

FEARLESS SPEECH: BREAKING FREE FROM THE FIRST AMENDMENT

Written by Mary Anne Franks, Reviewed by Marc Alexander



Professor Mary Anne Franks's *Fearless Speech* is a sustained argument, with footnotes, resting on Franks's contrast of "reckless speech" with "fearless speech." Franks writes: "What has been most protected in the United States above all is not fearless speech in the service of equality but rather reckless speech in the service of racial and gender hierarchy." Franks, however, wishes to promote "speech that seeks to communicate truth no matter what it might cost the speaker." The model for fearless speech is that gadfly Socrates, charged with failing to respect the gods and corrupting the youth of Athens. Another figure who inspires Franks is Sophie Sholl of White Rose fame, guillotined at the age of 21 in Nazi Germany for distributing leaflets critical of the fascist regime.

Franks argues that the First Amendment has not been as important as we may believe for protecting fearless speech. "[I]t was not the First Amendment," writes Franks, "that abolished slavery, or exposed the horrors of lynching, or fought for women's equal rights. Fearless speakers accomplished those things. Most of the time they did it without the shield of the First Amendment...."

While Franks's critical view of the damage caused by the First Amendment protecting reckless speech may seem startling, it is not entirely new. Back in 2014, Professor Steve Shiffrin of Cornell, recognizing that he was not a part of the "American mainstream," delivered his Melville Nimmer lecture at UCLA titled *The Dark Side of the First Amendment*. Shiffrin condemned "the sin of First Amendment idolatry." According to

Shiffrin, the First Amendment was "at odds with human dignity." He was troubled by rulings protecting speech depicting animal cruelty, demonstrations inflicting emotional distress at funerals, publication of the names of rape victims, marketing of violent video games to children, tobacco advertising, and permitting corporations to dominate American political campaigns at local, state, and federal levels.

But perhaps the late Shiffrin would have disagreed with Franks about the value of the First Amendment in defending fearless speech, for Shiffrin recognized the importance of the First Amendment in protecting dissent. Shiffrin believed "the First Amendment ought to have particular respect for that speech which criticizes existing custom, habits, institutions, and authorities ... dissent does not merely combat injustice; indeed, it often consolidates other values associated with the First Amendment including liberty, freedom, equality, tolerance, respect, dignity, self-government, truth...." Shiffrin praised "the European approach to freedom of speech," by which he meant an approach balancing freedom of expression against other interests, such as reputation, dignity, privacy, and safety. However, he believed the U.S. approach was better "when it comes to dissent."

Franks's book abounds in interesting examples and provocative arguments. She provides examples of the asymmetric treatment of speech she deems reckless and fearless speech. For example, in 1915, D.W. Griffith's racist epic film, "The Birth

of a Nation,” was very popular, and in fact, was the first movie shown at the White House, screened for Woodrow Wilson and his guests. On the other hand, “The Johnson-Jeffries Fight,” a boxing film which depicted the black boxer Jack Johnson knocking out white opponent Jim Jeffries, was banned.

Franks has collected riveting “profiles in fearless speech”: Elizabeth Freeman (1744-1829), an enslaved woman who won her freedom in the landmark lawsuit *Brom and Bett v. Ashley*, in Massachusetts; Dorothy Thompson (1893-1961), the journalist who warned from Berlin about the rise of National Socialism; William Baird (1932-), a reproductive rights advocate; Annette Lu Hsiu-lien (1944-), a feminist advocate, champion of Taiwanese independence, and Taiwan’s first female vice president; Marina Ovsyannikova (1978-), a Russian news producer, who slipped past security to intrude on live television, holding a poster and shouting “Stop the war! No to war!” among others. These speakers’ diverse times, and places, some foreign, some domestic, underscore the First Amendment is not central to Franks’s views about free speech.

Franks encourages social media platforms, as private actors, to do more—not less—to curb reckless speech on their platforms. She points out that when the public is surveyed, people believe the First Amendment is violated when social media, such as Facebook, decides to remove speech. Lacking education about the First Amendment, many people do not understand the state action doctrine, and instead equate freedom of speech with freedom of speech on a privately owned media platform. Section 230 of the Communications Decency Act actually allows social media platforms to curate content without being punished for doing so.

However, at a time when social media platforms want less, not more, regulation, and Mark Zuckerberg has purchased a \$23 million house in Washington D.C., presumably to be close to the seat of power, it remains to be seen what changes to section 230 will be made to impose more responsibility on social media platforms to censor “reckless speech.”

Franks’s goal is to “transform our reckless speech culture into a fearless one.” She seeks to promote the speech of the most vulnerable, based on “objective, historical, material conditions of subordination.” Borrowing from the writings of others, including Mahatma Gandhi, Franks explains that the weakest person, “the last girl,” needs protection. This argument about protecting the weakest speaker parallels John Rawls’s difference principle: “Social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged.”

Skeptics may ask: Who determines whether speech is reckless or fearless? Is all reckless speech to be banned? Is all fearless speech to be promoted? Given the First Amendment, should speech be evaluated in a content neutral manner, or should some speech be promoted? And is there the risk that banning reckless speech will backfire, leading to attacks on fearless speech? While Franks rejects the “marketplace of ideas” theory of free speech, are there not circumstances where counter-speech and debate will be more constructive than the regulation of speech? And in the digital space, regulating speech is logistically complex, requiring considerable resources, given the hundreds of millions of communications that take place daily.

Recent campus protests highlight the challenges of entrusting those in power to distinguish between fearless and reckless speech. The reluctance of some university leaders to crackdown on campus protests, which Franks would probably describe as examples of fearless speech, was treated by some politicians as a failure to suppress or regulate reckless speech. Also consequential, campus protests, condemned for creating a hostile campus environment, opened an opportunity for a full-throated political attack on the universities, their leaders, teaching, and language.

Franks cherry-picks legal cases to support her arguments. For example, Franks cites the feminist scholar Ann Scales, who wrote: “The defamation exception is like an affirmative action program for wealthy or important people. Defamation law officially recognizes their subjective experience of the worthlessness of ... the use of ‘more speech’ to prevent injuries to their reputations.” Franks comments, “This is a conclusion reinforced by the Depp-Heard trial and the wave of defamation lawsuits against other women who have spoken out about men’s abuse.” Yet there is no mention of E. Jean Carroll’s two verdicts in a suit against her defamer: a May 2023 verdict for \$5 million in damages, and an additional January 2024 verdict for \$83.3 million in damages.

Franks’s argument that the First Amendment was not necessary to protect fearless speech is ahistorical. She points out that abolitionists and suffragettes, unprotected by the First Amendment, and at personal risk, spoke out fearlessly. While that is true, it does not follow that dissenters do not benefit by First Amendment jurisprudence. There was no First Amendment jurisprudence before *Schenck v. United States* (1919) 249 U.S. 47, and it wasn’t until *Gitlow v. New York* (1925) 268 U.S. 652, that the First Amendment was selectively incorporated to apply to states. However, after World War I, the First Amendment was invoked to protect speech. *Stromberg v.*

California (1931) 283 U.S. 359 held that a broad state law prohibiting display of a red flag was too vague. The same year, *Near v. Minnesota* (1931) 283 U.S. 697 concluded prior restraint of the press was wrong. During World War II, in *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, the Supreme Court held that requiring a student, contrary to her religious beliefs, to salute the flag, violated the First Amendment. *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, affirmed the rights of students to wear black armbands to protest the Vietnam War. After Paul Cohen walked into a courthouse during the Vietnam War, wearing his "Fuck the Draft" jacket, the Supreme Court held that his profanity was protected by the First Amendment. During wartime, expressive dissent similar to Mary Beth Tinker's and Paul Cohen's protests, resulted in beheadings in Nazi Germany.

Notwithstanding Franks's very interesting discussion of online platforms and section 230, part of her solution is cockeyed. For example, Franks is critical of online platforms that exist to make a profit and encourage engagement by amplifying anger and controversy. Part of her solution: "Given that such services allow companies to harvest user data for profit, the FTC should treat the offer of free services as a 'deceptive and unfair act and practice' and require tech companies to charge fees for their services in order to make the transactional nature of these services clear. These fees could help offset some of the damage that the internet has inflicted upon traditional media outlets that have been unable to compete with 'free.'" (Italics added.) But in 2025, how many people using online services "for free" remain unaware that information they provide is harvested? Should we assume people would rather pay a fee than give up information? What is the likelihood the FTC would ever require tech companies to charge this fee? What is the likelihood that consumers and online media platforms would accept the imposition of a fee without protest? And can one really expect that the fees would ever be used to "offset some of the damage"?

Franks's fear of reckless speech is also fear for the safety of our democracy. "[T]he January 6 insurrection had many fathers," she writes. "The through line ... is a reckless, anti-democratic conception of free speech." Consistent with her views, she criticizes the "hate speech" cases: *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447, allowing hate speech unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" and *Terminiello v. Chicago* (1949) 337 U.S. 1, holding invalid a municipal ordinance for breach of the peace, invoked against a Catholic priest under suspension, for giving an inflammatory speech criticizing racial groups. Franks quotes from Justice Jackson's famous dissent in *Terminiello*, explaining that if we

are unable to distinguish between the exercise of liberty and the abuse of it, we "will convert the constitutional Bill of Rights into a suicide pact." (Id. at 37.) Franks agrees, adding, "As the January 6, 2021 insurrection demonstrated, we are perilously close to democratic suicide."

Though Justice Jackson and Franks do not expressly mention it, they are both pointing to the paradox of tolerance: the risk that an open society that tolerates reckless speech may give those who are intolerant and wish to destroy it the tools, including expression, to do so. To avoid "a suicide pact," the tolerant society cannot bestow absolute tolerance upon those who are extremely intolerant and reckless. The classic First Amendment solution is to give a pass to speech, and to draw the line at reckless conduct. But both Franks and Justice Jackson fear that reckless speech has dangerous consequences in the real world.

Whatever sympathy one has for Franks's argument that the First Amendment permits too much "reckless speech," it is indisputable that the First Amendment will have an important role in coming years protecting dissent and speech despised by the government. First Amendment issues are going to be raised when protesters are dispatched to foreign prisons; when universities are threatened with defunding because they have not cracked down on protests and a hostile atmosphere; when medical journals receive letters from a U.S. Attorney questioning whether they are partisan in scientific debates; when government websites are scoured for words or phrases such as incel, LGBTQ, and gay; when local governments ban 10,000 books from schools during the 2023-2024 school year; when a state judge rejects attempts by state legislators to remove from libraries any works that depict sex acts, no matter their "political, artistic, literary, and/or scientific value"; when NPR and PBS are threatened with federal defunding because they are not "fair, accurate or unbiased"; and when law firms are forced to do legal work pro bono or be barred from federal courthouses.

Franks demands that we think about freedom of speech beyond the confines of the First Amendment and its jurisprudence. Let's argue over whether a European model, balancing freedom of expression with other values, is a better way to control "reckless speech." But we have the First Amendment. Can we at least agree that it serves as one bulwark against governmental efforts to quell protest, dissent, and fearless speech?

Marc Alexander is an attorney and ADR neutral with ARC.
AlexanderDisputeResolution@gmail.com