until the late 19th century, when the courts first began to apply the Fourteenth Amendment in concert with the First Amendment to deny the states’ power to regulate speech as they had originally done with the federal government. It was only at this point in our history that we began to understand the First Amendment as we do today: as the guarantor of the civil right of free speech, as protecting citizens rather than states.

The next point to remember is that the Constitution in general and the Bill of Rights in particular (including the First Amendment) is a pact among slave-holding, white supremacists negotiating the terms by which they will share and distribute power in a white-supremacist patriarchy. This is explicit in the sections of the Constitution that recognize slavery and deny women citizenship, *but it is also implicitly and deeply true in the way it conceives of and protects free speech*. White men occupy positions of power and privilege in ways that create a purposefully and dramatically uneven playing field; the speech of white men is more powerful than that of women and people of color. The result is that what we think of as free

speech fundamentalism protects the speech of the powerful to the detriment of the civic membership of people of color.⁴

We need to take a moment here to understand for U.S. democracy the significance of being the particular and specific kind of liberal constitutional republic we in fact are: one designed by and for white patriarchs who were wealthy landowners, and particularly those enslavers. What this means today is that, despite tinkering at the margins of oppression by the amendment process, the social and political architecture within which laws are made and amendments are added is the political and structural architecture of the founders. To put it bluntly, we still live in a patriarchal, white-supremacist, aristocratic republic, and the standards of civil discourse presume that to be heard in the debates within this republic, one must belong (at least peripherally) to its privileged classes.

It is this fact that should remind us that the supposedly anomalous U.S. Supreme Court decision *People's United* is not an anomaly at all, but a reaffirmation that to be heard in the United States at the level of political discourse one must be rich. Money equals voice and voice equals influence. In this decision we see one of the senses in which free speech is anything but free; it charges by the minute for the right to be heard.

Tom Green analyzes in detail the difference between merely speaking in public and being heard,⁵ exploring the fact that those who speak *but who are not heard* are in fact not able to engage in what he calls *public* speech. The implications of his insight are profound; the ability to speak in public can very much be protected, but if the speech of particular individuals or groups remains systematically unheard, or heard only in a certain way (i.e., unless it is heard *and attended to*), the speakers are *de facto* excluded from full civil, political, and social membership.

Furthermore, the Enlightenment origins of the Constitutional structure prioritize reason over emotion; if one can give a reasoned argument rooted in the First Amendment for why it is acceptable to display symbols of injustice and oppression like the Confederate Battle Flag, then the fact that people are hurt by the display does not count as a legitimate counterargument. To hone the point more precisely, diverting the discussion to a consideration of Constitutional rights rather than a consideration of human decency or democratic entailments means that display of the CBF assumes both legal and moral equivalence with the claim that the display of the CBF denies people of color full civic membership in the (supposedly) democratic polity. What we need to recognize if we are to transform the discourse (and practice) of our polity is that the marginalization of people of color in our polity is

neither defect nor anomaly; the marginalization of women and people of color is built into the constitutional framework and reinforced by the standards of civil discourse granted recognition in the formation of policy. The white-supremacist patriarchy in the U.S. may periodically have to reassert its control of the levers of power, but the instruments for doing this are purposefully built into the deepest architecture of the polity and society.

This is precisely the message Dr. Edwards imparts: to defend the display of symbols of white supremacy as a question about free speech is to grant the high ground to white supremacy and to further marginalize the targets of white supremacy's oppression. Again, note the core of Dr. Edwards' objection: the very terms of the discussion and the criteria for resolution of the conflict are dictated by the representatives of white supremacy. Worse, even those of us who believe we are opposing white supremacy by putting free speech as the primary and the foundational democratic good, we, too, force targets of oppression to voice their objections within a discourse that assumes fairness involves ratifying the right of white supremacists to express their commitment to white supremacy. If the issue is always the free speech rights of the white supremacist, then that point of view is implicitly endorsed equally with its opposite. To be precise, when we use the First Amendment frame to discuss issues like the display of the CBF, we put on equal footing the view that people of color are not worthy of full citizenship and the view that people of color are not fully human. We may not mean to, but that is beside the point.

This means that people of color are "forced to engage as if [slavery, police violence against people of color, the display of the CBF are] rational topics of conversation. And that is the ultimate power of systemic white supremacist capitalist patriarchy, that we must remain calm and composed as we debate the morality of our slow deaths." The effect (and my thesis) is the purpose of the standards of civil discourse and public reason is to silence—to efface the civil presence of—those whom white supremacy and patriarchy mean to dominate.

Before fully considering the implications of my thesis, I reflect briefly on the significance of norms for democratic life, for one of the realities of democratic life is that we are governed more by norms than by law; law is coercive, but norms are the means of self-government.

Primacy of Norms

We often hear the shibboleth that "we are a government of laws, not men." I want to suggest this is only partly true; more to the point we

are a government of *norms*. It is important, then, to understand what norms are, and how they operate. We often think of *norms* as connected to that which is “normal.” In this view norms function as description of how people behave, but this is not the significance of social norms, which define not what people do so much as what we expect of ourselves and each other.

One overall error in the way we think about free speech is to think that it is law (the First Amendment) that protects us rather than norms. However, law only functions when norms bring their force to bear. It is worth remembering there was a time when people were comfortable with the Rev. Dr. Martin Luther King, Jr. being jailed, but then *norms* changed and southern sheriffs became pariahs. This led to a change in law. Similarly, there was a time when people could be put in jail for declaring themselves gay, but that is no longer the case; Norman Thomas spent a lot of time in jail for opposing World War I, but that was not the case by the time of Vietnam. The point is First Amendment protections are never absolute, they are always dependent on social norms that define the limits of acceptable free speech or expression (and there are always such limits).

This is an important point that society may well be on the verge of appreciating as we grapple with the presidency of Donald Trump. I am struck by the number of times political commentators have pointed out that the real threat presented by President Trump’s presidency is the extent to which he violates—tramples, more accurately—the norms of the office and the glee he (and his followers) seem to derive from such iconoclasm. While President Trump may or may not have broken a law, if he has done so there are remedies in place: prosecution, impeachment, effective demands for resignation, and so on. But we now face the fact that law is only as effective as the norms that protect law are strong. It is arguably the case that the more dangerous actions of the President are things like chanting, “Lock her up!,” which does not violate law, can be construed as protected free speech, but is shockingly contrary to the basic norms of participatory democracy. In our system we do not prosecute political opponents—until we do. And when our norms allow attacks on democracy, the law that might otherwise protect democracy is not likely to do so.

To what, then, do we refer when we speak of *norms*? In some uses, it simply means the behavior under discussion is taken to be “normal” in the sense that the majority of people do it, but this sense is inadequate to our consideration here. The more interesting and probably more important meaning of the term reflects what is strongly judged to be

proper (or improper) behavior. We know when norms exist both because we, (1) try very hard ourselves to live within them, and (2) we are offended when others break them. The current (as I work on this paper) focus on sexual abuse of women across many walks of life is an example of shifting norms: sexual predation is likely neither more nor less common today than when Bill Clinton was President despite his being very publicly and credibly accused of sexual assault, and it is likely neither more nor less common than a year ago when Donald Trump was elected President despite being recorded bragging about getting away with sexual assault. What we may be observing is the process of new norms being formed—new expectations about how men should behave.

In this contentious time, we hear much on the First Amendment's protection of free speech. As Dr. Edwards reminds us, "free" speech has a price, and it those on the margins of society who are far more likely to pay it. In this paper, I mostly take for granted that legal protection of political speech is an essential part of democratic life, and I want mostly also to take for granted that the First Amendment can and frequently does serve as a bulwark of such speech. But it is precisely for this reason that First Amendment fundamentalists like the ACLU or FIRE do democracy a great disservice. If our practice becomes to default to "protecting" free speech under virtually all conditions, we lose the ability to have a cogent public discussion about the content of the speech both in the granularity of its content and its effect on self governance. It is a mistake to concentrate on shaping the public square through law while ignoring the importance of fostering democratic norms.

Some Common Misunderstandings

There are three main arguments that are often used in discussing free speech in the U.S. political context: (1) First Amendment protections are foundational to the democratic polity: without the First Amendment's protection, democracy itself would be seriously threatened; (2) the First Amendment itself is a foundational principle of democratic governance, constructed by the founders to protect freedom of speech as a basic civil right; and (3) the exercise of free speech in the "marketplace of ideas" is the best way to sort out disagreements and arrive at either truth or compromise. All three of these claims are, I think, seriously problematic.

As for the first claim, we are one of a relatively small group of nations with a strict and explicit protection against government restriction of political speech, but many nations without such protection are functioning democracies (a group that no longer clearly includes us). In point of fact, at the moment this paper is being written, the U.S. experiment in democracy is something of a laughingstock on the international stage, largely because of the results of decades of systematic

and cumulative abuse of the First Amendment. Hiding behind the First Amendment's supposed guarantees, a propaganda network of white supremacists of various stripes has undermined the functionality of and our confidence in our institutions of government and civic life: Reagan's "Government is not the solution to the problem. It is the problem;" Fox News's dedication to the manufacture of alternative facts fitted into alternative narratives ("Benghazi," allegations of child prostitution rings run by Hillary Clinton); and Trump's assault on the rule of law ("so-called judges," attacks on the FBI) and the press ("fake news") are potent examples.

In short, while the First Amendment is an important tool in protecting free speech in the U.S. political context, it is also true democracy functions in places that have no such categorical protection. That democracy is not functioning very well in the U.S. right now is to a large extent due to abuses made inherently possible under the First Amendment (or at least under our current understanding of it).

As to the second shibboleth, the founders in fact had no idea they were protecting or creating some basic and absolute civil right to unrestricted free speech, and if they had been able to predict the future of the First Amendment, they would arguably have been appalled. The First Amendment was the founders' commitment to states' rights, not civil rights; the stipulation that "Congress shall make no law..." was not at the time a protection of the citizen's right to free speech. It was the stipulation that the limits to speech (and the other activities enumerated in the First Amendment) were to be set by the states, not the federal government; *the amendment does nothing to protect the right of free speech, it merely takes the power to regulate away from the federal government and reserves it to the states.* And, of course, the assumption was these men who created the government framework would always be in control of their states; their speech would be protected precisely because they and their heirs would determine what could be ruled out-of-bounds.

History has revised the role of the First Amendment, and that is almost certainly a good thing, but it is worth correcting the record: the First Amendment as a foundation of U.S. democracy is a myth. It has evolved in that direction, but that is a relatively recent development. Further, as pointed to previously, even under a supposedly absolutist interpretation of the First Amendment, norms matter, and the boundaries of acceptable speech—with or without a First Amendment—are decided by norms, not merely law.

The third error is perhaps the most significant. The argument is that speech is the coin of the realm in the marketplace of ideas, and that good ideas will triumph over bad ones, that truth will triumph over lies.

This seems to me to be seriously wrong, and obviously so. Consider a partial list of the disproofs of this claim: despite the clarity and overwhelming preponderance of evidence, we are still debating, among other absurdities, Barak Obama's citizenship as well as the existence of climate change and evolution. These are not, in any real sense, issues of debate, if by "debate" one means there are two defensible sides.

Note that these are not indefinite or disputable issues, they are not like debates about, say, the morality of abortion, or the most just rate of progressive taxation. Barak Obama was born in Hawai'i; evidence soundly settles that "dispute." Religious fundamentalists still insist that *in science class* teachers "teach the controversy" regarding evolution, despite the fact no such *scientific* controversy exists. Similarly, for ideological or economic reasons, public figures still deny the reality of human influence on the progress of climate change and its effects on human society. Put simply, none of these "disputes" would be discussed if good ideas drove bad ones out of public discourse, or if facts were dispositive in public discussion. What we lately have learned is that well-funded, widely distributed propaganda and misinformation can overcome—with great speed—well-evidenced fact and truth, and can do so quite powerfully, persistently, and pervasively.

Furthermore, this utilitarian defense of free speech has never been true. Were it true the Civil War would not have been fought, the ideology of emancipation being superior to that of slavery. World War II would have been unnecessary, since the racist ideology of Nazi Germany should have been easily vanquished by any number of superior alternatives.

One rapidly developing trope in public discourse is the idea that efforts to curtail hate and assaultive speech are unacceptable limitations of free speech as protected by the First Amendment and violations of academic freedom when applied in campus settings. Furthermore, the claim has been asserted (it would be overly generous and inaccurate to say that an argument has been advanced) that efforts to reduce such speech are actually harmful to the victims of the speech, producing delicate "snowflakes" unable to survive and compete in the rough-and-tumble arena of democratic life. This is an old narrative, spun and nurtured by professional hate-mongers like Rush Limbaugh, profiteering trolls like Milo Yiannopoulos, or insult-comedians like Bill Maher. The main strategy of those who advance this trope has been to depict efforts to curtail racist, sexist, homophobic, and other forms of assaultive speech as "political correctness," a term meant to disparage and demean efforts to promote social decency, but in recent years this point of view

has gained academic respectability thanks to a widely read, disseminated, and discussed article in *The Atlantic* by Greg Lukianoff and Jonathan Haidt.⁶

Their argument is that speech codes that oppose and delegitimize assaultive and hate speech, and the creation of “safe spaces” have no place on college campuses. For one thing, Lukianoff (who is the President of FIRE) and Haidt claim speech codes and safe spaces are interfering with free speech and academic freedom. In addition, they fear the protection these policies afford members of marginalized populations will weaken the character of today’s young people. They appear to believe that unless women, members of the LGBTQ community, people of color, and individuals with handicapping conditions, among others, are subjected to assaultive speech in class and on campus, they will not develop the thickened skins they need to function in society—a society defined by misogyny, homonegativity, white supremacy, and ableism. Creating a climate of safety and acceptance on campus, Haidt and Lukianoff tell us, is actually contrary to the best interests of those the effort is meant to benefit.

However, we should note that either their sincerity or their understanding of consistency is suspect: at the same time, and without apparent irony, Lukianoff and Haidt express concern for the well-being of white, male, tenured professors who may be somehow harmed by criticism from their students for remarks and assignments that are insensitive (or outright insulting) to some students in their classes or on their campuses. Their argument is free speech means those in power can use racist and assaultive speech, but the targets of their attacks are politically correct “snowflakes” to point the fact out and seek redress. Surely campus leaders and administrators have not only the right, but a positive responsibility to make campuses safe places for all in an institution partly defined by its structure of power inequalities. So, if “free speech” means some students can verbally harass their peers, or that instructors need not consider the potentially oppressive effects of some curricular content and need not worry about protecting “snowflakes” with trigger warnings about potentially difficult material, if this what free speech and academic freedom entail, then I am concerned about its effect on our polity. I think the line of argument in Haidt’s and Lukianoff’s article is simply and badly confused—free speech is not what they are defending in their article, they are protecting power and privilege, both of which they have in abundance. As I argue previously, this seems neither anomaly nor defect, but rather a design feature of a Constitution meant to create and perpetuate a white-supremacist, patriarchal republic.

So, while common sense tells us there must indeed be SOME limits to speech and expression (pornography to children, yelling “fire” in a crowded theater, sedition?), common sense gives no guidance as to what those limits might be, and when we begin debating the text of the First Amendment to discern the proper limits on speech we: (1) are likely to come with no principled limits and; (2) we are arguing about the wrong question, which ought to be: *is this speech a threat to democratic governance itself?* If the answer is *yes*, then we ought to stop that speech.

Here the problem is clear: if evil ends are pursued without scruple, and with persistent propaganda, false equivalences, appeals to powerful emotions like fear and anger, and pervasive dishonesty, then decency is liable to lose in the discussion. If the ruling class exercises its power and control of media to shape public opinion, or even to confuse people about what is reliable and what is fake, then bad arguments are likely to drive out good ones. And in an environment of such discourse, democracy seems fragile indeed. It is not, as Kruth suggests, that defenders of democracy lack confidence in its ability to stand up to critical honest discourse, *it is the fear that truth is at a disadvantage in the face of repeated and widely disseminated lies by people with wealth, power, and influence.*

And we now understand how this works: our brains are apparently constructed so basic emotions like fear and anger are able to overwhelm and reshape what counts as rational thought. It seems implausible to argue Donald Trump is President today because of the force of his arguments or the quality of his policy proposals. Instead, it seems clear he won because he tapped into the fear and anger of the American people. And his victory, in turn, has empowered the angry fearful Americans that belong to or tacitly support the rise of a neo-nazi, white-supremacist ideology.

Finally, we face the fact that argument in the public square is not an equal contest, and the reasons for this are not benign. First of all, there is the tendency for manipulation of fear and anger to be exploited in the pursuit of dark purposes, purposes quite antithetical to democratic life. Further corrupting democratic decision-making is the fact not all speech is presumed to be equal to begin with, and here I am not considering the validity of the arguments themselves, but the social positioning of the speaker. That is, we live in a society structured by hierarchies of race, class, gender, sexual orientation, verbal facility, access to knowledge, and power among many other distorting hierarchies.

In short, the First Amendment was not intended to do what we think it was intended to do; it does what we would like it to do badly; there is good reason not to want it to do what we think we want it to do; and when we use it in the way we use it, we miss the opportunity to have serious political discourse.

Conclusion

Long ago, Aristotle reminded his fellow Athenians they could expect different degrees of precision and certainty from different kinds of practices. So, he tells his fellow citizens, mathematics gives a degree of precision and certitude that one cannot properly expect from philosophy, particularly from ethics. His caution is relevant to my discussion of free speech because too often we seek absolute rules and strict, clear principles about what is permissible. Specifically, there is a First Amendment-sort of absolutism that, explicitly or not, places freedom of speech above all other issues facing us. This is a concern because speech can be dangerous to democracy, and because by absolutizing the value of free speech, we may be losing the ability to use public discourse to reach wiser policies.

As I come to the end of this paper, the reader will no doubt notice I have not proposed a solution to the problem I describe. There is a reason for that: I have none. But at a minimum, I think it important to rethink our heedless and fundamentalist view of the First Amendment. As things are now, the prioritization of free speech over other democratic goods not only hurts individuals left vulnerable by this prioritization as the testimony of Dr. Edwards affirms, but it threatens democracy itself by distorting, corrupting, and poisoning public discourse.

Endnotes

- 1 Manny Fernandez and Richard Perez-Pena, "As Two Oklahoma Students Are Expelled for Racist Chant, Sigma Alpha Epsilon Vows Wider Inquiry," *The New York Times*, March 10, 2015.
<http://www.nytimes.com/2015/03/11/us/university-of-oklahoma-sigma-alpha-epsilon-racist-fraternity-video.html>
- 2 Susan Kruth, "University of Oklahoma Expels Students for Constitutionally Protected Speech," Foundation for Individual Rights in Education (FIRE), March 10, 2015.
<https://www.thefire.org/university-of-oklahoma-expels-students-for-constitutionally-protected-speech/>
- 3 What follows is true of all elements of the First Amendment, though I refer here to free speech.
- 4 Charles W. Mill, *Racial Contract* (Ithaca: Cornell University Press, 1997).

- ⁵ Thomas F. Green, “Public Speech,” *Teachers College Record* 95, no. 3 (1994): 369–388.
- ⁶ Greg Lukianoff and Jonathan Haidt, “Coddling of the American Mind,” *The Atlantic* 1101 (September 2015): 2–4.
<https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>

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