

ARE HATE SPEECH AND DEMOCRACY DESTINED FOR A PAINFUL MARRIAGE?

LESSONS FROM POLITICAL
PHILOSOPHY

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The consensus among many liberal democratic societies that there exists a fundamental right to freedom of speech, but which can also be restricted, presents a perplexing dilemma. On the one hand freedom of expression is constitutive of self-realization, for it is through expression that we formulate the meaning and values that drive our lives. Moreover, it is a condition for democracy, allowing broad participation in the processes of formation of public opinion. On the other hand, many illegal acts are committed through discourse. When a doctor prescribes a drug in blatant disregard of medical conventions, causing harm to the patient, he is liable for resulting damages. In this case, the wrongful act is committed through doctor-patient communication, that is, through discourse. However, the idea that the doctor could claim rights to freedom of speech sounds bizarre to most people.

My research sheds light on this dilemma by investigating the reasons offered for protecting and curtailing freedom of expression. I focus specifically on Hate Speech since its emergence has polarized countries within, and across, America and Europe.

While in the United States the Supreme Court has repeatedly stated that speech cannot be restricted due to the moral demerit of its content, many European countries have laws banning the worst forms of hate speech.

The *Brandenburg v. Ohio* (1969) case, decided by the Supreme Court of the United States in 1969, illustrates the American legal position. In that case, it was decided that a Ku Klux Klan member had the right, under the First Amendment, to perform a burning cross ritual expressing and symbolizing its discriminatory convictions.

In Europe, the legal landscape is quite different. In Germany, hate speech restrictions increased since the atrocities of WWII. The country criminalizes the holocaust denial, what there is called the "Auschwitz lie". In England there are many legal statutes explicitly prohibiting or applied as prohibiting hate speech. Among them, the Criminal Justice and Public Order Act of 1994 criminalizes the use or display of "threatening, abusive or insulting" words, writings, signs or other visible representations with the intent to cause a person "harassment, alarm or distress". The Racial and Religious Hatred Act of 2006 defines as crime the use of "threatening words or behavior" or the display of "any written material which is threatening" with the intent to stir up religious hatred.

Some scholars criticize the European model claiming that European hate speech legislation has been converted into an ideological mechanism to control expression. One of the reasons for this would be the vagueness of the idea of "hate speech" (KISKA,

2012, p. 7, DAVIES, 2010, p. 4-12), worsened by the biased application of hate speech laws (DAVIES, 2010, p. 19-21). Some scholars denounce a new kind of "inquisition" in Europe, driven and based on indeterminate legal expressions that lead to trials, condemnation and punishment of speech for their politically incorrect character.

However, the acknowledgement of the risk that hate speech laws may be over applied does not necessarily undermine the pretension of prohibiting and punishing such speech, conceived as extremely immoral statements. The risk is taken as a side effect of the much-praised European strategy of balancing freedom of speech against other values such as equality and human dignity (BLEICH, 2011). Some critics' only claim is that hate speech statutes be refined so they can meet clarity, certainty and foreseeability criteria necessary to combine prohibition and punishment with freedom of speech protection.

My work, which applies a legal normative approach, advances a different claim - that the best arguments that can be fostered in defense of hate speech prohibition are unsound and lead to incoherent freedom of speech restrictions. There is no illicit harm that can be exclusively attributed to hate speech's immorality. Thus, there is no coherent argument for the prohibition of hate speech that does not lead to the prohibition of a wide range of paradigmatically protected speech. I argue, therefore, that the impossibility of coherently justifying hate speech restrictions based solely on their immorality is what weakens the protection of freedom of speech in countries where hate or discriminatory speech is forbidden per se.

To do so, I will first present what I believe to be the best argument for the restriction of hate speech on the basis of its immorality. Then, I will show how this argument cannot be defended without violating one of the following paradigms of a liberal society: i) that harms to third parties' feelings cannot by itself justify restrictions on freedom of speech rights, and ii) that democracy requires living with the recognition that guaranteeing democratic rights implies some risks to democracy itself.

1. THE HUMAN DIGNITY ARGUMENT

I argue that the right to human dignity plays a prominent role in the rhetoric justifying hate speech prohibition. It is commonly a right both explicitly protected by constitutional and statute rules as it is invoked in courts' decisions. However, human dignity bears many different meanings in ordinary language. In order to serve as a constraint foundation of freedom of speech rights, which are in turn also required by human dignity,

human dignity needs to be specifically conceptualized. And this specific conception needs to lead to the reasons why hate speech should be prohibited.

The following topic presents what I consider to be one of the best human dignity conceptions trying to articulate why one should have the right not to encounter hate speech in her daily life.

1.2 HUMAN DIGNITY AS AN ASSURANCE OF A MORALLY HEALTHY ENVIRONMENT

One of freedom of speech rights' paradigmatic implications is that they protect the expression of offensive convictions. If that were not the case, freedom of speech would only mean the freedom to express ideas accepted by the common sense, or that inspire nothing but indifference. Therefore, those who defend hate speech restrictions need to face the challenge of justifying these restrictions without resorting to the offensive impact of hate speech messages.

Jeremy Waldron's conception of human dignity is one of the most original formulations in this respect. He claims that the best way of understanding the contemporary right to human dignity is to think of it as a human right to belong to a human rank or status. Waldron states that human dignity is the right to be recognized and treated as an equal member of society in good conditions (WALDRON, 2012, p. 52).

According to Waldron, hate speech denies minority groups' dignity because it expresses ideas denying that members of these groups should be assigned the same and equal rights afforded to people in general by an egalitarian society. The goal behind this kind of speech would be to argue that certain groups of people are different and that these groups should be conferred a different and lower social status because of their difference.

However, why the act of merely conveying an idea denying someone's or some social group's dignity should be sufficient to violate this same dignity? If dignity is a guaranteed prerogative to enjoy equal rights, why speech, even when discriminatory or hateful, would violate dignity if it has no power to curtail rights' enjoyment?

As Waldron tries to avoid justifying hate speech restrictions by pointing to speech's offensiveness, he affirms that the prohibition is not about protecting people's feelings. The main goal would be to uphold a morally healthy environment. According to Waldron, dignity comprises the guarantee that every person will recognize the equal

social status of everybody else (WALDRON, 2012, p. 85-86). This guarantee is what enables one to engage her energy and efforts in conducting her own affairs without having to deflect part of this energy when challenged by the claim that she shouldn't be considered part of the society in good standing.

That is why Waldron is more concerned about hate speech conveyed through media bearing long and permanent public display, such as posters in public places or internet campaigns and websites (WALDRON, 2012, p. 38). These are the messages that mostly pollute the moral environment, as they publicly and persistently challenge the assumption that every person is entitled to equal rights.

That is an original argument, one that seeks to formulate a legitimate goal for hate speech legislation without slipping into the impossible justification based on offense. However, we claim that the argument is unsound as it asserts a right that does not fit with the best understanding of a democratic society.

2. SPEECH'S INTRINSIC HARM: IS THERE A RIGHT TO A MORAL BUBBLE?

It is important to bear in mind that the argument we now face claims that the harm caused by hate speech is independent of the speech's impact on third parties. This means that the problem with hate speech would be not confined to direct incitement to lawless action, or even to the cumulative persuasion effect that it could have on third parties. The harm in question would be intrinsic to the speech itself. This way of conceiving the harm arising from hate speech is needed to justify the prohibition of hate speech owing solely to its content's moral demerit, without considering the enunciation context and the likely impact of the speech.

If the problem with hate speech does not lie in its impact on third parties' attitudes, but resides on its direct effect on the targeted people, what kind of harm could it cause that could be distinguished from offense? Intuitively, we conceive that people have two different kinds of interests in prohibiting hate speech. The first concerns the speech effects on the quality of people's social interactions. Members of groups targeted by hate speech fear that the speech will diminish their access to services, resources and opportunities in society. The immediate focus of concern in this case is not the immoral content of hate speech, but the effect of speech in other important dimensions of life. However, this kind of interest concerns precisely the impact of speech on the conduct of

third parties. It does not relate to a harm intrinsic to the speech act. This is not the kind of grounds for the prohibition of hate speech we are facing in this work.

The second kind of interest relates to the personal experience of confrontation with hate speech. Every person has an interest in being treated with respect in her social interactions. Normally we associate this interest to another of preserving emotional balance. We usually want to conduct our business in calmness, tranquility and normality. Hate speech disrupts the normal course of our affairs by causing painful and disturbing emotional experiences. These experiences however are precisely those resulting from the offensive character of the speech, and the argument we now face must rule offense out as the basis of hate speech prohibition. Thus what kind of harm could justify the ban on hate speech that would be both distinct from emotional distress and intrinsic to the speech act?

A possible response is that, instead of focusing on people's feelings and emotions, laws prohibiting hate speech would seek to protect people from becoming aware of the fact that other people do not believe in everybody's equal belonging to society. In other words, they would imply the right to be spared from knowing that some people in society advocate differences in right and status between certain social groups.

This is a very difficult argument to sustain in view of some democracy pillars and its relation to freedom of speech. When we think of the reasons to protect freedom of speech what we have in mind is not only the possibility of disagreement but of serious mistake. Freedom of speech does not only mean the freedom to say what is right, just or true. We certainly think that it also implies the right to express deeply wrong convictions.

To be sure, this approach does not amount to moral relativism. People are equal and each person is entitled to pursue her goals and conduct her affairs under equal conditions. Nevertheless, recognizing each person's equal value means acknowledging each person's equal right to participate in public debate and to disclose her moral and political convictions to society. Democracy cannot bear silencing someone based on one's incompetence to civilized engagement in public debate. And this is so because democracy values equality not only as a substantive result, but also as a feature of the process of public opinion formation.

Thus, there is no right to be spared from the awareness that democracy is not a homogeneously valued political regime. We do have a right to democracy, but not to the sense that it is an ideal reality, protected from all other political convictions. We have the

right and moral duty to promote equality, but this means accepting that we live social processes in which we try to perfect our institutions and social culture. It implies recognizing that living with injustices perpetuated by the inability to sufficiently mobilize social change is an aspect of democracy. This is how we deal with poverty and unequal access to health and education services. This is also how we deal with subtly sexist speech in television and in the movie industry, even if this kind of speech may have a much greater role in sustaining a culture of women submission than the one played by explicitly misogynist speech. In such cases, it seems to be common sense that the morally appropriate way to fight for change is through discussion and not by censorship.

Hate speech presents us with the same challenge. This kind of speech may be especially immoral. But the extent of its immorality does not make it more dangerous. Therefore, laws prohibiting hate speech that do not take into account, both in its drafting and application, the specific relationship between speech and concrete harm to other people's rights reveal more about our moral sensibility. It reveals less about our ability to neutralize our revulsion in order to consistently assure the rights of the morally wrong.

Democracy is more than an efficient process to lead to certain morally correct results. It is a form of political regime that justifies itself before the people submitted to it by recognizing in each of them an agent of the regime. That does not mean a process through which we pass morally unscathed. It does not mean it is morally costless.

3. POLICY IMPLICATIONS:

My analysis provides a compelling case against governments limiting speech on the basis of its moral merits. If we accept that we don't have the right to a sanitized moral environment nor to eradicate ideas because of their content we should be lead to the following policy orientations:

1. First, there is no sound rationale for governments to restrict speech merely because it is morally wrong. The United States offer an example of legal doctrine that limits the government's restrictive power on speech. This doctrine affirms that, once an act is considered a speech act, that is, an act primarily of engagement in the expression of ideas and ways of perceiving the world, the government may not prohibit or punish it based on its content. Governmental restrictions on speech would be considered unconstitutional if the only way of explaining them is by assuming that the government's aim is to ban some points of view from the public sphere.

2. Instead, my analysis offers that moral speech could be restricted when it is possible to establish a direct causal and temporal link between the speech act and a concrete and foreseeable harm to other people. In this case, the law should emphasize that such a restriction falls on each and every speech act that is likely to cause such harms, and not only over speech expressing a particular point of view.
3. Similarly, the government could promote egalitarian ideas and attitudes by means other than restricting immoral speech. For example, it may run public campaigns denouncing discrimination and may promote egalitarian ideas in early childhood and youth education.

REFERENCES

BLEICH, Erik. (2011) 'The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies', *Journal of Ethnic and Migration Studies*, 37: 6, 917 — 934.

DAVIES, Jon Gower. (2010) 'A New Inquisition: religious persecution in Britain today', London: Civitas.

KISKA, Roger. (2012) 'Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence', *Regent University Law Review*, 25, 107 - 151.

WALDRON, Jeremy. (2012) 'The Harm in Hate Speech', Cambridge: Harvard University Press.