

How To Spot And Critique Censorship Tropes In The Media's Coverage Of Free Speech Controversies

American journalists and pundits rely upon vigorous free speech, but are not reliable supporters of it. They both instruct and reflect their [audience](#).

Ken White writes in [overt calls for censorship from the commentariat](#). Those have become more common in the wake of both tumultuous events (like the violence questionably attributed to the “Innocence of Muslims” video, or Pamela Geller’s “Draw Muhammad” contest) and mundane ones (like fraternity brothers recorded indulging in racist chants).

But it’s harder to detect the subtle pro-censorship assumptions and rhetorical devices that permeate media coverage of free speech controversies. In discussing our First Amendment rights, the media routinely begs the question – it adopts stock phrases and concepts that presume that censorship is desirable or constitutional, and then tries to pass the result off as neutral analysis. This promotes civic ignorance and empowers deliberate censors.

Fortunately, this ain’t rocket science. Americans can train themselves to detect and question the media’s pro-censorship tropes. I’ve collected some of the most pervasive and familiar ones. This post is designed as a resource, and I’ll add to it as people point out more examples and more tropes.

When you see the media using these tropes, ask yourself: what normative message is the author advancing, and does it have any basis in law?

Trope One: "Hate Speech"

Example: "I do not know if American courts would find much of what Charlie Hebdo does to be hate speech unprotected by the Constitution, but I know—hope?—that most Americans would." Edward Schumacher-Matos, NPR, February 6, 2015.

In the United States, "hate speech" is an argumentative rhetorical category, not a legal one.

"Hate speech" means many things to many Americans. There's no widely accepted legal definition in American law. More importantly, as Professor Eugene Volokh Example: "There is no freedom to shout 'fire' in a crowded theater." Prof. Thane Rosenbaum, Daily Beast, January 30, 2014.

I previously explained at length how Holmes said it in the context of the Supreme Court's strong wartime pro-censorship push and subsequently retreated from it. That history illustrates its insidious nature. Holmes cynically used the phrase as a rhetorical device to justify jailing people for anti-war advocacy, an activity that is now (and was soon thereafter) unquestionably protected by the First Amendment. It's an old tool, but still useful, versatile enough to be invoked as a generic argument for censorship whenever one is needed. But it's null-content, because all it says is *some speech can be banned* – which, as we'll see in the next trope, is not controversial. The phrase does not advance a discussion of *which* speech falls outside of the protection of the First Amendment.

Trope Three: "Not all speech is protected"

Example: "Not all speech is protected if there is hate speech and it is intended to ridicule another religion," he said. "I don't believe it is a free speech matter." Archbishop Paul Coakley, quoted on FoxNews.com, August 8,

2014.

The media routinely prefaces free speech discussions with the bland and inarguable statement “not all speech is protected.” That’s true. In fact it’s not in serious dispute. The problem is that the media routinely invokes this trope to imply that the proposed First Amendment exception it is about to discuss is plausible or constitutional because other exceptions already exist. Not so. Though First Amendment analysis can be complicated at the margins, the core exceptions to First Amendment protection are well-known and well-established. The Supreme Court – in the course of rejecting a proposed *new* exception – articulated them [Example:](#) “Texas Shooting Sheds Light On Murkiness Between Free, Hate Speech.” NPR.com Headline, May 5, 2015.

[“true threats” are an actual category of unprotected speech and there’s a line between them and protected speech.](#)

Too often, though, the “line” is invoked to imply a nonexistent legal distinction. The “line between free speech and hate speech” rhetoric from the examples above is misleading and meaningless because, as noted in Trope One, “hate speech” is not a legal thing. “The line between free speech and bullying” – another [Example:](#) “The incident raised heated questions about race relations – and how to balance free speech with protection from discrimination and harassment.” Washington Post, March 3, 2015.

The media’s love of “balancing” stories is a variation on its love of “line between” stories, only more misleading.

“Balancing,” when used as a colloquial description of how courts decide whether speech is protected, is almost always wrong. American courts don’t weigh the value of speech against the harm it does. When speech falls into an established exception to the First Amendment, as discussed above, no balancing is necessary; it can be restricted.

When it doesn't, balancing of its "value" against other interests is almost always prohibited. [prohibit the burning of draft cards because](#) the government had a *substantial interest* in the draft system and the law was narrowly addressed to that legitimate interest, and aimed only at the non-communicative element of the conduct (destroying the card) and not the communicative aspect (doing so to protest the draft). But that analysis doesn't purport to assign a value to the speech. It considers only whether the government has a sufficiently compelling interest in its goal. Moreover, there's very good reason to doubt that the Supreme Court would ever approve a speech restriction that is content-based – that is, *premised on dislike of the speech* – no matter how strong the government's interest. The Court has [Example:](#) "It's not free speech. It's bullying and intimidation. It's a horror show." Mary Elizabeth Williams, Salon, February 17, 2015.

The First Amendment is, in a way, categorical: there are well-defined categories of speech that are not protected, as I discussed above. But media commentators often abuse [Example:](#) "There are two exceptions from the constitutional right to free speech – defamation and the doctrine of "fighting words" or "incitement," said John Szmer, an associate professor of political science and a constitutional law expert at the University of North Carolina at Charlotte." McClatchy.com, May 4, 2015.

No discussion of controversial speech is complete without some idiot suggesting that it may be "fighting words."

In 1942 the [that's in serious doubt](#) – it's limited to [Example:](#) "The exhibit of cartoons in Texas might have crossed the line, [Professor] Szmer said."

The media loves to quote a professor to support a viewpoint. This is intellectually neutral: it can be good or bad, depending on the honesty and qualifications of the

professor selected.

Quoting professors about law is particularly risky, if your aim is an accurate and informative discussion of free speech law. If you call a physics professor and ask them what will happen if you drop your pencil, and why, he or she will say “it will fall, because of gravity.” There is a relatively low chance that the professor will tell you “well, maybe nothing will happen” because he or she harbors the belief that the current gravitic regime is unfair and otherwise problematical. But when you call a professor of law, or political science, or journalism, and ask them a question about whether some controversial speech is protected by the First Amendment, there is an unacceptably high probability that you will get a quote expressing what the professor thinks the law *ought to be*. Sometimes the professor will flag a statement as an argumentative one, sometimes not. Moreover, some professors how can one put this delicately? Some law professors’ views on how a court is likely to rule on an issue are untainted by exposure to actual courts.

Many professors will give you a sober, accurate and well-informed assessment of how a court would likely approach a given free speech situation. The trick is separating those professors from ones who are out of their field or mere advocates.

Trope Nine: “This speech may be protected for now, but the law is always changing.”

[brehtaking Court found their speech protected by a margin of 8-1.](#) The Court struck down an overbroad law