

Should hate speech
be protected as free
speech?



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Question: Should hate speech be protected by the right of free speech?

Introduction

Hate speech is a controversial and often misinterpreted term for speech intended to degrade, intimidate, or incite violence or prejudicial action against an individual or a group of individuals based on their race, ethnicity, national origin, religion, sexual orientation, or disability. The term has been taken to cover written as well as oral communication.

My starting position is that hate speech is not just one thing; there can be at least four categories of hate speech that we can address.

By the end of this essay I hope to have shown sufficiently which, if any, types of hate speech could be protected by the right of free speech.

Right to free speech and expression

Perhaps in a different era, the two could be seen as distinct, not just by name, but also in context.[1]

The right of free speech is a human, political or civil right recognised and appreciated by states and their citizens. It is the right to communicate one's opinions and ideas using one's body and property to anyone who is willing to receive them. It was included in the First Amendment to the United States Constitution.[2]

Although freedom of expression is sometimes used within an identical context, it nevertheless includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used.

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Perhaps the most commonly cited definition is the one given by the United Nations in Art. 19 of their UDHR[3] adopted in 1948.[4]

Along the same lines, Art. 10 of the ECHR[5] provides the right to freedom of expression, subject to certain restrictions that are “ in accordance with law” and “ necessary in a democratic society”.

It is important to appreciate that the two are largely intertwined, and to be read separately would be of no particular value or help. For the purposes of this essay, I shall regard the two rights as two faces on the same side of a coin.

Being part of a group of ideals or social goods even, the right of free speech is not specially protected from other ideals. It has to compete with such rights as right to private life, public security and democratic equality amongst others. There is no precedence that the right for free speech must always prevail.

The wording of the First Amendment creates a defence for individuals and a difficulty for the state to regulate similar acts in the United States, as well as a desire to abolish the limitations already imposed by other states.[6]

When may the right of free speech be limited?

It can easily be imagined that the time, place and way of something being said or written or expressed in any other form is subject to scrutiny as to its appropriateness or inappropriateness respectively that is subsequently reflected in regional legislations. This is not normally objected to.

There is another controversial excuse for limiting it and that has to do with its content.[7] A classic example is the prohibition of circulation of Nazi ideas in parts of Europe. This is only to be expected, considering that the UDHR was an attempt to stop the terror witnessed during that war from happening again.

It is important however to understand that all is meant by limiting free speech or prohibiting hate speech is not preventing someone from exercising the right, but rather a subsequent punishment.

Hate speech

The prohibition of hate speech is often anathematised by the advocates for the right of free speech. Following Smolla, it can be generically defined as a speech assault based on race, ethnicity, religion and sexual orientation or preference[8].

Brison attempts to colour it even more by defining it as the speech that vilifies individuals or groups on the same basis and which is face to face vilification or constitutes a group libel[9].

Waldron also believes that hate speech is a form of group defamation[10]. I would think that defamation is more suiting as we have already accepted that hate speech can be manifested both verbally and in writing.

When can free speech include hate speech?

There is, of course, a number of arguments articulated to justify the importance of including hate speech in the right of free speech, however,

lacking space, I will address only the four that I consider of greatest importance.

Discovery of truth

This argument has two distinct streams of interpretation. According to the first, we come to know more truth if we allow a “ free marketplace of ideas”.

[11]

Advocates of the second stream claim that allowing discussions promote truth and the interests of the right for free speech more than restrictions, as it allows for comparing and contrasting arguments.

Scanlon divides the possible participants in a trade of speech into speaker, audience and bystanders.

The value protected by both is truth itself; the speaker has an interest in communicating an opinion; the audience and the bystanders have an interest in evaluating and challenging the said opinion.

Central to this argument is the importance of reliable and truthful information since it would be detrimental to knowingly spread opinions based on the unreliable and false information.[12]

Note that this argument, like the rest, covers not only the promotion of views and opinions, but also of the communication of facts that do not invite evaluation, such as the names of professors in the University of Essex’s Human Rights department.

However, as Schauer points out, this value does not have an a priori precedence over other values.[13]

Livelier apprehension and personal development

According to J. S. Mill we come to apprehend the truth in a more lively way when we confront people who dispute our beliefs or be confronted by them respectively.

“ So essential is this discipline to a real understanding of moral and human subjects that, if opponents to all-important truths do not exist, it is indispensable to imagine them and supply them with the strongest arguments which the most skilful devil’s advocate can conjure up.”[14]

Eric Barendt adds:

“ Restrictions on what a man is allowed to say and write, or to hear or read, inhibit the growth of his personality. People will not be able to develop intellectually and spiritually, unless they are free to formulate their beliefs and political attitudes through public discussion, and in response to the criticisms of others.”[15]

Greenawalt provides further input:

“ By affording people an opportunity to hear and digest competing positions and to explore options in conversations with others, freedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as autonomy.”[16]

The speaker here has an interest in influencing the thought and conduct of others through speech. Furthermore, according to Joseph Raz, the audience has an interest in hearing expressed ideas that may potentially reassure and validate their lifestyles. [17]

Democratic participation

This has been elaborated best by Cass Sunstein.

“ Free speech is to be protected because it facilitates the democratic articulation, aggregation and balancing of interests, and is necessary if the people are to be able to decide for themselves the candidates they think most suitable for public office and the policies that public officials should pursue. This argument links free expression with a ‘ commitment to political equality’ and a ‘ belief in democratic deliberation’.[18]

The argument presupposes that the citizens of a democratic state have the right of free speech and are not negligent in exercising it fully. Democracy translates – loosely – into power of the people and by definition, for the sovereignty of the people to be effective, public opinions should be formulated free of any control or intervention by the government.

As such, the speaker’s interest is in providing an opinion on matters of public-political life, while the main audience has an interest in hearing the views of others, and gaining an understanding of political views and preferences.

The argument of the right of autonomy

In considering a law that prohibits speech, Scanlon writes:

“ In order to be protected by such a law a person would... have to concede to the state the right to decide that certain views were false and, once it had so decided, to prevent him from hearing them advocated even he might wish to”[19]

He goes on to argue that that since an autonomous person's reason is sovereign over her own decisions, it is incompatible with her autonomy to be shielded from certain evaluative views, or factual information, even if only to avoid the harm to her of coming to have false beliefs.[20]

Greenwald describes such intervention as viewpoint discrimination[21], the very thing that the First Amendment is employed to counter.

This corresponds to the right of the audience not to have restrictions on their range of options to choose from in order to formulate an autonomous decision.

Let us now examine the kinds of hate speech

Targeted vilification

Speech directed at specific individuals or small group and with the intention to harm and insult the audience. The speaker consciously selects the wording for its potential to achieve just that.[22] Contrary to what Brison argues, I would argue that it should include non-face-to-face acts, such as cases when is not direct but sufficiently specific.[23]

The content itself does not usually qualify adequately as an assertion of fact, expression of an evaluative opinion or even of a valid political preference, since it is usually based on false accusations.

Also, the speaker cannot barricade behind the right of autonomy and argue that non-racists are privileged over racists, since having a right of autonomy does not imply having the right to be racist and furthermore clashes with the rights of others to be equally autonomous.

It does not encompass the essence of the right, it does not promote the interests that the right seeks to, and it is not what is meant when the right for free speech is interpreted; therefore we can conclude that targeted vilification should not be protected by the right to free speech.

Diffuse vilification

This is speech directed at a friendly or of mixed sentiments but larger audience than targeted vilification, but nevertheless has the same intentions; to assault individuals based on the group they adhere to, or even the group itself, although they may not be the immediate audience.[24] It usually employs symbols or banners with group specific insults.

An example would be the Nazi march in Skokie, a village with a notable population of holocaust survivals and younger Jews. There is an evident intention to cause emotional distress and so, any speech or acts employed and political symbols used could not be excused as such, but as insulting, harmful and intimidating.[25]

A fair excuse would be that the allegedly distressed could avoid the march. To what extent this is possible depends on other factors such as prior sufficient advertising and the financial or effort overbearing on the victim's part.

This becomes more apparent when the cost to pay to avoid the distress would mean losing one's work or avoiding communing areas or even becoming antisocial. This would clearly outweigh the interests of the speaker.

Evidently, diffuse vilification promotes free speech interests at a far higher level than targeted vilification; it can take the form of honest - albeit mistaken at times - expression of political and evaluative opinions, precisely because it is not targeted but addressed to a wider audience, which could be proactively met and discussed with an opposing group.

Although in its honest and fair form it should be protected by the right of free speech, in my opinion, the government has enough justification to intervene and attempt to control the manner in which it is expressed, and specifically by regulating the prohibition of speech, acts and symbols used for their potential to offend and/or to incite hatred and violence towards another social group.

Advocating exclusionary policies

Exclusionary policies are those that attempt to exclude certain social groups from equal participation in decision making and full enjoyment of their

citizen and political rights. In its extreme form, this could include advocating genocide and ethnic cleansing.[26]

The harm caused by a possible adoption and enactment of such policies is not easily outweighed, especially by the arguments for the discovery of truth and of personal development - for obvious reasons.

Following the argument for democratic participation, such cases constitute political speech, or part of, which the right of free speech clearly intends to protect. However, allowing the advocating of non-democratic ideals in a democratic society brackets democracy itself.

I do not accept that democracy should succumb to such hypocritical arguments. I agree with what Rosenblum terms as militant democracy who attempts to defend itself. [27]

Even though state controls on political speech is restricting political equality, a democratic value, it is acceptable to do so when the speaker advocates anti-democratic values, even more so when they are advocating restriction on the political equality of others.

From the perspective of the argument for autonomy, it can be argued that people should be allowed to exercise their right as rational sentient beings and consider, reflect upon, and decide for themselves which political speeches to support and which to strike down, without the need to cede their right to do so to any government.[28]

However, how empirically justified is, or can, that be? What assures us that citizens will in fact make the right choices? What assures us that citizens will

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even bring themselves to consider such important and hard matters? Is it not the case that people who do concern themselves with such issues have a prior long time interest in them? How can we be sure that the citizens actually have the necessary mental capacities to fully comprehend the speech and its consequences?

A democratic society is successful not only because of alleged equality, but also, because of alleged intellect. Following the notion of militant democracy not only there should be intervention to prohibit anti-democratic elements from exploiting democratic values, but also, there should be intervention to debunk, rebut and expose anti-democratic speeches. If the body of citizens is not able to comprehend it fully, the democratic government, assuming it is able to comprehend it, should step in.

In my opinion, although this category is part of the general category of political speech, which the right of free speech intends to protect, it can take the form of anti-democratic speeches and incitement of hatred that may lead to horrid results. To this end, I conclude that this form of speech could be protected under the right of free speech, but the states should reserve their right to intervene in such circumstances that put into danger and jeopardize their very democratic nature.

Harmful assertions of fact

The notion that free speech should include the right to speak words that insult others, or saying what others do not like hearing, has become part of the modern society's pop wisdom heirlooms.

The combined promotion of the values of truth, democratic participations and autonomy is indispensable, even though we cannot deny that even these assertions can cause grave harm to individuals or groups.

A fair objection to protecting these kinds of assertions I have found is what Margalit and Raz call the self-respect and dignity of group members, which are being threatened by such assertions.[29]

This links to a reversed interest for personal development on the part of the group members, especially when it comes to social groups identified by ethnicity, where self-dignity and self-respect depends on the dignity and respect assigned to that group by others.

However, can it not be said that a Kurdish minority in Turkey or the UK should be exposed for their practice of FGM[30] and to evaluative opinions and scrutiny from the rest of society about it, independently of their other dignity recognition and respect issues?

In their extreme form, such factual assertions and evaluative opinions may lead to unjustified hate crimes and violence against innocent members of targeted groups. A classic example is the growing contempt that locals feel against immigrants in most countries.

Even if top level surveys manage to prove that economic crisis, health system deterioration or other social harms are caused by immigrants, there is a huge leap from an empirical observation to undemocratic acts of violence.

Militant democracy should step in here once again, not only to prohibit and punish such actions, but also, I would argue, to better regulate the matters revealed by such surveys.[31]

Despite all these, harmful assertions of fact can be seen as promoting the interests embraced by the right of free speech. Even with harmful – but not extreme – assertions, an available remedy would be counter speech instead of restriction. This is possible because they are not mere vilification, but truthful and empirical assertions of honest intentions and therefore do not cause emotional distress.[32]

In my opinion, a government should not be able to intervene by prohibiting the expression of such assertions, but they should be allowed to prohibit and punish individuals who misinterpret such assertions from resulting to hate crimes such as racial attacks.

By saying this, one may think that I refuse to consider what some call group libel as hate speech worthy of being punished. This is not the case, since libel, defamation in general, is harmful yet untrue assertion. Even though some may disagree as to the context of vilification, I take it to also have an element of faulty accusations.

Conclusion

I do not see hate speech to have just one singular face. As I have shown, it can be manifested in many different ways, which can in turn be judged on different grounds. Therefore it is inapplicable to argue that it should be either protected under the right for free speech in its entirety, or not at all.

I am of the opinion that some forms of hate speech should be protected by the right of free speech, because of the benefits bestowed to society.

Some other forms should not be protected; states should take steps to better inform citizens about the different shades of hate speech and democratically establish legal frameworks to punish the ones that fall on the negative side of the spectrum.

[1] Due to the frustratingly large portion of the first draft of my essay spent on citing relevant treaties and articles defining the two rights, and assuming that the reader is familiar with them already, I have decided to include the definitions in footnotes, as they do not count towards the total word count. I do realise that this is inelegant, but I am exercising my right of autonomy to promote my personal interest, namely of not being penalised. Forgive me.

[2] First Amendment to the United States Constitution reads as follows “ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

[3] United Declaration of Human Rights

[4] Article 19 of the UDHR states that “ Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

[5] European Convention on Human Rights

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[6] UK: Sec. 18 (1) of the Public Order Act of 1986; France: Sec 24 of the Press Law of 1881; Denmark: Article 266 (b) of the Danish Criminal Code; The Netherlands: Articles 137 (c) and 137 (d) of the Dutch Criminal Code

[7] i. e. the grounds cited in ICCPR and ECHR are content relevant.

[8] Smolla, 1991, 152

[9] Brison, 1998, 313

[10] Waldron, 2009, 1600-1601

[11] Justice Holmes' obiter dictum in *Abrams v. United States*, 250 U. S. 616 (1919).

[12] Cohen (1993: 211, 229).

[13] Schauer (1982: 23, 33).

[14] Mill

[15] Barendt (1985: 14).

[16] Greenawalt (1989a: 143-5).

[17] Raz (1991: 311).

[18] Sunstein (1993: xvi-xvii).

[19] Scanlon (1972: 217).

[20] Ibid.

[21] Greenawalt (1995: 32).

[22] Greenawalt (1995: 49).

[23] i. e. threatening letters, vandalism and so on and so forth.

[24] But may be bystanders.

[25] The fact that a march in virtually every other village or even a march in the same place but without the symbols would not constitute diffuse vilification but would rather be political speech only proves the dishonest intentions of the marchers. (Feinberg 1985: 86).

[26] With notable examples the anti-Semitic speeches in Nazi Germany, anti-Greek and anti-Armenian speeches in Turkey, 1910-1922

[27] Nancy Rosenblum (2008: 412-455).

[28] i. e. the ban of Nazi parties from political life in Denmark

[29] Margalit and Raz (1990: 119).

[30] Female Genital Mutilation

[31] Although not relevant to this essay, I would argue that the right of free move and work is a lot like the right to free speech in the sense that it is important but militant democracy should intervene to prevent it from harming a democratic state. A failed example of this would be Italy's policy which only allowed a very limited percentage of immigrants. Surely, a middle position would be more successful.

[32] For example, a Kurdish should have been able to reflect upon the issue of FGM before encountering an adversary of the practice.