SOCIAL SANCTIONS ON SPEECH

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Social sanctions on speech are ubiquitous. Every day, private actors respond to speech they dislike, disagree with, or find offensive with measures that impose a cost on speakers and thus potentially chill the expression of ideas. Some sanctions, such as criticism and condemnation, are mild and largely unobjectionable, while others, such as violence and vandalism, are severe and clearly unacceptable. Yet there are numerous sanctions in between these two poles and little agreement on which ones are compatible with the principle of free speech.

In this essay, I provide a framework for thinking about social sanctions—and the phenomenon of "cancel culture" they are part of. I begin by explaining that social sanctions, in some form at least, are an inevitable and indispensable part of our free speech system. I then consider three possible criteria for distinguishing between permissible and impermissible sanctions—intent, effect, and means—and conclude that we should focus primarily on the means used to sanction. Finally, I argue that whether a particular social sanction is consistent with free speech depends on a balancing of its expressive value and its coerciveness, and I use this approach to plot a variety of social sanctions on the continuum from least to most troubling.

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Introduction

This essay explores the extent to which social sanctions on speech are incompatible with the principle of free speech. By social sanctions, I mean actions by individuals and private entities that impose a cost on speakers and therefore might be thought to suppress the expression of certain ideas or the use of particular language. Such sanctions run the gamut from the severe to the mild. They include violence, vandalism, physical threats, harassment, boycotts, loss of employment, deplatforming, shouting down, disassociation, shaming, vilification, condemnation, and criticism. Because such sanctions are imposed by private actors instead of government officials, they are not covered by the First Amendment to the U.S. Constitution[1] or by most state guarantees of free speech.[2] For that reason, legal scholars have largely

[1] Private entities engage in "state action" if they are (a) carrying out a traditional state function, (b) acting at the direction of the government, or (c) acting jointly with the government. Such actions are subject to ordinary First Amendment rules. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019). In this essay, I am interested only in social sanctions that fall outside the state action doctrine.

[2] A few state constitutions do prohibit the suppression of speech by private actors. The New

ignored them.[3] Yet social sanctions on speech have become increasingly visible and controversial in recent decades.[4] They are at the heart of debates about free speech on college campuses, content moderation on social media platforms, and the general phenomenon that used to be called "political correctness" but is now referred to as "cancel culture."[5]

Much of this discourse is depressingly partisan and opportunistic. Many politicians and pundits, particularly on the right, invoke the specter of cancel culture whenever they face repercussions for their views or choice of words.[6] This makes it

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Jersey Supreme Court has interpreted the state's constitution to protect "against unreasonably restrictive or oppressive conduct on the part of private entities" in circumstances where public use of the property is prevalent. State v. Schmid, 84 N.J. 535, 560 (1980) (protecting speech at private universities). *See also* Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 486 (2012) (protecting speech in private homeowners association); N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 333 (1994) (protecting speech in private shopping malls). The Pennsylvania Supreme Court has also recognized free speech rights on private college campuses under its state's constitution. *See* Commonwealth v. Tate, 432 A.2d 1382, 1389–90 (Pa. 1981). More common are state *statutes* protecting speech against private suppression. For instance, nearly half the states provide some form of statutory protection for speech in the private employment context. *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012). In addition, California has enacted laws providing free speech rights for students at private colleges, *see* CAL. EDUC. CODE § 94367, and private secondary schools, *see* CAL. EDUC. CODE § 48950. For a catalog of such state protections, see Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV L. REV. 2300 (2021).

[3] The most extensive legal discussions can be found in Andrew Koppelman, *In Praise of Evil Thoughts*, 37 SOC. PHIL. & POL'Y 52 (2020); Lackland H. Bloom, Jr., *John Stuart Mill and Political Correctness*, 56 U. LOUISVILLE L. REV. 1 (2017); Eugene Volokh, *Deterring Speech: When Is It "McCarthyism"? When Is It Proper?*, 93 CALIF. L. REV. 1413 (2005); Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998); Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891 (1996).

[4] Commentary on the subject is too extensive to capture in a footnote. Anyone who reads *The Atlantic* or *Reason*, or spends any time watching Fox News or perusing Twitter knows what I mean.

[5] The phrase "cancel culture" is sometimes used broadly to refer to social sanctions on conduct as well as speech. Prominent men whose reputations or careers are damaged by accusations of sexual misconduct are often said to have been "cancelled." I am interested here only in social sanctions on speech because of the special role free speech plays in our culture and democracy.

[6] *See* Anne Applebaum, *The New Puritans*, ATLANTIC (Aug. 31, 2021) ("Partisans, especially on the right, now toss around the phrase cancel culture when they want to defend themselves from

tempting to question the sincerity of those who complain about social sanctions on speech. Do they really care about the clash of ideas or are they simply using the rhetoric of free speech to "own the libs" and carve out space to express objectionable views without consequence? It is easy, in other words, to find oneself not so much on the side of cancel culture as against the critics of cancel culture—to be not *pro* cancel culture but *anti* anti-cancel culture. But that too is a problem because, in confusing the argument with its advocates, it obscures serious questions about the role of social sanctions in our system of free speech. As the journalist Josh Marshall has stated, "[T]he worst thing about 'cancel culture' continues to be those who are constantly whining about it. But the thing itself isn't nothing."[7]

I agree with that assessment: Social sanctions on expression, though often exaggerated and cynically exploited, are not nothing. But to what extent are they inconsistent with the principle of free speech? That's the question this essay addresses. I begin in Part I by considering whether social sanctions threaten the values served by free speech and conclude that, as a general matter, they *can*. However, I also conclude that social sanctions, in some form at least, are an inevitable and indispensable part of our free speech system. The challenge is determining when they cross the line from inevitable and indispensable to gratuitous and unacceptable, and in Part II I consider three possible sorting criteria: 1) the intent behind the sanctions; 2) the effect of the sanctions; and 3) the means used to sanction. Although there is something to be said on behalf of each of these criteria, I argue that a focus on intent is not practical or reasonable; that the effect of a social sanction is not sufficient by itself to render it incompatible with free speech; and that the most

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criticism, however legitimate."). It is true that many liberals have also bemoaned cancel culture, even if they don't always use that term. *See, e.g.*, Editorial Board, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022); *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020. But fighting "cancel culture" has become a conservative sport over the past five years or so, just as fighting political correctness was before that. *See, e.g.*, Meredith Conroy, *How Cancel Culture Became An Issue for Young Republicans*, FIVETHIRTYEIGHT (Mar. 22, 2021), https://fivethirtyeight.com/features/how-cancel-culture-became-an-issue-for-young-republicans/; Matt Vasilogambros, *GOP Targets "Cancel Culture" in School Lessons*, PEW CHARITABLE TRUSTS (Feb. 26, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/02/26/gop-targets-cancel-culture-in-school-lessons-political-speech.

[7] Josh Marshall (@joshtpm), TWITTER (Jan. 3, 2022, 1:40 PM), https://twitter.com/joshtpm/status/1478073732954525701.

important criterion is the means used to sanction. I then argue that whether a particular social sanction is inconsistent with free speech depends on a balancing of its expressive value and its coerciveness. Sanctions that are clearly expressive and not overly coercive—such as criticism, condemnation, vilification, shaming, and even disassociation—should be regarded as compatible with free speech in nearly all instances.[8] Sanctions that are inexpressive (or only weakly expressive) and strongly coercive—such as violence, vandalism, physical threats, and harassment—should be regarded as categorically incompatible with free speech. Other sanctions, such as economic boycotts and loss of employment fall into a gray zone that does not lend itself to easy generalizations. As a result, their compatibility with free speech likely depends on the circumstances in which they are imposed.

In Part III, I address additional concerns related to vagueness and notice, as well as the mutually reinforcing relationship between social and legal sanctions on speech. I conclude by emphasizing the difference between free speech and norms of civility and explaining why we should avoid confusing the two.

Two clarifications are in order. First, this essay proceeds on the premise that there is a principle of free speech that reaches beyond the Constitution.[9] The First Amendment prohibits the government from abridging speech, but most of us care about expressive liberty even in the absence of state action. Free speech is not just a constitutional right; it is a political and cultural value, and understanding the reach of that value is as important as understanding the contours of the First Amendment. It may be more important since, as John Stuart Mill observed, social suppression of speech, "though not usually upheld by such extreme penalties . . . leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."[10]

Second, my concern in this essay is solely with the free speech implications of social sanctions. I do not address whether social sanctions are an effective means of achieving one's political goals,[11] or whether they are a good thing generally. A social practice may be unpleasant or destructive yet still be consistent with free speech.

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[8] For a possible exception to this general rule, see *infra* note 129.

[9] *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989).

[10] JOHN STUART MILL, ON LIBERTY 63 (Penguin Books 1974) (1859).

[11] *See* JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE 14 (2021) (arguing that "norm-policing backfires against the norm police").

Many people think the indiscriminate use of profanity and the public display of sexually suggestive advertising are harmful, but that doesn't mean these forms of communication are outside the bounds of free speech. The thrust of numerous Supreme Court opinions is that free speech encompasses expression we wish did not exist.[12] So even though one may find aspects of cancel culture troubling or appalling, that by itself should not lead to a conclusion that it is inconsistent with free speech.

I. SOCIAL SANCTIONS AND FREE SPEECH VALUES

In the Anglo-American tradition, free speech is largely viewed as instrumental.[13] We protect speech not because it is valuable in itself but because it furthers ends we deem valuable, such as truth-seeking, self-government, and autonomy or self-expression. Legal sanctions on expression undermine these ends and thus violate free speech unless outweighed by important or compelling governmental interests. The first question to ask about social sanctions, therefore, is whether they also threaten these ends. If so, that would suggest they are likewise antithetical to free speech.

In general, the answer appears to be yes: Social sanctions *can* threaten the goals served by free speech. Start with truth-seeking, which is usually represented by the metaphor of the marketplace of ideas. The premise of the truth-seeking rationale is that human beings are fallible and can never be certain of the truth. As a result, we are forbidden from banning ideas we believe to be false and must instead rely on "the competition of the market" as the "best test of truth."[14] This competition will not always result in the truth; the market being comprised of fallible humans, it is also fallible. But by subjecting our ideas to scrutiny and second-guessing, we will

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[12] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011); Hustler Mag. v. Falwell, 485 U.S. 46 (1988); Cohen v. California, 403 U.S. 15 (1971).

[13] *See, e.g.*, MILL, *supra* note 10, at 69–70 (grounding a defense of free speech in its utility); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas"). Although nonconsequentialist justifications have also been proffered, consequentialist arguments have dominated the discussion. *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989). *See also* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 15 (1994) (arguing "that *any* coherent understanding of so-called free speech will be consequentialist") (emphasis in original).

[14] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

get as close as *humanly* possible to the truth.[15] And the "truth" that emerges from this competition is, in the words of Justice Oliver Wendell Holmes, "the only ground upon which [our] wishes safely may be carried out."[16]

The truth-seeking rationale helps explains why legal sanctions are incompatible with free speech. But it is also relevant to social sanctions. If individuals are afraid to speak because they fear private violence, vandalism, or loss of a job, we will be deprived of their ideas. And if those ideas are true or contain a portion of the truth (or would help us understand the truth better), the marketplace of ideas will not function properly.[17] Rather than subjecting our ideas to competition, it will simply reaffirm what we already believe. As the New Jersey Supreme Court has observed in interpreting its state constitution to protect speech against private action, "It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech."[18]

The same analysis applies to the self-government rationale. Under this theory, we protect speech because of the many ways it facilitates and legitimizes democracy: by giving individuals the information they need to evaluate public policies;[19] by allowing them to participate in public debate about those policies;[20] and by enabling them to bring about political change.[21] Legal sanctions on speech undermine these goals, but so can social sanctions. If individuals are afraid to speak because of privately-imposed penalties, they will not be able to participate fully in public debate, will not be able to share and receive information about public policies, and will have difficulty altering the status quo. Likewise with the goal of self-expression,

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[15] *See* Thomas Healy, *Anxiety and Influence: Learned Hand and the Making of a Free Speech Dissent*, 50 ARIZ. ST. L.J. 803, 25 (2018) (explaining that Holmes did not believe "the market would inevitably produce an objectively verifiable truth" but that "subjecting our ideas to challenge is the only way we can have confidence in the actions we take in the face of uncertainty").

[16] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[17] *See* MILL, *supra* note 10, at 76.

[18] New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 369 (1994).

[19] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[20] *See* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); James Weinstein, *Participatory Democracy as the Central Value of Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

[21] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

which is threatened both by social and legal sanctions. An individual who is unable to realize her expressive capacities because of the threat of sanctions is unlikely to care whether those sanctions are imposed by state actors or private actors; autonomy is undermined either way.

It is true that some justifications for free speech focus specifically on the dangers of governmental power and thus may not seem readily applicable to social sanctions. Vincent Blasi's theory of the checking value of speech is one example.[22] So-called negative theories of free speech—that government cannot be trusted to determine which speech has value—provide another example.[23] But even these justifications may be implicated by social sanctions. Imagine a corrupt administration that enriches its corporate allies. If those allies use their wealth and power to silence individuals who criticize the administration, the checking value of free speech will be undermined even if the government itself does not abridge speech. As for concerns about the ability of government to honestly and objectively weigh the value of speech, we might have similar fears about powerful private actors, especially as they gain increasing control over modern modes of communication. If we don't trust public officials to determine which speech has value, why would we trust corporate executives at Google, Meta, or Twitter to make such judgments? Free speech, in other words, can serve as a bulwark not only against the risks of governmental power but against the risks of private power as well.[24]

As an initial matter, then, social sanctions would seem to threaten the ends served by free speech. But although social sanctions raise many of the same concerns as legal sanctions, they are different in important ways. First, many social sanctions are themselves expressive. When people criticize, condemn, and disassociate themselves from speakers or ideas, they are exercising their own rights of free speech and free association.[25] That criticism, condemnation, and disassociation is itself a sanction—a cost paid by those who speak—yet to disallow such sanctions

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[22] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

[23] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80–85 (1982).

[24] Heidi Kitrosser developed this point more fully in her presentation at this Symposium.

[25] Legal sanctions may also be expressive, in the sense that they send a message about what conduct or ideas the government approves or disapproves of. But the government has no constitutional right to speak, and legal sanctions that express hostility to speech based on its underlying message are unconstitutional. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

would infringe on the right of people to criticize and condemn ideas they disagree with and to choose which speakers to associate with. In the words of Mill, "We have a right . . . to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours."[26]

Disallowing such social sanctions would also run counter to the free speech justifications discussed above. Consider again the search for truth. The premise of the market metaphor is that government censorship would interfere with the search for truth by tipping the scales in favor of certain ideas and against others. But the market metaphor does not imply that harmful or dangerous speech must be allowed to go uncontested. The metaphor conceives of government as remaining neutral; it does not envision private actors remaining neutral.[27] To the contrary, it relies on private actors to use their own voices to counter true ideas with false ones and to push back against dangerous speech.[28] This counterspeech will often impose at least some cost on those against whom it is targeted. It may embarrass or discredit them. It may show them to be ignorant, foolish, disingenuous, hypocritical, or malicious. It may damage their personal or professional reputations. It may lead others to disassociate from them, to shun or ostracize them. But at least some of these social

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[26] *See* MILL, *supra* note 10, at 144. Mill continued: "We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty, to caution others against him, if we think his example or conversation likely to have a pernicious effect on those with whom he associates." It is unclear why Mill draws a line at parading our avoidance of other speakers. The right to express ourselves by choosing who we associate with would mean little if we could not make others aware of those choices. Perhaps Mill simply means it is in bad taste to parade our avoidance of others, a proposition I agree with in most, but not all, cases. Some views are so abhorrent that we should not let a concern with etiquette stand in the way of publicly disassociating from those who express them.

[27] *Cf.* Eule & Varat, *supra* note 3, at 1628–29 ("Unlike the state, which 'must be neutral about both the ends and the means of speech[,]' the university is a 'speech monitor' committed to pursuing 'normative goals of speech, such as clarity, rigor, responsiveness, and balance.'").

[28] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he fitting remedy for evil counsels is good ones"); Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'").

costs are unavoidable if we are committed to the role of counterspeech in the marketplace of ideas.[29]

The same logic applies if we focus on the other major justifications for free speech. To effectively participate in democracy, one must be free to criticize, condemn, and disassociate oneself from ideas and speakers one disagrees with, and this criticism, condemnation, and disassociation will often be *felt* as a penalty by those against whom it is directed. Similarly with the goal of autonomy or self-expression, which requires us to respect the expressive capacities of speakers and counterspeakers alike, even though the self-expression of the latter will often impose costs on the former.

None of this should be especially controversial. In fact, it may seem so self-evident as to not need saying. Yet pundits, politicians, and even legal scholars sometimes make statements suggesting that anyone who criticizes, condemns, or disassociates from controversial ideas or speakers is violating the principle of free speech. Exhibit A is a *New York Times* editorial from March 2022 with the headline "America Has a Free Speech Problem."[30] The editorial expressed concern that Americans could not exercise their freedom of speech without "fear of retaliation or harsh criticism." According to *The Times*, "Americans are losing hold of a fundamental right as citizens of a free country: the right to speak their minds and voice their opinions in public without fear of being shamed or shunned." *The Times* also quoted a survey respondent who stated, "You can't give people the benefit of the doubt to just hold a conversation anymore. You've got to worry about feeling judged."[31] Being harshly criticized, shamed, shunned, or judged is no doubt an unpleasant experience. But to suggest that these things are incompatible with free speech is to overlook the basic proposition that social sanctions, at least in some

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[29] *See, e.g.*, Volokh, *supra* note 3, at 1414–16; Frederick Schauer, Hudgens v. N.L.R.B. *and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 443 (1977) (noting that the state action requirement "leaves private persons free to 'discriminate' against the speech and speech-related activities of others in ways that are forbidden to the government").

[30] *America Has a Free Speech Problem*, *supra* note 6. *See also* STANLEY FISH, THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP 89 (2019) (suggesting that condemnation of statements "is tantamount to condemning the person who made them" and may therefore "cross[] a line").

[31] For more examples, see Thomas Healy, *Who's Afraid of Free Speech?*, KNIGHT FIRST AMEND. INST. (July 14, 2017), https://knightcolumbia.org/content/whos-afraid-free-speech.

form, are an inevitable and indispensable aspect of free speech. Indeed, in any society that values free speech and freedom of association, there will always be *some* things that cannot be expressed without risking *some* form of social sanction.[32]

There's also a general tenor in free speech scholarship that celebrates subversive and heterodox speech without fully acknowledging the importance of expression on the other side of the debate. Yes, there is value in having evil thoughts, as Andrew Koppelman argues in a recent essay.[33] But evil thoughts are not sufficient by themselves to further the goals of truth-seeking or self-government. We also need the scrutiny, challenge, and pushback that such thoughts elicit, and that pushback will often have an inhibiting effect.[34] One of the most common complaints about our current media environment is that it is filled with disinformation about important subjects, from public health to immigration to the integrity of elections.[35] Yet many people who complain about disinformation also complain about the atmosphere of intense pushback in our public discourse without acknowledging the extent to which the latter can serve as a remedy for the former.[36] In a world in which misinformation and disinformation is rampant, social sanctions play a valuable role: They help to minimize the harm of false and misleading speech without resort to government censorship.[37]

My point is not that social sanctions raise no free speech concerns. As explained above, they can undermine the goals that free speech serves. But they can also further those goals. The challenge is determining when the threat outweighs the value.

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[32] *See* Bloom, *supra* note 3, at 14 ("As such, social intolerance is essential to the continuance of freedom of speech. Indeed, social intolerance is an aspect of free speech; it is a part, indeed an important part, of the marketplace of ideas."); Koppelman, *supra* note 3, at 67 ("A liberal society depends on an ethic of mutual respect, and that ethic will entail some constraints on speech—and social sanctions brought upon those who fail to respect those constraints.").

[33] *See, e.g.*, Koppelman, *supra* note 3.

[34] *See* Bloom, *supra* note 3, at 11 (noting that speakers who fear social censure "will often feel as though he or she is walking on eggshells").

[35] *See* Emily Bazelon, *Free Speech Will Save Our Democracy*, N.Y. TIMES (Oct. 13, 2020).

[36] *See* RAUCH, *supra* note 11, at 18 (describing "a fight against two insurgencies: the spread of viral disinformation and alternative realities, sometimes called troll culture, and the spread of enforced conformity and ideological blacklisting, sometimes called cancel culture").

[37] *See* Bazelon, *supra* note 35 ("Today the research consensus among social scientists is that some fact-checking methods significantly reduce the prevalence of false beliefs.").

II. Potential Sorting Criteria

If social sanctions can be, but are not always, inconsistent with a principle of free speech, when do they cross the line? That is the million-dollar question and one that has largely gone unaddressed. Critics of cancel culture tend to lump all social sanctions together, ignoring that at least some are an inevitable feature of free speech. One exception is Jonathan Rauch, who, in his recent book *The Constitution of Knowledge*, identifies seven features of impermissible canceling. According to Rauch, we should be wary of responses to speech that 1) punish the speaker rather than the idea; 2) attempt to deplatform the speaker; 3) rely on "posturing," "outrage," and "grandstanding"; 4) engage in reductionism; 5) are orchestrated and targeted; 6) involve secondary boycotts; and 7) distort the speaker's message. "The more of these information-warfare tactics you are encountering, the surer you can be that you are being canceled, not criticized," Rauch writes.[38]

Although Rauch identifies these features of impermissible canceling, he spends little time justifying or developing them. For instance, he doesn't explain why expressions of outrage are unacceptable, whether deplatforming is different from disassociating, or how his injunction against orchestrated responses to speech can be squared with the First Amendment right of association, which finds value in group advocacy.[39] There are also tensions in his argument. Although he writes that we should punish the idea, not the speaker, he elsewhere acknowledges the legitimacy of sanctioning speakers who push demonstrably false ideas, rely on faulty evidence, or fail to properly vet their claims. "In cases of outright misconduct, those who break the rules are called out and sanctioned, or at least should be," he writes. "[T]heir papers or prizes may be withdrawn, their careers impeded, their reputations damaged. Sometimes, in extreme cases, when the violation is consequential and clearly committed in bad faith, they may lose their professional credential or be fired."[40] In the end, Rauch does not arrive at a coherent theory for distinguishing

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[38] *See* RAUCH, *supra* note 11, at 218–20. Rauch doesn't say explicitly whether he is drawing a line based on free speech principles or other considerations. But his book frequently invokes free speech principles, and its title suggests he is making an argument about constitutional values, not just norms of civility.

[39] *See, e.g.*, Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981) (stating that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process").

[40] RAUCH, *supra* note 11, at 105.

between acceptable and unacceptable social sanctions. Instead, like Potter Stewart with obscenity,[41] he seems to trust his instincts. "Most of the time, in real life," he writes, "the difference will not be hard to see."[42]

I think the difference is often very hard to see. And it is made harder to see by the absence of formal adjudication. Ordinarily, when there are questions of line-drawing in the law, we rely on courts to develop criteria through case-by-case adjudication. When the process works well, it yields coherent principles and useful distinctions that can be applied in subsequent cases. Because social sanctions are not formally and publicly adjudicated—in cases involving private companies, the public often doesn't even know the basis for a particular sanction—we don't have that luxury. Instead, we must rely on a less formal, more abstract process of line-drawing.

I am also skeptical that a single, all-encompassing standard can be developed. The line between acceptable and unacceptable sanctions will likely vary depending on context—whether, for instance, we're talking about college campuses, the workplace, or social media platforms.[43] If we view free speech as instrumental, we must consider the purpose it serves in different spaces and the interests it is aligned against—much as we do with legal sanctions in special contexts such as public schools, public fora, and government workplaces.

Even if we cannot settle on an all-purpose test for social sanctions, however, we can consider some general criteria to help us draw the line between the acceptable and the unacceptable. In this Part, I consider three such sorting criteria: the intent behind the sanctions; the effect of the sanctions; and the means used to sanction. Each of these criteria plays at least some role in assessing the constitutionality of legal sanctions on speech, so it makes sense to ask whether they might also help distinguish between acceptable and unacceptable social sanctions.

A. Intent

Critics sometimes denounce "cancel culture" on the grounds that it is an attempt to shut down debate, thereby ascribing an illicit motive to those who push back against speech they disagree with or think harmful. The implication is that

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[41] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it").

[42] RAUCH, *supra* note 11, at 220.

[43] Hence, the other three panels in this Symposium, which focus on these very contexts.

social sanctions designed or intended to suppress ideas are inconsistent with the principle of free speech. In *The Constitution of Knowledge*, for instance, Rauch distinguishes criticism, which he regards as legitimate, from canceling, which he regards as illegitimate, in part on the basis of intent. "Criticism seeks to engage in conversations and identify error," he writes; "canceling seeks to stigmatize conversations and punish the errant."[44] He also writes that canceling's "interest is not in discovering knowledge but in shaping the information battlefield."[45]

The use of intent in free speech theory and doctrine has a varied history, both with respect to speakers and regulators. With respect to speakers, there has long been an effort, beginning with Judge Learned Hand, to avoid punishing speakers solely on the basis of intent. In the view of Hand and later scholars, punishing speakers for bad intent gives judges and juries too much discretion, because determining intent is such a subjective inquiry. If fact-finders don't like the speaker's message, they can simply impute an illicit motive to the speaker as a way to justify punishing him.[46] Hand's argument helped persuade Justice Oliver Wendell Holmes not to defer to jury determinations of speaker intent in cases brought under the Espionage and Sedition Acts.[47] It also helped shape the development of modern First Amendment doctrine, which generally does not punish speakers because of their intent. As the Court stated in *Hustler v. Falwell*, "In the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment."[48] Instead, the Court frequently uses a requirement

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[44] RAUCH, *supra* note 11, at 218.

[45] *Id. See also* Bloom, *supra* note 3, at 12 ("Social stigmatization of particular opinions or subjects is intended to cleanse the public arena of unpleasantness and offensiveness"); *Letter on Justice and Open Debate*, *supra* note 6 ("The way to defeat bad ideas is by exposure, argument, and persuasion, not by trying to silence or wish them away.").

[46] *See* Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Apr. 1, 1919) ("[S]ince the cases actually occur when men are excited and since juries are especially clannish groups . . . it is very questionable whether the test of motive is not a dangerous test") (on file with the Harvard Law School Library); GREENAWALT, SPEECH, *supra* note 9, at 266; Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 698–99 (2009).

[47] *See* Healy, *Anxiety*, *supra* note 15, at 809–20.

[48] *See* Hustler Mag. v. Falwell, 485 U.S. 46, 53 (1988); *see also* Snyder v. Phelps, 562 U.S. 443 (2011) (extending *Hustler* to suits brought by private figures); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact

of intent (or some other level of *mens rea*) to avoid the chilling effect that speech regulations might otherwise have.[49]

When it comes to regulators, the Supreme Court stated in *United States v. O'Brien*[50] that the government's purpose is irrelevant in assessing whether legislation is consistent with the First Amendment. However, as then-Professor Elena Kagan showed in a well-known 1996 article, "the concern with governmental motive remains a hugely important—indeed, the most important—explanatory factor in First Amendment law."[51] It informs the Court's differential treatment of content-based and content-neutral regulations, its creation of "low-value" speech categories, and its skepticism of speech regulations that give government officials standardless discretion.[52] It also informs the Court's treatment of conduct regulations that incidentally burden expression and regulations of the time, place, and manner of speech. In the former category, the Court asks whether the government's interest is related to the suppression of expression,[53] while in the latter it asks whether the law is justified without reference to the content of the speech.[54] Both questions

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on respondent does not remove them from the reach of the First Amendment.").

[49] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that advocacy of unlawful conduct is protected unless it is likely to produce imminent unlawful conduct *and* is intended to do so); New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a public official cannot recover damages for "a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not"). *See also* Healy, *Brandenburg*, *supra* note 46, at 700–02, 709–10 (arguing that the intent requirement in *Brandenburg* is used not as a justification for punishment but as a safe harbor for speakers). *But see* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013) (arguing that intent requirements cannot be justified as prophylactic measures); Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014) (arguing that intent requirements are better understood as respecting speakers' status as autonomous agents).

[50] 391 U.S. 367 (1968).

[51] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 500 (1996).

[52] *Id.* at 443–83.

[53] *See O'Brien*, 391 U.S. at 377.

[54] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

make clear that the government cannot regulate expression if its motivation for doing so is tied to the message being conveyed.[55]

Turning to social sanctions, we can view those who impose them as speakers *or* regulators, since, as noted above, many social sanctions are themselves expressive. If we treat sanctioners primarily as speakers and take our cues from Hand, we might hesitate to focus on intent because of the inherent subjectivity of the inquiry. We frequently misjudge the intent of people on the other side of the political divide, and there is often an assumption that those who impose social sanctions are not interested in debate but are only performing, or "virtue signaling."[56] It is true that the hazards of this subjectivity are mitigated by the fact that no legal consequences will befall those we wrongly judge as having imposed social sanctions with bad intent. They will merely be regarded as having acted contrary to the principle of free speech. On the other hand, that result, like cancel culture, "isn't nothing."[57] And if, by avoiding a focus on speaker intent, we can minimize the role of subjectivity in our conclusions about what social sanctions cross the line, perhaps we should do so.

What if we treat those who impose social sanctions not as speakers but as regulators? In that event, it seems even clearer that intent should be irrelevant. As explained above, a regulation of speech or expressive conduct is unconstitutional when the government's interest is related to the suppression of expression or when the regulation cannot be justified without reference to the content of the speech. This is another way of saying that the government cannot regulate speech in an effort to discriminate against certain viewpoints.[58] In the words of *R.A.V. v. City of St. Paul*, "The government may not regulate (speech) based on hostility—or favoritism—towards the underlying message expressed."[59] But private actors, even if viewed as regulators of speech, are not subject to this prohibition. As also explained above (in Part I), private actors are participants in the marketplace of ideas. They

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[55] *See* Kagan, *supra* note 51, at 483–84. For a related argument that inquiries into governmental justification are tied up with inquiries about governmental intent, see Michael Coenen, *The Ends (and Endings) of Government Motive Analysis*, 74 ALA. L. REV. (forthcoming 2023).

[56] *See* RAUCH, *supra* note 11, at 127–28, 215.

[57] *See supra* note 8 and accompanying text.

[58] *See* Kagan, *supra* note 51, at 421.

[59] 505 U.S. 377, 386 (1992).

are permitted to favor some ideas over others; indeed, the marketplace only works if they do so, since it is the *competition* of ideas we rely upon to find the truth that "is the only ground upon which [our] wishes safely may be carried out."[60] To conclude that social sanctions are contrary to free speech when imposed for the purpose of advancing some ideas and discrediting others would run counter to the premise of the market metaphor. It would also run counter to the self-government rationale for free speech. As participants in the project of self-government, individuals must be permitted to favor certain ideas over others and cannot be faulted when they have the intent to do so.

One might respond that it is not the intent to advance or discredit certain views that is inconsistent with free speech. Rather, it is the intent to drive some ideas out of the marketplace altogether that is forbidden. Under this view, we can hope to temporarily gain the upper hand in the marketplace (or the project of self-government) but not to achieve permanent victory. We can intend to wound—even critically—but not to kill.

Aside from the difficulty of parsing intent so finely (how would we assess whether a sanctioner intended to kill or merely wound critically?), this approach is seriously overinclusive. It would disallow not only the most severe social sanctions such as violence, vandalism, and physical threats, but also milder sanctions such as criticism and condemnation, at least when undertaken with an intent to drive competing ideas out of the marketplace. A person who condemned the theory of white supremacy would be on safe ground as long as he had no intent to permanently remove that theory from public discourse. But if his goal was complete elimination of the theory, he would, according to this argument, be violating the principle of free speech.

Some might be untroubled by this result, believing that our goal in debate and democracy should be engagement and education, not the silencing of the opposing view.[61] But this strikes me as an unreasonable expectation to place on those participating in the marketplace of ideas and the project of self-government. Much participation in public debate is motivated by the hope that we can make progress as a

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[60] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[61] *See* RAUCH, *supra* note 11, at 198 ("I am suggesting that when we encounter an unwelcome and even repugnant new idea, the right question to ask is, 'What can I learn from this?' rather than 'How can I get rid of this?'").

society, that some pernicious and patently false ideas can be put to rest as discredited views that need not be listened to and engaged with.[62] To tell advocates of racial equality—to continue the example—that they violate the principle of free speech whenever they are motivated by a desire to expunge white supremacy from public discourse would be deeply demoralizing. It would suggest that society cannot escape from the prejudice, hatred, and ignorance inherited from the past.[63]

It could also dampen the fervor with which individuals respond to ideas they disagree with, which would in turn distort the marketplace and impoverish public discourse. As Mill noted, in order to fully understand opposing views, one "must be able to hear them from persons who actually believe them, who defend them in earnest and do their very utmost for them."[64] Mill was explaining why we must let people express offensive or heterodox views, but his statement applies equally to those who push back against such ideas.

I do not mean to suggest that we should all adopt as our goal the removal from public discourse of any opinion we dislike. Those who believe strongly in the value of debate and are humble about their beliefs will often tread carefully, fearful of silencing ideas prematurely, before they have been fully discredited. This is especially true when the issues are most contested and we are least certain about our beliefs.[65] But concluding that the principle of free speech forbids us from having the intent to drive ideas out of the marketplace strikes me as impractical and unreasonable.

There is one final argument to consider in favor of an intent-based inquiry. What if a sanctioner acts pretextually, condemning, vilifying, or shaming someone for his speech when in fact the sanctioner is motivated by wholly unrelated concerns? Perhaps the sanctioner has a grudge against the speaker or is a business rival. If social sanctions are used to achieve goals that have nothing to do with the ideas being expressed, might we say that the principle of free speech has been offended?

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[62] *See* FISH, NO SUCH THING, *supra* note 13, at 107 ("In ordinary contexts, talk is produced with the goal of trying to move the world in one direction rather than another.").

[63] *See* Koppelman, *supra* note 3, at 68 ("Even libertarians ought to endorse the project of transforming culture to eradicate the notion that some classes of persons are beings of an inferior order who have no rights.").

[64] MILL, *supra* note 10, at 99.

[65] *Cf.* Koppelman, *supra* note 3, at 53 (discussing the "ethical obligations of private actors").

Though a close question, I'm inclined to say no. Even if we could accurately assess a sanctioner's intent—and ignored the reality that most people act on the basis of multiple motives—I see no reason for concluding that pretextual sanctions are inconsistent with a principle of free speech. As long as the sanctions are themselves expressive—and thus contribute to the underlying goals of free speech—the sanctioner's intent seems irrelevant. If the condemnation, vilification, or shaming communicates a message about the sanctioner and the sanctioner's views, it has value under either the truth-seeking or self-government justifications for free speech.[66] It may even have value under an autonomy rationale, since some people may achieve self-fulfillment through such dissembling.

In sum, we should not look to the intent behind social sanctions to determine whether they are incompatible with free speech. We don't ordinarily judge speakers on the basis of intent and, to the extent we view those who impose social sanctions as regulators rather than speakers, they are situated differently than state actors. As participants in the marketplace of ideas, as members of a self-governing polity, and as autonomous individuals pursuing self-fulfillment through expression, they are entitled to favor some ideas over others with the goal of vanquishing those they believe to be wrong or dangerous.

B. Effect

If intent is unsatisfactory as a sorting criteria, what about the effect of social sanctions? Might we say that social sanctions are acceptable so long as they do not result in the silencing of certain ideas or language, but that they cross the line when they do have that effect?

This is a tempting criterion. If we protect speech because it contributes to the search for truth, we should worry about the elimination of ideas or language from the marketplace. The premise of the truth-seeking rationale is that we are fallible and can never be certain we know the truth. An idea that seems false today may turn out tomorrow to be true. But if social sanctions result in the eradication of that idea, we won't have the opportunity to discover whether it is in fact true. The same concern applies to the self-government rationale. Social sanctions that result in the silencing of an idea deprive us of any light that idea might shed on future policy debates. As for autonomy, if an idea is banished, some people will be deprived of

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[66] *See* Healy, *Brandenburg*, *supra* note 46, at 700 (arguing that "a speaker's intent has nothing to do with why we protect speech in the first place").

the self-fulfillment they might have attained by expressing the idea.

In spite of these concerns, I believe focusing on effect is an unsatisfactory sorting mechanism, for several reasons. First, if one agrees with my view on intent above, this would mean that people can have the purpose to drive ideas out of the marketplace but that once they achieve their goal they are undermining the principle of free speech. It would turn success in the marketplace into evidence of a free-speech violation and would send conflicting messages about what we can hope to achieve through our participation in truth-seeking and self-government.

Second, as with intent, effect is difficult to measure. How would we determine that an idea has been eliminated from the marketplace? Even if it no longer appears in mainstream media, it may survive in obscure outlets, on the "intellectual dark web," in private communications, or simply in the minds of its adherents. It may also survive in ordinary political discourse, albeit in new and different clothing. See, for instance, the recent transformation of "white supremacy" into the "great replacement" theory.[67]

Third (and again, as with intent), a focus on effect would not distinguish between severe and mild sanctions. It would mean that the principle of free speech is violated whenever, as a result even of temperate criticism, an idea was so thoroughly discredited that no one had any desire to express it. Yet this is exactly what we hope will happen in the marketplace. We don't prohibit government censorship because we want all ideas forever circulating in a fruitless and unproductive swirl. To the contrary, we hope that, over time, bad ideas will be exposed, debunked, and ultimately discarded. Even Rauch, one of the most forceful critics of "cancel culture," accepts this understanding of the marketplace. "The Constitution of Knowledge," he writes, using his own metaphor for free speech, "owes its efficiency to producing a body of knowledge, an archive of settled claims which do not need constant relitigating. The reality-based community is conservative, in the sense that it conserves what it has learned and reopens closed accounts reluctantly."[68]

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[67] *See How White Supremacy Returned to Mainstream Politics*, CENTER FOR AMERICAN PROGRESS (July 1, 2020), https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics/.

[68] RAUCH, *supra* note 11, at 198. *See also id.* at 124 (explaining with approval how an unsupported idea "dies out" eventually).

Mill, too, conceded that the removal of some questions from "serious controversy" was an "inevitable and indispensable" feature of free speech. And though Mill believed it might nonetheless be wise to keep even the most settled questions alive through "some contrivance" such as Socratic dialogue, he did not object to efforts to consolidate public opinion. "As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase," he wrote, "and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested."[69]

A comparison to antitrust law may help clarify the point. Under longstanding antitrust principles, success in the marketplace is not itself prohibited. A company can drive other firms out of business and can even achieve monopoly power without violating the law. In the words of Learned Hand, "The successful competitor, having been urged to compete, must not be turned upon when he wins."[70] What violates the law is when a company achieves monopoly power through anticompetitive conduct—i.e. through *means* that are, for one reason or another, considered illegitimate.[71] My argument is that we should approach social sanctions in a similar way, focusing not simply on whether an idea is driven out of the marketplace but on *how* that goal is pursued.

C. Means

So what types of sanctions might be illegitimate? In this section, I focus on two factors that are relevant to that question: the extent to which a sanction is expressive and the degree of coercion it exerts. I then show how these two factors can be used together to plot social sanctions on a continuum from least to most troubling.

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[69] MILL, *supra* note 10, at 105–06.

[70] United States v. Alum. Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

[71] *See* Verizon Comm'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.") (emphasis in original); United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001) ("A firm violates § 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" (quoting United States. v. Grinnell Corp., 384 U.S. 563, 571 (1966))).

1. Is the sanction expressive?

As explained in Part I, one of the reasons that social sanctions, at least in some form, are an inevitable and indispensable part of our free speech system is because they contribute to the underlying goals of free speech. In determining whether a particular sanction is acceptable, therefore, it makes sense to begin by asking whether it is a legitimate form of expression that contributes to those goals.

Critics of cancel culture often argue that although it is legitimate to combat offensive or harmful ideas with reasoned criticism, it is illegitimate to rely on vilification, name-calling, shaming, social ostracism, and similarly vituperative methods. "Criticism expresses arguments or evidence with the goal of influencing opinion through rational persuasion," writes Rauch. In his view, criticism should be "dispassionate," "impersonal," and "orderly,"[72] and he quotes approvingly Lincoln's dicta that "[r]eason—cold, calculating, unimpassioned reason—must furnish all the materials for our future support and defense."[73] Professor Lackland Bloom asserts that in order for the marketplace of ideas to function properly, disagreements should be settled by civil discourse rather than ad hominem attacks and demonization.[74] The pundit Kirsten Powers argues that many liberals "instead of using persuasion and rhetoric to make a positive case for their causes and views, work to delegitimize the person making the argument through character assassination, demonization, and dehumanizing tactics," adding that such efforts "are a chilling attempt to silence free speech."[75]

It is not clear, however, why only reasoned criticism should count as legitimate expression. One possibility is that measures such as condemnation and name-calling do not address the merits of a debate. But as I have argued elsewhere, "that reflects a rather narrow view of what counts as 'the merits.' To argue that a speaker's position is racist or sexist is to say something about the merits of her position, given that most people think racism and sexism are bad. Even arguing that the speaker herself is racist goes to the merits of the debate, since it gives us context for judging her motives and the possible consequences of her position."[76] Of course,

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[72] RAUCH, *supra* note 11, at 67, 98–99.

[73] *Id.* at 233.

[74] Bloom, *supra* note 3, at 15–16.

[75] KIRSTEN POWERS, THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH 3–4 (2015).

[76] Healy, *Who's Afraid*, *supra* note 31.

such statements are conclusory and might not be persuasive. But just because statements are unpersuasive doesn't mean they're irrelevant to the merits of a debate.

Furthermore, it is unclear why we should be limited to discussing the merits of a matter when historically, at least, we have not been. Political debate has often strayed from the issue under consideration to personal or tangential matters. This is not just because personal attacks are cheap and easy. It is because most people do not reason like lawyers and policy wonks, carefully dissecting an issue into its component parts and then addressing each part separately. What Rauch and others propose may be a good principle in the world of appellate litigation or Washington D.C. think tanks, but it is not consistent with our free-speech tradition, which values not only logical, rational argument but emotional, impassioned, and inarticulate expression too. As the Supreme Court explained in *Cohen v. California*, "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."[77]

The Court reaffirmed that view in *NAACP v. Claiborne Hardware*.[78] "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases," it stated. "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'"[79]

At one point in *The Constitution of Knowledge*, Rauch seems to acknowledge this. Recounting his involvement in the marriage equality movement, he writes that "[a]ppeals to reason and evidence . . . could persuade, but only after people had moved to a persuadable place emotionally: by knowing gay people or couples, or by

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[77] 403 U.S. 15, 25–26 (1971); *see also* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right opinion on the part of the citizens of a democracy.").

[78] 458 U.S. 886 (1982).

[79] *Id.* at 928 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

a change of heart among friends or family, or by receiving a signal from a trusted leader or authority that supporting same-sex marriage was OK. People's personal opinions, political identities, and peer-group norms all had to be nudged and cajoled simultaneously, which was a long slow process."[80]

Much public discourse involves these kinds of emotional appeals and signals. Take shaming, which critics of cancel culture regularly denounce as illegitimate. Shaming signals that you not only disagree with someone's speech or behavior but find it appalling. And it does so in a way that likely could not be achieved through reasoned criticism alone. One of the most celebrated moments in mid-twentieth century political history was the shaming of Senator Joseph McCarthy by the lawyer Joseph Welch during a televised congressional hearing. When McCarthy attempted to smear a young lawyer in Welch's office as a communist, the latter famously asked, "Have you no sense of decency sir, at long last? Have you left no sense of decency?" Welch's question, the rhetorical equivalent of "you should be ashamed of yourself," was widely credited with turning the tide of opinion against McCarthy, of capturing in a few short words the disgust and weariness many people were feeling.[81] That Welch was shaming McCarthy for himself trying to shame the young lawyer does not undermine the point, which is that shaming is a powerful, effective, and widely accepted form of expression.

Even if one were not persuaded of the value of such expression, it is unclear how we would distinguish rational, dispassionate criticism from impassioned, irrational argument. Is it rational to rely on anecdotes, even though they pull selectively from experience to make a point? What about storytelling in general? Are stories irrational because they harness the power of narrative and character rather than relying on cold logic? Is figurative language unacceptable, given that it attempts to move us emotionally? If so, those who bemoan "cancel culture" are themselves offending the principle of free speech since that phrase is figurative. Not to mention the many other instances of figurative and hyperbolic language used by critics of "cancel culture," such as "information warfare," "mob action," and "the woke mob."[82]

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[80] RAUCH, *supra* note 11, at 30.

[81] GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 387 (2004).

[82] *See, e.g.*, RAUCH, *supra* note 11, at 216–20; Osita Nwanevu, *The Willful Blindness of Reactionary Liberalism*, NEW REPUBLIC: SOAPBOX (July 6, 2020), https://newrepublic.com/article/158346/

In short, there is little reason to distinguish between reasoned criticism and social sanctions such as condemnation, vilification, disassociation, and shaming. All of these sanctions are forms of expression that have traditionally been recognized as legitimate within our free speech system because they contribute to its underlying goals of truth-seeking, self-government, and autonomy.

There are, however, some means of sanctioning speech—such as violence and vandalism—that have not traditionally been viewed as legitimate forms of expression. As the Supreme Court stated in *Claiborne Hardware Co*., "The First Amendment does not protect violence," and "'the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'"[83] Nor are there are any cases in which defendants have successfully argued that vandalism was a protected form of expression.[84] Not being regarded as expressive, these sanctions cannot be said to contribute to the goals served by the principle of free speech. Therefore, the threat they pose to those goals is not counterbalanced by any corresponding benefits.

Other sanctions, such as physical threats and unlawful harassment,[85] are more plausibly viewed as expressive, since they are usually accomplished through language. But as Kent Greenawalt has explained, not all uses of language contribute to the underlying goals of free speech.[86] Greenawalt distinguishes "assertions of fact and value" from "situation altering utterances," which are similar to J.L. Austin's

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willful-blindness-reactionary-liberalism (arguing that "reactionary liberals" use terms like "mobs" and "groupthink" to denigrate collective efforts).

[83] 458 U.S. 886, 916 (1982) (quoting Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)).

[84] *R.A.V. v. City of St. Paul* is not to the contrary, since the Court made clear that the defendants could have been punished under a law prohibiting arson or criminal damage to property. *See* 505 U.S. 377, 380 n.1 (1992).

[85] As defined by the Supreme Court, unlawful harassment, at least in the educational context, consists of speech that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999).

[86] *See* GREENAWALT, SPEECH, *supra* note 9.

concept of "speech acts."[87] Such utterances are "ways of doing things, not of asserting things," Greenawalt writes, and are thus more like action than speech.[88] There is a strong argument that both threats and harassment fall under the category of situation-altering utterances because, rather than describing the way the world is or should be, they alter social relations and normative obligations. Indeed, the Supreme Court has held in the case of threats[89] and suggested in the case of harassment[90] that any expressive value such statements have is outweighed by the harm they inflict. In effect, the Court treats both threats and harassment as conduct, not speech.[91]

What about economic boycotts or other forms of financial pressure? The story here is more complex. On the one hand, the Court has ruled that non-violent boycotts and pickets are protected forms of expression, both in the context of labor disputes and political activism.[92] It has also recognized the value of concerted action to achieve ideological goals, stating that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[93] On the other hand, the Court has suggested that some secondary boycotts, at least in the context of labor disputes, are not protected by the Constitution.[94] Moreover, the Eighth Circuit recently held that an Arkansas law

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[87] *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

[88] GREENAWALT, SPEECH, *supra* note 9, at 58,

[89] *See* Virginia v. Black, 538 U.S. 343 (2003); *see also* White v. Lee, 227 F.3d 1214, 1230 (9th Cir. 2000) ("Threats of violence and other forms of coercion and intimidation directed against individuals or groups are, however, not advocacy, and are subject to regulation or prohibition.").

[90] *See Davis*, 526 U.S. at 651.

[91] For criticism of the Court's treatment of workplace harassment claims, see Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757, 777–82 (1992); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1843–47 (1992).

[92] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914–15, 918 (1982); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940).

[93] *See, e.g.*, Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981).

[94] *See Claiborne Hardware*, 458 U.S. at 912; *see also* Dan Ganin, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539, 1549–50 (2008).

prohibiting public contractors from participating in a boycott of Israel did not violate the First Amendment because economic decisions that are not explained to observers are not inherently expressive.[95] In reaching this conclusion, the Eighth Circuit relied on the Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., which held that law schools refusing access to military recruiters were not engaged in expressive activity.[96]

The upshot of these decisions is that economic boycotts and refusals to deal can be, but are not always, expressive. Sometimes, they are simply business decisions that have nothing to do with the communication of ideas. Whether one agrees with the results in particular cases, this general framework seems correct. Unlike condemnation, vilification, and shaming, which are inherently expressive, economic boycotts are expressive in some contexts but not in others.

The firing of employees is similarly complex. In most cases, we do not interpret the termination of an employee as an expressive act. We view it as a business decision based upon market conditions, employee performance, or other commercial considerations. But the Court has made clear that corporations have rights under the First Amendment. They have a right to spend money on public referenda[97] and candidate elections,[98] and they likely have rights under the free exercise clause.[99] Furthermore, there are many situations in which the firing of an employee could plausibly be regarded as expressive. If a newspaper fired a columnist for expressing views contrary to its own, we would likely regard that as an exercise of the company's free speech and associational rights.[100] The same would be true if the American Civil Liberties Union fired an employee who advocated the curtailment of civil

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[95] *See* Arkansas Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022) (upholding Arkansas law that barred public contractors from engaging in "boycott of Israel"). *But see* Amawi v. Pflugerville Independent Sch. Dist., 373 F. Supp. 3d 717, 743 (W.D. Tex. 2019) (striking down a Texas law banning public contractors from boycotting Israel because "[p]laintiffs' boycotts are inherently expressive conduct . . . [that] is protected by the First Amendment"), *vacated by* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020) (holding that dispute was rendered moot by changes to Texas law).

[96] 547 U.S. 47, 65–68 (2006).

[97] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[98] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[99] *See* Hobby Lobby v. Burwell, 573 U.S. 682, 714–15 (2014) (citing Gallagher v. Crown Kosher Super Market of Mass., Inc. 366 U.S. 617 (1961)).

[100] *See* Volokh, *supra* note 3, at 1427–29.

rights or the National Rifle Association fired an employee who endorsed repealing the Second Amendment.[101] Deciding which terminations are expressive is not an easy task, of course. It likely turns on the same kind of factual analysis conducted by the Eighth Circuit in the Arkansas case and the Court in *Rumsfeld*. But whatever the analysis, it seems clear that the firing of a worker can, but does not always, implicate an employer's right to free speech and expressive association.

2. How coercive is the sanction?

Whether a social sanction is expressive is one factor to consider in deciding whether it is compatible with free speech. We should also consider another factor: how coercive the sanction is.

Every sanction is at least somewhat coercive in the sense that it increases the odds that a speaker will remain silent when he would prefer to speak. But that alone should not be enough to render a sanction incompatible with free speech, since even criticism can be coercive in that sense. Instead, we should draw the line at sanctions that are so coercive, they leave the speaker little or no choice but to remain silent. Such sanctions—call them strongly coercive—will silence speech no matter how valuable it is or how much it contributes to the speakers' self-fulfillment. It is true that mildly coercive sanctions may also silence speech, since some speakers will be unwilling to endure even a small cost for expressing their views. But mildly coercive sanctions at least leave speakers a choice; those who feel strongly enough about their views can still express them. And because, as Michael Coenen has argued, the "objective constitutional value" of speech probably bears at least some relation to "the subjective value that an individual attaches to it," mildly coercive sanctions are less likely to deter speech that contributes to the search for truth and self-government.[102] They are also less likely to undermine speaker autonomy. By giving speakers a real choice, they allow the expression of ideas that are most essential to their self-fulfillment.[103]

So when does a sanction cross the line from mildly to strongly coercive? In answering this question, it might be helpful to first consider the question in the context of legal sanctions. When it comes to state action, not every measure taken in

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[101] *See id.* at 1414.

[102] Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1035 (2012).

[103] *See id.* at 1037–38.

response to speech is considered a violation of the First Amendment. Instead, courts must first determine whether the government's response is punitive enough to count as an abridgment of free speech.

The issue arises frequently in First Amendment retaliation claims brought by public employees under 42 U.S.C. § 1983. To establish a First Amendment violation, public employees must show, among other things, that they have suffered an adverse employment action. All courts agree that "ultimate employment decisions," such as discharge, demotion, and refusal to hire or promote, are sufficient to qualify as "adverse employment action."[104] Beyond that, there is disagreement. A number of circuit courts—the Fifth, Eighth, and Eleventh—have held that employees must show "a material change in the terms and conditions of employment."[105] In these circuits, the bar for establishing an infringement of free speech is quite high. The Eighth Circuit has concluded that the standard is not met by "loss of status and prestige";[106] "negative memoranda in a personnel file";[107] "minor shifts in employment responsibility";[108] or involuntary job transfers resulting in "no diminution in title, position, salary, job responsibilities, benefits, hours, or other material terms or conditions."[109] The Fifth Circuit has held that retaliation consisting of "investigations, criticisms, public (but withdrawn) reprimands, psychological and polygraph testing, suspension with pay, [and a] transfer . . . do not, either individually or collectively, constitute adverse employment actions."[110] And the Eleventh Circuit has rejected First Amendment claims based on reprimands, negative evaluations, threats of job loss, exclusions from meetings, and removal of job duties.[111]

Other circuits—the First, Second, Third, Sixth, and Tenth—have adopted a

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[104] Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669, 687 (2005).

[105] *Id*. at 674–75 n.13.

[106] Meyers v. Neb. Health & Human Servs., 324 F.3d 655, 659–60 (8th Cir. 2003).

[107] Jones v. Fitzgerald, 285 F.3d 705, 714 (8th Cir. 2002).

[108] Duffy v. McPhillips, 276 F.3d 988, 992 (8th Cir. 2002).

[109] *Jones v. Fitzgerald*, 285 F.3d at 714.

[110] Breaux v. City of Garland, 205 F.3d 150, 164 (5th Cir. 2000).

[111] Akins v. Fulton Cnty., 420 F.3d, 1293, 1300–02 (11th Cir. 2005).

more lenient standard, asking whether the government's actions would deter a "reasonable person" or a "person of ordinary firmness" from continuing to engage in constitutionally protected speech."[112] The application of this standard has been mixed, however. In one case the Tenth Circuit held that the filing of criminal charges against an employee was an adverse action because the trial was public,[113] while in another case the same court held that the launching of a private investigation was not an adverse action because it did not result in reputational damage to the employee.[114]

The Ninth Circuit has adopted the most liberal standard, asking only whether the government's action would "deter" or "chill the exercise" of protected First Amendment rights.[115] It has also made clear that "a government act of retaliation need not be severe" and that "even minor acts of retaliation can infringe on an employee's First Amendment rights."[116] Applying this standard, the court has found adverse action where an employee was reassigned to another position,[117] banned from certain meetings and other job duties,[118] subjected to an investigation and a negative employment report,[119] and temporarily suspended.[120] But even the Ninth Circuit has made clear that some "retaliatory action is so insignificant that it does not deter the exercise of First Amendment rights, and thus does not constitute an adverse employment action within the meaning of the First Amendment retaliation

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[112] Alston v. Spiegel, 988 F.3d 564, 575 (1st Cir. 2021) ("reasonable person"); Palardy v. Township of Millburn, 906 F.3d 76, 80–81 (3rd Cir. 2018); Couch v. Bd. of Trs. of the Mem'l Hosp., 587 F.3d 1223, 1238 (10th Cir. 2009) ("reasonable person"); Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 227 (2d Cir. 2006) ("ordinary firmness"); Farmer v. Cleveland Pub. Power, 295 F.3d 595, 602 (6th Cir. 2002) ("ordinary firmness"); Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000) ("ordinary firmness").

[113] Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996).

[114] Lincoln v. Maketa, 880 F.3d 533, 540–41 (10th Cir. 2018).

[115] Coszalter v. City of Salem, 320 F.3d 968, 970, 975 (9th Cir. 2003). The Seventh Circuit has sent mixed signals. *Compare* Spiegla v. Hull, 371 F.3d 928, 941 (7th Cir. 2004) (stating that governmental action that "is likely to deter the exercise of free speech . . . is actionable"), *with* Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982) (employing the "ordinary firmness" language).

[116] *Coszalter*, 320 F.3d at 975.

[117] *Allen*, 812 F.2d at 428.

[118] Thomas v. Carpenter, 881 F.2d 828, 829 (9th Cir. 1989).

[119] Ulrich v. City and Cnty. of San Francisco, 308 F.3d 968, 977 (9th Cir. 2002).

[120] Anderson v. Central Point Sch. Dist., 746 F.2d 505, 506 (9th Cir. 1984).

cases."[121] In one case, it rejected a retaliation claim where the plaintiff had shown only "that he was bad-mouthed and verbally threatened."[122] The court held that "such actions, even if taken in response to protected speech, did not constitute an adverse employment action."[123]

The Supreme Court has not weighed in on this precise question. In one case, it did remark that the First Amendment protects against "even an act of retaliation as trivial as failing to hold a birthday party for a public employee."[124] However, that statement has been described as "colorful rhetoric,"[125] and the Court has not yet adopted a standard for determining when adverse action against a state employee is significant enough to implicate the First Amendment. In other contexts, the Court has suggested a higher bar. For instance, in upholding the NAACP's right not to disclose its membership list to the state of Alabama, the Court pointed to the group's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[126] Based on context, it seems clear that the Court's use of the phrase "public hostility" was not a reference to mere criticism or even vilification and shaming. Instead, the Court was almost certainly referring to the violence and loss of livelihood that was a hallmark of the backlash to the civil rights movement. This conclusion is bolstered by another case involving the NAACP, in which the Court rejected the claim that the use of vilification and social ostracism to effectuate a boycott rendered the protections of the First Amendment inapplicable.[127]

The Court has also made clear that speech does not lose First Amendment protection just because it exerts some coercive pressure. Addressing the actions of boycott enforcers in the NAACP case, the Court wrote that they "admittedly sought to

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[121] *Coszalter*, 320 F.3d at 975.

[122] Nunez v. City of Los Angeles, 147 F.3d 867, 875 (9th Cir. 1998).

[123] Coszalter v. City of Salem, 320 F.3d 968, 976 (9th Cir. 2003).

[124] Rutan v. Republican Party of Illinois, 868 F.2d 943, n.4 (7th Cir. 1989).

[125] Acosta-Orozco v. Rodriguez-de-Rivera, 132 F.3d 97, n.5 (1st Cir. 1997).

[126] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

[127] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926 (1982) ("To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award.").

persuade others to join the boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[128]

What does this review of cases tell us? Mainly that there is little agreement about what the standard should be in determining whether a sanction is serious enough to implicate free speech. But it does drive home the point that even when it comes to legal sanctions, not every consequence imposed on speakers is inconsistent with free speech. And arguably, the bar should be even higher for social sanctions since there are free speech interests on both sides of the equation. At a minimum, we should apply the test established by the First, Sixth, Seventh, and Tenth Circuits: that a social sanction implicates free speech only when it is severe enough that a "reasonable person" or a person of "ordinary firmness" could not be expected to bear it. This standard respects the expressive interests of sanctioners by making clear that mildly coercive sanctions do not contravene free speech. At the same time, it protects the underlying goals of free speech since sanctions a reasonable person cannot resist are likely to silence even the most valuable expression.

The question then becomes what kinds of sanctions a person of ordinary firmness cannot reasonably resist. Based on the case law above, it seems clear that, as a general matter, criticism, condemnation, vilification, shaming, and disassociation do not meet the standard.[129] Though not pleasant, none of these sanctions are so severe that a reasonable speaker cannot be expected to bear them. By contrast, violence, vandalism, physical threats, and harassment meeting the statutory definition (e.g., "severe, pervasive, and objectively offensive") would all qualify. These are not merely unpleasant responses to speech. They are the kind of measures resorted to when one wants to overwhelm the will of even the most stalwart adversary.

Once again, it is the sanctions in the middle—boycotts and firing of employees—that pose the thorniest problems. Whether a boycott is strongly coercive likely depends on a variety of factors, including how widespread the boycott is and how

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[128] *Claiborne Hardware*, 458 U.S. at 909–10.

[129] I qualify this statement with the phrase "as a general matter" to account for the possibility that there might be exceptional circumstances in which vilification, shaming, or disassociation might be so coercive as to overbear the will of a reasonable speaker. Imagine a teenager who finds herself the target of a viral social media campaign in which she is so universally vilified, shamed, or ostracized that her life is unbearable. In such an exceptional case, we might conclude that the sanction is incompatible with free speech.

economically resilient the company is. An isolated boycott of a massive, financially secure company such as Spotify[130] is different from the complete boycott of small, economically vulnerable firm.

Context is also important when it comes to other types of financial pressure, such as loss of a job.[131] As Mill wrote, "Those whose bread is already secured, and who desire no favours from men in power, or from bodies of men, or from the public, have nothing to fear from the open avowal of any opinions, but to be ill-thought of and ill-spoken of, and this it ought not to require a very heroic mould to enable them to bear. There is no room for any appeal *ad misericordiam* in behalf of such persons."[132] But for most people, Mill believed, financial retaliation was overly coercive since "men might as well be imprisoned, as excluded from the means of earning their bread."[133]

3. Balancing the two factors

The two factors discussed above—the extent to which a sanction is expressive and the degree of coercion it exerts—can help us identify which social sanctions are incompatible with free speech. To get a more complete picture, however, we should consider the two factors together. That is, we should balance the expressiveness of a sanction against its coerciveness. When a sanction's contribution to free speech values outweighs the threat it poses to those values, we should regard that sanction as compatible with free speech. When the opposite is true—when the threat is greater than the value—we should regard that sanction as incompatible with free speech. Thus, the more expressive a sanction is, the more coerciveness we should be willing to tolerate. The following diagram illustrates the point:

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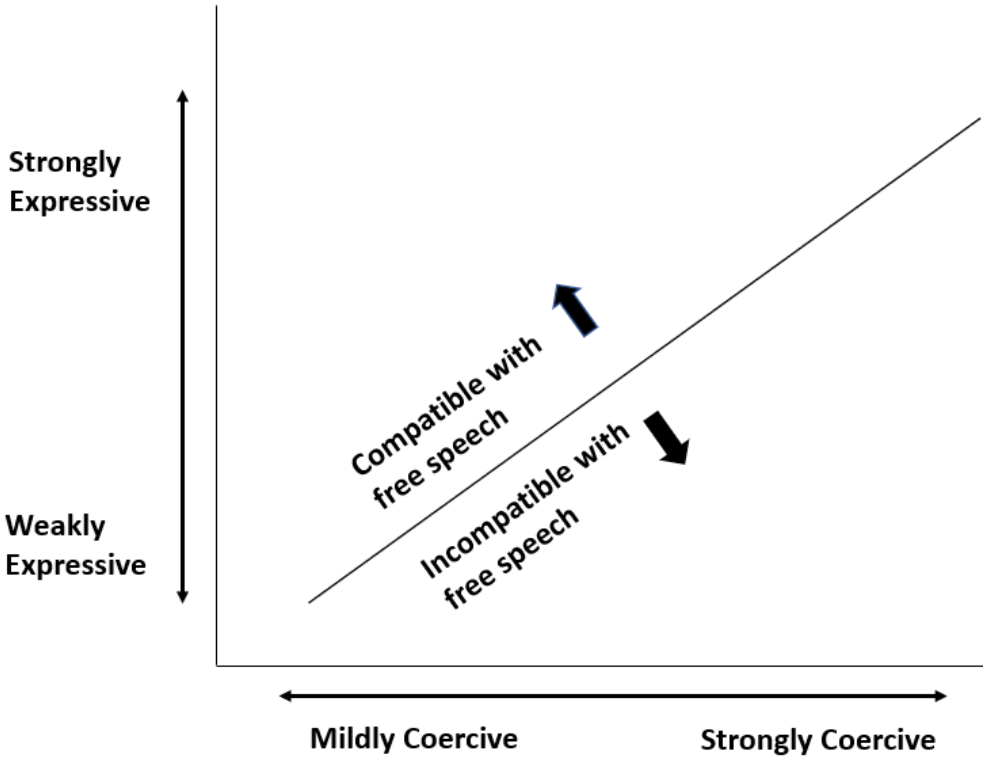
[130] *See* Peter Kafka, *It's Going to Take a Lot More Than Neil Young to Change Spotify's Mind About Joe Rogan*, VOX (Jan. 27, 2022), https://www.vox.com/recode/22905047/joe-rogan-spotify-neil-young-boycott.

[131] A related question is whether advocacy of economic retaliation is inconsistent with free speech. People sometimes frame this as a demand, but the use of that word obscures degrees of power. Some people are in a position to make a demand that will be followed. In other cases, what it means is that people are arguing vehemently that the person should lose his job.

[132] MILL, *supra* note 10, at 93.

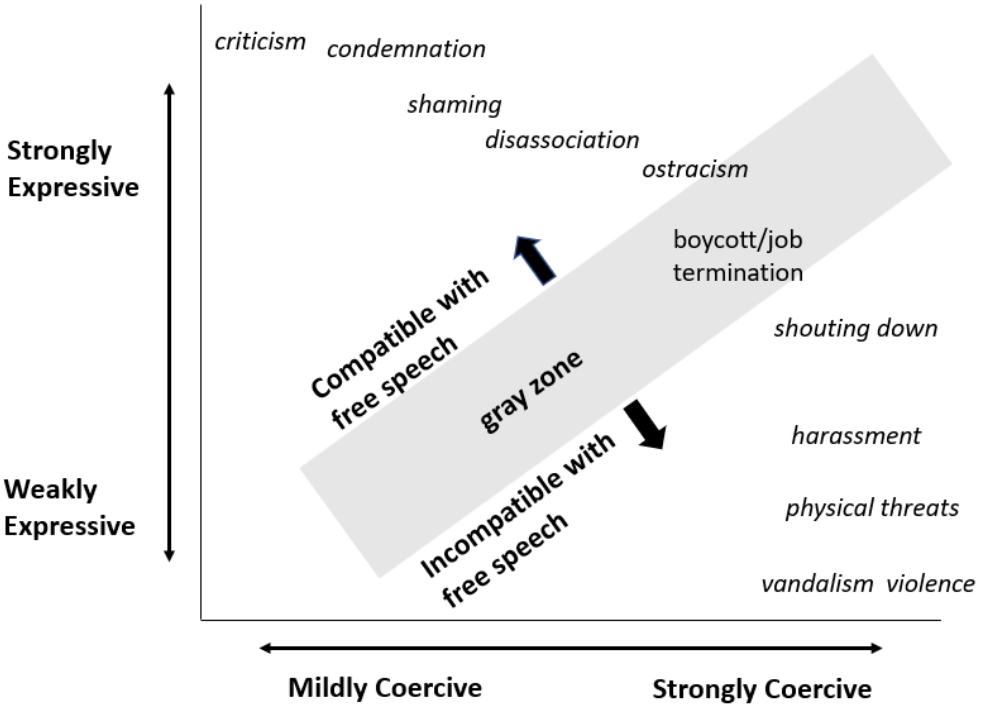
[133] *Id.*



In this diagram, the vertical axis represents the extent to which a sanction is expressive, while the horizontal axis represents the degree of coerciveness it exerts. The line sloping upward from left to right represents the boundary between sanctions that are compatible with free speech and those that are incompatible. When a sanction is mildly coercive, even a weak degree of expressiveness is sufficient to render it compatible with free speech. As a sanction becomes more coercive, however, it requires a greater degree of expressiveness to reconcile it with the principle of free speech.

This diagram is primarily conceptual. It is not meant to illustrate the precise location of the line between permissible and impermissible sanctions. It also does not resolve difficulties on the margins. For instance, it doesn't tell us what should happen in the lower left corner, where the expressive value of a sanction is almost nonexistent yet its coercive effect is very mild. It may be that a certain threshold of coerciveness must be reached before even a weakly expressive sanction can be said to violate the principle of free speech. But the diagram does show the relationship between expressiveness and coerciveness I have in mind. And it can be used to contemplate where a variety of sanctions might fall on the continuum from least to

most troubling, as seen in the revised diagram below:



In this diagram, I have made two adjustments. First, I have converted the line sloping upward into a gray zone to reflect the reality that some sanctions, such as boycotts and job terminations, are neither categorically permissible nor impermissible. Instead, as argued in the preceding subsections, we must consider them on a case-by-case basis. Second, I have attempted to plot the remaining social sanctions according to their expressive value and their coerciveness. In the upper left corner are sanctions that are strongly expressive and mildly coercive, such as criticism and condemnation, which most people would agree are compatible with free speech. As we move from left to right, we encounter sanctions that are arguably less expressive and more coercive, such as shaming and disassociation, but that, in my view, still fall on the safe side of the line. At a certain point as we continue rightward, we cross the gray zone and encounter sanctions that are weakly expressive and strongly coercive, such as violence, vandalism, and physical threats. These are sanctions most people would agree are incompatible with free speech, with harassment possibly occupying a more contested zone.

Viewing the relationship between expressiveness and coerciveness in this way not only helps identify those sanctions that are clearly compatible or incompatible with free speech. It also helps show that even some fairly expressive sanctions might

be so coercive as to fall on the wrong side of the line and that some fairly coercive sanctions might be expressive enough to fall on the right side of the line. I have included two such cases on the diagram above. The first is "shouting down" a speaker. In my view, occasional boos or interruptions are compatible with free speech since they don't prevent speakers from communicating their ideas. A person of ordinary firmness can ignore the interruptions and continue speaking. But heckling that is so loud and continuous that a speaker literally cannot be heard is little different from putting a hand over a speaker's mouth. No matter how resolute the speaker is or how valuable his ideas are, he will be unable to communicate his message. Thus, although shouting down is quite expressive—the crowd typically shouts slogans, retorts, or insults—I place shouting down on the incompatible side of the line.

The second case is ostracism, which we might define as a severe form of disassociation in which sanctioners not only distance themselves from a speaker but encourage or pressure others to do the same. Ostracism is quite coercive because of its effect on the social and economic life of the person targeted. However, ostracism is rarely all-encompassing. Most people ostracized in certain circles find refuge in other circles. There are even networks of "cancelled" people who offer solidarity and economic support to each other.[134] At the same time, ostracism is quite expressive. It is a way for people to join together in the exercise of their associational rights. Thus, I place ostracism on the compatible side of the line, though close enough to the gray zone to account for the possibility that some instances of ostracism might be so extreme as to be unbearable.[135]

One might disagree with this judgment, or with any of the judgments reflected in the diagram above. I am conflicted about certain edge cases myself. But more important than any particular conclusion is the general framework I have presented. By balancing the expressiveness of a sanction against its coerciveness, this framework can help us distinguish between sanctions that present the greatest threat to free speech and those that present the least.

III. Additional Considerations

Even if we accept that certain social sanctions, such as criticism, condemnation,

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[134] *See* John McDermott, *Those People We Tried to Cancel? They're All Hanging Out Together*, N.Y. Times (Nov. 2, 2019).

[135] *See supra* note 131.

shaming, and disassociation are generally consistent with the principle of free speech, we might have other concerns about their imposition. In this Part, I consider two such concerns: 1) the due-process implications of vague and rapidly shifting norms about what ideas and words are acceptable; and 2) the potential for social sanctions to pave the way for an expansion of legal sanctions.

A. Vagueness and Notice

One reason we might care about social sanctions that do not by themselves violate a principle of free speech has to do with notions of due process, such as notice and vagueness. Although notice and vagueness are important aspects of due process in any context, they carry special weight in the context of free speech. This is because of the role that free speech plays in promoting the ends of truth-seeking, self-government, and self-expression. If legal sanctions on speech are unclear or are imposed without notice, valuable speech might be chilled and we will lose the benefits it offers.

The same is true of social sanctions. If ideas or words that were deemed acceptable in the past are suddenly and unexpectedly made the basis for social sanctions, valuable speech could be chilled. People who have seen norms shift abruptly in the past may refrain from expressing any thoughts that are not obviously unobjectionable, which is to say any thoughts that are not bland and predictable. Likewise if social norms about what speech is unacceptable are not clear. Speakers who are unsure whether they will be vilified or shunned for expressing certain ideas or using particular language may decide to remain silent. And if the speech they forego is speech that society would otherwise find acceptable, the prospect of social sanctions will have acted as an overdeterrent. As the journalist Conor Friedsdorf has written, "A dearth of clarity is hugely useful for wielding social control. It leaves everyone guessing. But a self-governing people shouldn't have to guess at what speech is forbidden and what's allowed."[136]

Concerns about notice and vagueness may be one reason the cry of cancel culture is heard so frequently these days. Although social norms are always in flux, it seems likely that we are living through a period in which norms are shifting more quickly and dramatically than usual. That shift in norms is itself a result of a shift in power at various cultural institutions. Groups that were once excluded from, or

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[136] Conor Friedersdorf, *The Real Reason Cancel Culture Is So Contentious*, ATLANTIC (Apr. 28, 2022).

marginalized by, the media and the academy have achieved a measure of power in these spheres and are using that power to push back against existing norms. One can see this at a company such as the *New York Times*, which has been at the center of several disputes over cancel culture.[137] Whatever one thinks of these disputes, it seems clear they are occurring because women, people of color, and gay and transgender individuals have influence in the media they lacked in previous decades.[138]

So what is the answer? When it comes to legal sanctions, there's a simple solution for such due-process concerns. The government is forbidden from enacting vague regulations of speech or imposing ex post facto laws. But that solution is not feasible when it comes to social sanctions, which are imposed not by legislatures or governmental agencies but by millions of individuals acting on their own. It's simply not possible for society to agree with precision on what speech is acceptable at any given moment. Even if most of us reached agreement, others would always have the right to challenge that consensus, pushing norms in new directions that would catch some people off-guard.

In truth, there is likely no perfect solution for the due-process concerns raised by social sanctions. The best we can do is to keep these concerns at the forefront, exercising caution when norms are vague or shifting (which often happens simultaneously). This is especially important with respect to some of the more serious but permissible social sanctions, such as economic retaliation, ostracism, and shaming. When norms are vague or shifting, the milder sanctions of criticism and condemnation are less likely to offend the principle of free speech. Only when norms have solidified should we resort to the more serious sanctions in our arsenal.

B. Mutually Reinforcing Sanctions

It is tempting to talk about legal sanctions and social sanctions as though they are entirely independent of one another, but they are not. Both emanate from the larger political community as a response to similar fears. As a result, they can be

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[137] *See, e.g.*, Joe Pompeo, *"It's Chaos": Behind the Scenes of Donald McNeil's New York Times Exit*, VANITY FAIR (Feb. 10, 2021); Edmund Lee, *Bari Weiss Resigns From New York Times Opinion Post*, N.Y. TIMES, at B3 (July 14, 2020); Zack Beauchamp, *The New York Times Staff Revolt Over Tom Cotton's Op-Ed, Explained*, VOX (June 7, 2020).

[138] *See, e.g.*, Wesley Lowery, *A Reckoning Over Objectivity, Led by Black Journalists*, N.Y. TIMES (June 23, 2020); Ben Smith, *Inside the Revolts Erupting in America's Big Newsrooms*, N.Y. TIMES (June 9, 2020).

mutually reinforcing. A community that imposes legal sanctions on the expression of particular ideas will almost certainly impose social sanctions on the same ideas. This happened during World War I when private vigilante groups, spurred by the government's enforcement of the Espionage Act, carried out a campaign of harassment against dissenters, opening their mail, searching their homes, and sometimes violently attacking them.[139] It happened again during the Cold War when federal investigations and prosecutions of communists led Hollywood studios to blacklist hundreds of actors, writers, and directors.[140] As Mill had observed presciently a century earlier, "[T]he chief mischief of the legal penalties is that they strengthen the social stigma."[141]

The influence can run in the opposite direction as well. If social sanctions are imposed on provocative or heterodox speech, government may feel emboldened to enact legal sanctions on such speech. This also occurred during World War I. After private vigilante groups began attacking dissenters, Congress passed amendments to the Espionage Act that expanded its reach and strengthened its penalties. Supporters of the amendments argued that they were necessary to show vigilante groups that the government had the situation under control.[142] But the result was to ratchet up the pressure, both legal and social, on those who objected to the war and the draft.

As these experiences show, there's a risk that social sanctions, even if consistent with a principle of free speech, will lead to legal sanctions that are not. A social consensus that some ideas or words are beyond the pale and thus should result in shaming or shunning might lead to a call for legal sanctions on the same speech. But because the government, unlike private actors, cannot discriminate against speech because of its content, such sanctions would be a violation of free speech.

One might respond that it doesn't matter if social sanctions lead to legal sanctions since the latter, if content-based or not sufficiently tailored to important governmental interests, will be struck down under existing caselaw. The persuasiveness of this response depends on how confident we are that current doctrine will stay

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[139] *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 53 (2013).

[140] *See* STONE, *supra* note 81, at 365–66.

[141] MILL, *supra* note 10, at 93.

[142] *See* STONE, *supra* note 81, at 184–85.

the same and will be enforced faithfully by prosecutors and judges. There's no guarantee on either score. And even if the legal sanctions are eventually struck down, they may chill valuable speech in the meantime.

This is not by itself a reason for concluding that all social sanctions are inconsistent with free speech. For one thing, social sanctions may sometimes have the opposite effect, forestalling legal sanctions by serving as a less restrictive alternative that satisfies the public's demand for a response to harmful speech. But the relationship between social and legal sanctions is a reminder that the law of unintended consequences always lurks in the background. Even if we are confident about the permissibility of certain social sanctions, we should be alert to the way they might subtly alter the legal landscape.

Conclusion

When *The New York Times* published its editorial this year bemoaning the state of free speech in America, critics pointed out the many flaws in the paper's argument. There is no right to speak "without fear of being shamed or shunned," as the Editorial Board suggested. Nor is "harsh criticism" tantamount to censorship, as the board also implied. And "cancel culture," contra the *Times*, is not a problem only on the left. Just ask anyone on the Professor Watchlist maintained by the conservative group Turning Point USA, whose tagline is "unmasking radical professors."[143]

But the *Times*' biggest, and most fundamental, mistake was a categorical one. In lamenting the state of public discourse in this country, the editorial board confused the ideal of civility with the principle of free speech. These are two very different concepts, and it's important to keep them straight.

The ideal of civility asks that we treat each other with respect and courtesy, that we listen to opposing views with an open mind, that we respond with rational and dispassionate argument, that we avoid name-calling and insults. It's the ideal that once defined the U.S. Senate and public life more generally, and there's no question it has deteriorated in recent years. We've endured a president who belittled his rivals and demonized his critics. We've watched grown men and women berate flight attendants and store clerks for doing their jobs. And we've witnessed the debasing of social media by those who specialize in snark, invective, malice, and willful misunderstanding.

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[143] *See* Professor Watchlist, https://perma.cc/W9WX-J2NS.

These developments are disturbing to anyone who values civil discourse, but they are not inconsistent with the principle of free speech. That principle rejects the idea that we must adhere to traditional notions of politeness, restraint, and rationality. Think about *Cohen v. California*, in which an anti-war activist wore a jacket reading "Fuck the Draft" inside a municipal courthouse. He wasn't speaking rationally or politely, but that didn't stop the Supreme Court from reversing his conviction for breach of the peace. Or think about *Collin v. Smith*, which recognized the right of the National Socialist Party of America to march through Skokie, Illinois, home to thousands of Holocaust survivors. The Nazis weren't adhering to norms of civil discourse when they proposed to flaunt their hate on the streets of Skokie. Yet, their speech was also protected.

Our free speech tradition is filled with such examples: *Hustler* running a parody that described Jerry Falwell having sex with his mother while drunk in an outhouse; the Westboro Baptist Church holding up homophobic signs outside the funeral of a deceased soldier; Ku Klux Klan members using the n-word and telling Jews to go back to Israel. The expression in each of these cases violated norms of decency. But it did not violate the principle of free speech. To the contrary, it was a testament to the scope of that freedom. As the Supreme Court stated in *Cohen*, "That the air at times may seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength."

Many critics of "cancel culture" have lost sight of this. When they observe others launching *ad hominem* attacks, joining social media pile-ons, or attempting to shame their political opponents by calling them out as racists, misogynists, or traitors, they mistake it for a violation of free speech rather than what it actually is—a breach of civility.

The confusion is understandable. Some aspects of "cancel culture" *are* inconsistent with free speech. As I have argued in this essay, responding to speech with violence, vandalism, threats of physical harm, or harassment is a violation of free speech principles because these responses—in addition to not traditionally being viewed as expressive—are so coercive that reasonable people cannot be expected to bear them. The same is true of some boycotts and job terminations, though whether these sanctions offend free speech depends on context, since they can be expressive and are not always strongly coercive.

But harsh criticism, condemnation, shaming, and even disassociation are not

incompatible with the principle of free speech. Yes, they deter speech to some degree because they impose a cost on expression. But the cost is not so high that speakers have no choice but to remain silent. These sanctions also contribute to the goals of free speech because they are, themselves, expressive. As difficult as they can be to stomach, they are essential to the effective functioning of our free speech system, which relies on counterspeech as a remedy for false and dangerous ideas.

None of this is to say we shouldn't be concerned about the decline of civility. We should be, and we should debate whether that decline is threatening our ability to solve the problems that face our country. Some might argue that civility was always just a pretense and that it's better to be honest about how we feel. Others, such as the *Times* Editorial Board, will argue that we can't move forward as a nation until we learn how to speak to one other respectfully. But confusing the ideal of civility with the principle of free speech is not helpful. It disserves free speech by suggesting it is more limited than it really is. And it cheapens civility by tying it to a principle that sets the baseline, not the goal, for the level of our public discourse.

What that discourse ultimately looks like is up to us, as *Cohen* also made clear. "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours," the Court stated.[144] "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."[145]

Individual choice, in other words, is the essence of free speech. Some people will exercise that choice in ways we find distasteful. But that's what freedom means. It's a bitter pill.

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[144] Cohen v. California, 403 U.S. 15, 24 (1971).

[145] *Id.*