

Content-Based Restrictions on Freedom of Expression: Should Hate Speech be Banned?

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Abstract

The regulation of freedom of expression, and specifically hate speech, is a controversial topic in both Europe and the United States. The European Court of Human Rights and the United States Supreme Court use very different approaches when deciding issues of speech regulation. This thesis presents a theoretical argument for why hate speech should be banned, even though there are significant societal costs involved.

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Introduction

The use of hate speech is heavily regulated within many nations in Europe. Such regulation results in widespread prosecution for such offenses in Europe, and the resulting appellate litigation. The United States has very few restrictions on this type of expression. America does have limits in certain areas, especially if an imminent breach of the peace is likely to occur.¹ Undoubtedly, mainstream people and legislators on both continents find hate speech to be despicable and utterly offensive. Why then, is hate speech not universally banned? There must be some perceived value inherent in free speech for otherwise reasonable people to oppose an outright ban on hate speech.

Unfortunately, free speech has caused rifts and conflicts since time immemorial. The opinion of one may often be construed as offensive, unpleasant or untrue by another. Governments have tried different ways of regulating the freedom of speech in order to bring a sense of order and fair play to their societies. The signatories to the European Convention on Human Rights ("ECHR" or "the Convention")² have taken on an approach of balancing various interests in which the freedom of speech is equal to other fundamental rights.³ The United States, however, has a long history of freedom of speech, as enshrined in the First Amendment, being superior to other rights. This speech, it is said, is essential to the functioning of the marketplace of ideas.⁴ These very different approaches seem to be at odds with each other, and sometimes produce much different results, but it can also be said that similar values and considerations underlie both systems.

¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

² These nations will collectively be referred to as "Europe" throughout this document.

³ Françoise Tulkens, *When to Say is to do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights*, in *FREEDOM OF EXPRESSION: ESSAYS IN HONOUR OF NICOLAS BRATZA* 279, 280 (Josep Casadevall, Egbert Myjer, Michael O'Boyle, Anna Austin eds., 2012).

⁴ *Id.* at 279.

This thesis will discuss the mechanisms through which hate speech can be banned and regulated in both Europe and the United States. Once it is established that hate speech *can* be banned, this thesis seeks to determine if hate speech *should* be banned. First, we must look at why speech is important, then to various justifications for regulating hate speech to greater or lesser extents. Lastly, justifications for not regulating speech will be discussed. The writings of several authors will be analyzed and criticized to determine if bans on hate speech are helpful and beneficial to society, or just another example of government seeking more and more control over the general public. A thorough theoretical analysis is used to arrive at practical conclusions. Bans on any type of speech (even hate speech) do create societal costs. Some amount of liberty is lost whenever speech is limited. The deleterious effects of hate speech and racism on society are real and serious. Ultimately, it is concluded that hate speech in a modern democracy cannot be ignored and that the court system is well-suited to undertaking this type of regulation.

Chapter I - Definition and Background

In order to discuss hate speech we must define exactly what hate speech is. It is difficult to define hate speech because it is very much defined by what it is not. For purposes of legal discussion, hate speech is not a statement that is simply rude or distasteful or unpleasant. According to Bhikhu Parekh, hate speech "expresses, encourages, stirs up or incites *hatred* against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality and sexual orientation."⁵ Hate speech is not speech that simply expresses a dislike or disrespect of certain people, it requires more than that. Likewise, generalized statements that advocate no particular ideas or course of action will not constitute hate speech. Another important aspect of hate speech is that it is not something that is directed toward a persons or persons who have committed acts which are reprehensible. Stating that "I hate criminals" is not an example of hate speech.⁶ According to Parekh, hate speech must contain three essential elements. Hate speech must: be directed toward an "easily identifiable" individual or individuals, and be based upon an arbitrary feature; stigmatize "the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable," and; view the targeted group as a "legitimate object of hostility."⁷

Further complicating the definition of hate speech is the fact that hate speech can be masked or stated by implication. There are an infinite number of ways in which hate speech can be expressed both overtly and implicitly. A point of view contrarian to the mainstream may be just that, or may be something far more sinister. Implicit expressions of hate speech convey the same message and result in the same harm as explicit expressions and it is up to

⁵ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 40 (Michael Herz & Peter Molnar eds., 2012).

⁶ *Id.*

⁷ *Id.* at 40–41.

the courts to decide when a defendant has or has not crossed the line from rude speech into hate speech. This leads to a case by case factual determination that must be made by a judge or a jury, depending upon the local legal system where a prosecution takes place.

The respective European and American court systems use different criteria for evaluating the legality of restrictions upon freedom of speech. The United States, and most common law countries, see speech rights as negative rights, while most European civil law countries operate with a positive rights approach.⁸ Freedom of expression is protected by Article 10 of the European Convention on Human Rights. Freedom of expression is a qualified right under the ECHR, because limitations upon its exercise are listed on the face of both Articles 10(1) and 10(2). Clearly, Article 10 does not provide complete exercise or unlimited exercise of free expression. Due to this limitation of the right, a court can and must determine what restrictions upon expression are acceptable. In order to make this decision, the European Court of Human Rights ("ECtHR") must initially decide if there was interference with an Applicant's rights which are protected by the ECHR. After this threshold finding, the Court must then decide if the interference complained of was: 1. Prescribed by law; 2. In pursuit of a legitimate governmental aim, and; 3. Necessary in a democratic society.⁹ When making the final determination, the Court will look to see if the government had a "pressing social need" for the action that it took, and if the action taken was proportional to satisfying that need. Simply stating that the government action was reasonable and in good faith is not enough to satisfy the test. The government Respondent will be required to produce reasons that the ECtHR deems to be "relevant and sufficient."¹⁰

⁸ Adrienne Stone, *The Comparative Constitutional Law of Freedom of Expression*, in *COMPARATIVE CONSTITUTIONAL LAW* 406, 411-412 (Tom Ginsburg & Rosalind Dixon, eds., 2011).

⁹ *Observer and Guardian v. United Kingdom*, Eur. Ct. H.R. no. 13585/88, Par. 49, (1991).

¹⁰ *Observer and Guardian v. United Kingdom*, Eur. Ct. H.R. no. 13585/88, Par. 59(d), (1991).

The first and second elements of the above test are relatively easy to find in most cases, and thus, there is little litigation regarding these two features. A government action that is not "prescribed by law" is simply an arbitrary regulation, and will be swiftly invalidated by the ECtHR as being a violation of the rule of law. Likewise, a government action that serves no legitimate aim will be invalidated because the government would have no reason to limit the rights of the citizenry. Presenting some sort of legitimate aim, such as "public safety" or the "rights of others" is quite simple, so this element is rarely a real issue. Many articles of the Convention (including Article 10) explicitly allow for limitations based upon reasons related to public health, morals and public safety, among several other reasons. Given these broad criteria, even a first-year law student could regularly pass the second prong of the test. What is left is that the vast majority of litigation and discussion centers upon whether the interference in question was necessary in a democratic society.

In the United States, the European Convention on Human rights is obviously not applicable. Since there is no federal ban on hate speech in the abstract, victims of abusive language must wait much longer before they may have an actionable claim. The marketplace of ideas and free speech are so highly valued in America, that the government (and the people, it seems) are willing to allow speech just up until the threshold of violence in order to prevent a chilling effect upon expression of all types. This hands-off attitude, though, has not always been the case.¹¹ In order to study the current regulation of hate speech in the United States, we must look to the test set out in *Brandenburg v. Ohio*.¹²

Brandenburg stands for the proposition that words and acts are very different things. The United States Supreme Court had previously used and later abandoned the "clear and

¹¹ C. Edwin Baker, *Hate Speech*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE 57, 59-60 (Michael Herz & Peter Molnar eds., 2012).

¹² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

present danger" standard when reviewing speech claims.¹³ When *Brandenburg* was decided, the Court stated that

the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed at inciting or producing imminent lawless action and is likely to incite or produce such action. The mere abstract teaching of the moral propriety or even moral necessity to resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.¹⁴

The *Brandenburg* test thus requires that for hate speech to be banned, there must be a direct, imminent and likely possibility for the words to cause violence. This test does not allow for the restriction of speech that is merely hurtful, rude, bigoted or racist. Without a showing of a serious threat of causing imminent violence or lawless action, speech will not be regulated.

It is worthwhile to note that it is not true that there is no regulation of hate speech in the United States. Hate speech in America can be, and is, criminally prosecuted, but the prosecution must satisfy the burden of the *Brandenburg* test. These cases are rarely seen by foreign scholars because they are almost exclusively prosecuted at the misdemeanor level within the individual states. The State of Texas, for instance, prohibits "abusive, indecent, profane or vulgar language in a public place" when the language "by its very utterance tends to incite an immediate breach of the peace."¹⁵ Also prohibited is abusing or threatening "a person in a public place in an obviously offensive manner."¹⁶ As long as the prosecution proves the elements of the offenses listed, and makes a showing of "direct, imminent and likely" required by *Brandenburg*, then a defendant can be convicted and fined for committing

¹³ *Whitney v. California*, 274 U.S. 357 (1927) and *Dennis v. United States*, 341 U.S. 494 (1951).

¹⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 447-448 (1969).

¹⁵ Texas Penal Code § 42.01(a)(1) (2011).

¹⁶ Texas Penal Code § 42.01(a)(4) (2011).

hate speech under this particular statute. The burden required to obtain a conviction under this scheme is admittedly high, but definitely not impossible.

The difficulty inherent in the regulation of any type of speech is that of drafting and defining. Over-inclusive measures will oppress and frustrate normal, otherwise law abiding people, while under-inclusive statutes will be futile and rarely enforceable. The European Court of Human Rights and the courts in the United States struggle to handle the issues surrounding the regulation of speech. Very different approaches are used on opposite sides of the Atlantic, but the ultimate goal of preserving a fair and respectful society is the same.

Chapter II - Why Speech is Important

Freedom of speech is highly valued in democratic societies. The reasons for this are innumerable, but some common explanations include: discovering truth;¹⁷ self-fulfillment of the populace;¹⁸ participation in democracy,¹⁹ and; suspicion of government.²⁰ Even with the high value placed upon free speech, there is some criticism of placing too much emphasis on speech, to the detriment of other rights.

A. The Discovery of Truth

The discovery of truth is often cited as a reason to protect freedom of speech. Speech is a basic manner in which humans interact and communicate with each other. Speech is required for the exchange of ideas. When ideas are exchanged, people have the ability to evaluate those ideas, and to decide which ones are valid, appropriate or true. Likewise, people will also find that some ideas are questionable, offensive or false. The idea that free speech is essential to the discovery of truth relies on the idea that people must hear many ideas in order to evaluate ideas. If a person is held in a vacuum, and only exposed to the status quo, that person would be unable to evaluate other ideas effectively. In extreme cases, that person may not even be able to imagine alternatives, much less effectively evaluate those alternatives.

B. Self-Fulfillment

The self-fulfillment of individuals is another reason given for the special status that has been granted to speech in democratic societies. The free exchange of thoughts and opinions lead to the development of well-adjusted adults who can think for themselves and

¹⁷ ERIC BARENDT, FREEDOM OF SPEECH 7 (2d ed. 2005).

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 21.

decide their own courses in life. This theory, though a bit abstract, makes sense when evaluated in light of the discovery of truth principle. The discovery of truth points mainly to the discovery of objective truths, such as the economic costs of certain tax policies or the corruption of a certain public official. The self-fulfillment approach allows people to learn more about subjective truths. The choice of a particular religion or the decision to pursue a certain vocation could be considered to be subjective truths, that is, people deciding what lifestyle or course of action is best for them. Choosing to become an artist or an historian is not objectively better than choosing any other career, but it is subjectively the best choice for a person who evaluates other careers and chooses to pursue a particular path.

C. Democratic Participation

The ability to participate in democracy is perhaps the easiest reason for free speech to be justified, though the speech itself is not the desired outcome.²¹ Simply put, democracy requires the free exchange of opinions and ideas to work effectively. Democracy is a system based upon choice. Do you want lower taxes or more social services? Do you oppose abortion or are you pro life? The free exchange of opinions must occur so that the citizenry in a democratic society can know what the various options are, compare those options to each other and make a decision. These are oftentimes not objective truths, but are subjective decisions on what the best public policy should be. Democracy without choice, such as in a one party state, is not really democracy at all. Furthermore, citizens need to know about the performance and behavior of public officials, so that those officials may be effectively evaluated.

²¹ Francoise Tulkens, *When to Say is to do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights*, in *FREEDOM OF EXPRESSION: ESSAYS IN HONOUR OF NICOLAS BRATZA* 279, 288 (Josep Casadevall, Egbert Myjer, Michael O'Boyle, Anna Austin eds., 2012).

D. Suspicion of Government

The last major reason offered to support the freedom of speech is that free speech allows for a healthy suspicion of the government. It seems to be in the American system where this suspicion is most pronounced, but it is a necessary element in all democracies. Modern democracy, in general, has been a response to monarchies and authoritarian regimes. The purpose of democracy is to put the people in control, and create governments that are made up of representatives of the people who should serve the best interests of the people. In order for the people to maintain control of the government, vigilance is required to prevent the subversion of the rights of the people.²² How much control a particular government has over individuals is, of course, determined by local attitudes and history, but all democracies do require some level of suspicion of the government.

The discovery of truth, self-fulfillment, participation in democracy and suspicion of government are all important reasons for preserving the freedom of speech. None of these four bases can operate without free speech, and a legitimate democracy cannot exist with these four bases. Since speech is so integral to the functioning of a modern liberal democracy, there is little debate surrounding the necessity of preserving speech. The disagreements, then, rest not in the substance, but in the degree of regulation to be implemented.

²² Françoise Tulkens, *When to Say is to do: Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights*, in *FREEDOM OF EXPRESSION: ESSAYS IN HONOUR OF NICOLAS BRATZA* 279, 287 (Josep Casadevall, Egbert Myjer, Michael O'Boyle, Anna Austin eds., 2012).

Chapter III - Reasons to Ban Hate Speech

With the above definition of hate speech in mind, it is easy to understand why the overwhelming trend worldwide is to ban hate speech. There are many valid reasons for banning hate speech. These reasons include protecting the dignity of all members of society, maintaining public order and safety, fostering inclusive communities and preventing the further development of hate groups. Of course, providing these protections has societal costs.

A. Individual Dignity

Governments do have a legitimate interest in protecting the dignity of their citizens. Affronts that fall into the definition of hate speech surely can and do negatively affect the dignity of mental well-being of the targeted persons. Many of the effects may not be completely obvious. Hate speech has long-term negative effects on social attitudes.²³ These effects lead to the marginalization of entire populations, and also prevent harmonious interactions in society. Negative societal effects can also discourage minorities from applying for certain types of jobs, standing for elections, living in certain areas and strip minorities of their individual personalities.²⁴

Although this justification of individual dignity offers quite a bit of promise, it must be asked if bans on hate speech actually do accomplish as much as is suggested. Hate speech starts in the mind. Banning speech may reduce the expression of thoughts that already exist, but regulations cannot destroy the underlying ideas. Do such bans change minds and attitudes over time, or do they just drive hateful ideas underground? There are also many societal factors in force in every imaginable situation that are contributing to friction between various populations in an area, and hate speech may not be the biggest problem. Difficulties

²³ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 44 (Michael Herz & Peter Molnar eds., 2012).

²⁴ *Id.*

related to chronic unemployment, failing to participate in the electoral process and living in low-income neighborhoods may have causes that are more directly related than hateful speech. Lack of educational opportunities and poor schooling policies come to mind as factors that may create disparities in a much more direct manner.

Instead of passing sweeping bans on hate speech, the United States has chosen to empower minority populations through legislation. Initiatives such as the Civil Rights Act of 1964²⁵, affirmative action programs and other non-discrimination rules have been used to combat the history of educational and income inequality that exists in the United States. These programs seek to remedy the evils of racism and invidious discrimination while limiting the free expression of ideas as little as possible.

The rationale behind the European-style bans on hate speech seems to be that hate speech marginalizes minorities, and that banning that speech reduces the marginalization, and thus creates a more integrated and harmonious society. Hate speech legislation is obviously paired with other non-discrimination statutes in European nations. The American approach, though not banning many forms of hate speech outright, still seeks to accomplish the same goals. The rationale behind the American approach could be expressed as hate speech marginalizes minorities, and the best way to stop hate speech is to bring diverse groups of people together. Thus, by forcibly integrating schools and workplaces the American policies create experiences and friendships amongst people whom otherwise may have never met. It is then hoped that it is more difficult to hate someone that you know.

B. Maintenance of Public Order

Separate from the dignity argument, governments also have a strong interest in maintaining public order and preventing violence. Hate speech is just the type of discord that

²⁵ 42 U.S.C. §§ 2000(a) - 2000(a-6) (2006).

may lead to civil unrest and violence, both against minorities and by minorities. The dehumanizing effect of hate speech is that it promotes the feeling of "us" versus "them." Such an attitude makes it easier to verbally abuse a "lesser human." Further desensitization makes committing violence against "them" easier than it normally would be.²⁶ Violence by minorities may also occur as the result of taunts, abuse and physical assaults in which a minority individual would need to defend him or herself. A fundamental role of government in democratic societies is to prevent violence and to protect the safety of all individuals.

Public health and safety are without any doubt extremely important concerns of all democratic governments. It must be explored, though, if these goals can be attained without resorting to the stifling of free expression. The use of violence by one private citizen against another is illegal all around the world. The European approach to hate speech is designed to prevent violence from happening in the first place. It is believed that removing offensive language will prevent the stoking of anger and resentment that can easily boil over into violence, both against minority peoples or by minority peoples. This is a proactive approach to ridding society of violence.

The United States, meanwhile, uses a more reactive approach. Criminal laws prohibiting the use of violence are regularly broken and prosecutions routinely take place. Not all assaults and attacks that take place are hate based. In fact, relatively few of them are. It is hard to quantify how many assaults would be prevented by a wide reaching prohibition of hate speech in America. This reactive approach requires a very strong law enforcement community. The work involved in arresting offenders and prosecuting them is very expensive, and such a system simply cannot be supported by the economies of some other nations. The reactive American approach has been criticized by some European

²⁶ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 45 (Michael Herz & Peter Molnar eds., 2012).

commentators.²⁷ It is also open to vigorous debate if arresting and incarcerating large numbers of people is good public policy in the long run.

The use of the proactive approach and the reactive approach are policy questions. Do we want to prevent some unknown amount of violence and possibly stifle some unknown amount of otherwise protected speech? Or, do we want to arrest people who have actually committed a crime when some unknown amount of violence may or may not have been prevented? When framed in this manner, both approaches seem reasonable, but in different ways. Ultimately, these are choices that must be made by legislators and the persons whom they represent.

C. Fostering Inclusive Communities

Third, a ban on hate speech fosters a greater feeling of community amongst the population as a whole. Many groups can take comfort in the fact that these protections exist, even if they are not currently the target of widespread discrimination or xenophobia.²⁸ Times change and attitudes change. Persons who don't necessarily need the protections of hate speech legislation in the present can build lives and prosper knowing that they will be protected should social attitudes change in the future. On the other hand, when minority members feel that the ruling regime has no interest in their welfare, such feelings may cause further stress in relation to an already unstable situation.²⁹

This is a somewhat tenuous justification for banning hate speech in that the results are very hard to measure and because the purported benefits could likely be achieved through other means already discussed. That being said, this may be one of the more convincing

²⁷ Anthony Lester, *The Right to Offend*, in FREEDOM OF EXPRESSION: ESSAYS IN HONOUR OF NICOLAS BRATZA 297, 303 (Josep Casadevall, Egbert Myjer, Michael O'Boyle, Anna Austin eds., 2012).

²⁸ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE 37, 46 (Michael Herz & Peter Molnar eds., 2012).

²⁹ *Id.* at 44.

arguments for banning hate speech. Creating a feeling a community safety is something that is quite subjective and it is hard to measure if any success or change is being achieved. The fact of the subjectivity of the justification may be just why it is important. Without any doubt, feelings of inclusion in the community are important in maintaining a peaceful society, and the elimination of hate speech will help to maintain this peace to some degree.

Subtle changes in feelings of community and inclusion may make inhabitants more at ease and happier without those people really realizing what is happening around them. These intangible factors may actually improve the quality of life of a large number of people. It could also be that changes in feelings about community acceptance have nothing to do with the regulation of hate speech. Improvements in employment opportunities, education, and community status may be the actual causes of feelings of positivity.

D. Prevention of Hate Group Development

Lastly, governmental bans on hate speech can prevent the development of hate-based groups and parties.³⁰ When public discourse is conducted in a manner that clearly disapproves of hate speech and intolerance, members of the public have a better understanding of what is and is not acceptable in open discussions. These norms can have the effect of marginalizing hate groups and persons who use hate speech by showing them as outliers, or people who do not fit within accepted norms. When compared to the majority of the population, these speakers will be viewed as extreme by many members of the public, and thus hurt the recruiting opportunities of the despised groups. There is also a fear on the part of governments that organized hate groups pose a more real threat to social order than

³⁰ *Id.* at 46.

individuals do.³¹ Parekh argues that this strategy works best in developing democracies before strong groups and parties have emerged, but also works in mature democracies.³²

This justification is one that cannot be ignored, but also has mentionable drawbacks. There is vigorous debate on this aspect of hate speech regulation, and rightly so. The belief that banning public displays by hateful groups and persons will eventually reduce the number of hateful groups and persons in society is countered by the view that banning these groups and actions will simply drive them underground, while not stopping their ideas. It is also a relevant fear that banning such groups could make them a "forbidden fruit" that interests some segments of the population, particularly young people. Whether this justification works in practice remains to be seen over time.

It can be seen that regardless of this justification, hate groups are still very active in many countries all over Europe. In the United States, hate groups clearly exist, but there has not been a mushrooming population of hate groups, nor have they achieved mainstream acceptance in the modern era. One possible explanation for this result in the United States could be that the "marketplace of ideas" is working. Racist and fascist groups in America, though operating openly, seem to be relegated to the fringes of society as objects of disgust and ridicule.

The four reasons presented for banning hate speech are made up of good intentions, and undoubtedly have quite a bit of merit. Proponents of peaceful, pluralistic societies all over the world can appreciate the preservation of individual dignity, the maintenance of public order, the creation of inclusive communities and the prevention of the spread of hate.

³¹ Maleiha Malik, *Extreme Speech and Liberalism*, in *EXTREME SPEECH AND DEMOCRACY* 96, 100 (Ivan Hare & James Weinstein, eds., 2009).

³² Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 46 (Michael Herz & Peter Molnar eds., 2012).

Unfortunately, societal costs are associated with all of these initiatives, because "the ascription of special rights to minorities is never for free, but always has to be paid for by others within a society."³³ It is not suggested that the banning of hate speech is a "special right" for minorities. Freedom from oppression and hate is a right to which all people are unequivocally entitled. The point is that all forms of regulation have costs, and some of those costs may be unexpected. The costs involved can be physical, as in the costs of policing and prosecution. Those costs can also be societal, as in the chilling of otherwise legal expression and resentment or confusion on the part of some members of society. The United States has a strong rule of law tradition.³⁴ Creating confusion regarding what is and what is not allowed can cause quite a bit of friction amongst people generally aspire to follow the law. These benefits and costs make the regulation of hate speech a difficult proposition not to be taken lightly.

³³ Marlies Galenkamp, *The Rationale of Minority Rights: Wishes Rather Than Needs?* in DO WE NEED MINORITY RIGHTS?: CONCEPTUAL ISSUES 40, 54 (Juha Raikka, ed., 1996).

³⁴ Robin Charlow, *America's Constitutional Rule of Law: Structure and Symbol*, in THE RULE OF LAW IN COMPARATIVE PERSPECTIVE 89, 95 Mortimer Sellers & Tadeusz Tomaszewski, eds., 2010).

Chapter IV - Concerns Regarding Hate Speech Regulation

According to Bhikhu Parekh, an outright ban on hate speech is disfavored by many writers and commentators.³⁵ There are many reasons for normal people who support pluralism and democracy to still oppose regulations on the freedom of expression. Parekh sets out six commonly stated reasons for opposing such bans, and tries to explain why those six reasons are flawed.

A. Free Speech is Important in a Democracy

The first reason to not regulate hate speech given is that freedom of speech is so important to democratic society that it should be hindered as little as possible. Democracy requires debates and the exchange of ideas. There are, in fact, times when regulation of speech is necessary, but these situations are relatively rare. Hate speech, it is thought, is damaging, but the verbal effects of hate speech are minor enough that they are allowed to ensure liberty and a free flow of ideas in society.³⁶

Parekh's response to this line of reasoning is that democratic societies regulate many types of speech on a daily basis which go against the accepted norms of a modern pluralistic society, including defamation and pornography. So, if society can regulate certain types of speech effectively, why should we not regulate words that "intimidate, bring into contempt, provoke hatred of, and damage the dignity and life chances of sections of society?"³⁷ There are certain guiding principles behind the regulations on defamation and pornography, for instance, and that the principles of mutual respect and dignity should be used to guide regulations on hate speech, instead of providing for a free speech based trump. Speech can

³⁵ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 47 (Michael Herz & Peter Molnar eds., 2012).

³⁶ *Id.*

³⁷ *Id.*

be looked at as a public good that, in some views, should be used to reinforce good or acceptable norms.³⁸ It is also argued that hate speech is undemocratic in that it does not invite public debate or rational arguments, but that it actually denies people the freedom to listen and choose from a set of rational options.³⁹

The argument presented is relatively, but not absolutely, convincing. It is hard to find a compelling reason to allow such hateful language by saying that we want to live in a society that is based upon liberty and the absence of government intrusion, when the government regularly limits speech in many ways. One response is that, especially in the American system, the common regulations on speech have been applied and interpreted by courts for decades and even centuries. That these regulations have been carefully tested and crafted for being both necessary and useful, and that the creation of new regulations would not have the built in wisdom and experience found in the more traditional regulations.

Additionally, if the courts have been handling speech regulations for so long, why was hate speech not banned centuries ago? Surely hateful, distasteful and disgusting speech has existed nearly since the creation of the spoken word. Why didn't the legislators and judges of former days outlaw these words? Perhaps they realized the difficulty of defining hate speech and applying consistent judicial standards that could be understood by the courts and by the citizenry who would be subject to the new rules. Defamation can simply defined as a public statement about another that is presented as truth, but is, in fact, untrue. Pornography is not as easy to define, and in the words of Justice Stewart, "I know it when I see it."⁴⁰ Such a definition would obviously not be acceptable in a criminal statute. The difficulty in defining and applying rules dealing with words that are hateful, rude, distasteful,

³⁸ ERIC BARENDT, FREEDOM OF SPEECH 35 (2d ed. 2005).

³⁹ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE 37, 47-48 (Michael Herz & Peter Molnar eds., 2012).

⁴⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

and shocking present significant challenges for the courts when those courts do not want to be over-inclusive.

B. The Marketplace of Ideas

An often cited justification for failing to regulate hate speech rests upon the concept of the "marketplace of ideas." It is said that "the answer to hate speech is not less but more speech."⁴¹ The underlying rationale for this approach is the thought that, when confronted with many ideas, rational people will choose the good and truthful ideas while discarding the false, xenophobic and hateful ideas. This is the basic approach that is followed in the United States, and it is hoped that this method will eventually eliminate ideas that are false or wrong.

It is argued by Parekh that the marketplace of ideas can work, but that it is based on a fundamentally flawed assumption. The marketplace, he argues, is not a level playing field, but one that is affected by various forces.⁴² It is pointed out that in many countries discriminatory views are the norm, and thus pluralistic views may have little or no access to the marketplace because people have already made up their minds. Access to the marketplace becomes more difficult in countries where the media is state controlled or ultra conservative.⁴³ In other contexts, some speakers are just louder and better financed than others, while others can just be drowned out in the marketplace.⁴⁴

Just like markets for consumer goods, marketplaces of ideas are also affected by powerful groups, people who have an agenda and monetary forces. Those who have something to lose will seek to manipulate the marketplace to their own advantage. Thus, Parekh argues, the marketplace of ideas can work, it just needs to be regulated in the same

⁴¹ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 48 (Michael Herz & Peter Molnar eds., 2012).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 15 (2006).

way we regulate markets for tangible goods, and a good way to do that is through hate speech regulation.⁴⁵ By doing this, the marketplace can function efficiently, and all voices that follow appropriate social norms will have access to it.

The approach laid out above for marketplace regulation requires a lot of government involvement, and with any type of government involvement, disputes are sure to arise about how much regulation is enough without being overbearing. Should hate speech bans prohibit speech that is racist, but not merely abusive? Should such a ban prohibit both racist speech and abusive speech? How can "abusive" be defined in such a way that ordinary people will be able to distinguish between what is legal, and what will earn them a fine or a night in jail? These questions, though somewhat abstract, would be crucial to creating hate speech prohibitions, and must be answered for such a system to work. These particular questions would have to be answered by legislators, or worse bureaucrats working in government ministries, and this is what is feared by many opponents of hate speech legislation.

There are also regional differences to contend with. It is not suggested that vile, racist speech is disliked London, but enjoyed in Ljubljana, the point goes to interpretation of statutes. All statutes must be interpreted and applied in individual cases. The way that judges apply these statutes could lead to divergent outcomes in different areas. A response to this concern would likely be that the margin of appreciation would allow local courts to apply the restrictions based on local standards. But, if the margin of appreciation argument is used, would courts be implying that it is perfectly acceptable to spout racial epithets in certain countries or states? Differential treatment is a serious concern when it comes to this sort of regulation. This is especially grave when criminal sanctions are involved, because a criminal conviction, no matter how trivial, can have lasting effects on one's employment prospects and

⁴⁵ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 49 (Michael Herz & Peter Molnar eds., 2012).

esteem in the community. Perhaps government is best suited to handling wide policy considerations, and not to regulating speech word by word as it exits people's mouths.

C. The Chilling Effect

Robust and free debate in society may be culled by a chilling effect produced by hate speech regulation. In its simplest form, the chilling effect occurs when people practice self-censorship. This self-censorship often occurs when people don't know or are unsure about what speech is illegal and what speech is protected. The danger of the chilling effect is that it creates over-inclusiveness, that is, protected speech is inadvertently silenced due to ambiguity. This chilling effect is in part created by drafting and definitional concerns discussed in Subsection B, above. Another often cited concern regarding the chilling effect is that once language is silenced, there will only be more and more regulation to follow.⁴⁶ The great protection that speech enjoys in America has much to do with the Supreme Court's fear of creating a chilling effect.⁴⁷

In order to allay fears regarding the chilling effect, Parekh argues that we must first understand that speech does not deserve to be completely uninhibited.⁴⁸ There is no basis, in his view, to believe that speech should receive special protection over all other rights. It is stated that speech has "social consequences," and those consequences should not be accepted simply because of their connection to expression.⁴⁹ Instead, all rights should be balanced against one another, and reasonable compromises should be struck that protect all members of society. The slippery slope argument regarding free expression is also quickly dismissed by Parekh by stating "we ban defamation of individuals without jeopardizing fair critical

⁴⁶ *Id.*

⁴⁷ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 161 (2006).

⁴⁸ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 49 (Michael Herz & Peter Molnar eds., 2012).

⁴⁹ *Id.*

comment, and we ban obscenity without discouraging acceptable forms of erotic expression."⁵⁰

Whether freedom of speech should receive absolute protection is a question worth pondering. As Parekh says, there is nothing inherently virtuous about speech to make it trump other rights.⁵¹ The rights to be free from slavery and free from torture are surely just as important (or more important) than speech rights, and, in fact, those two mentioned rights are non-derogable rights, while speech is subject to limitations. Speech, then, is probably not the most important of all rights. What is important about speech is that many other rights flow from it. Freedom of religion, freedom of assembly, freedom of association and the right to vote all depend upon freedom of speech. Without free speech, the other four would cease to exist in any meaningful way. In this light, the problem of the chilling effect extends much further than just to spoken and written words. It extends to most aspects of what we consider to be a modern democratic society. Parekh's view fails to take into account the ripple effect created by speech regulation into many aspects of our lives.

The slippery slope argument is used in many or all areas of legal study from time to time, and is perhaps a quite over used tool. Some readers and commentators may have begun to look at the fear of government intervention as exaggerated, or as a legal version of "crying wolf," that is, complaining about a problem which is not a real problem.⁵² Though the argument may appear more often than is necessary, it still has a place in this legal debate. All regulations get started somewhere. Many oppressive regimes have begun by implementing small or innocuous restrictions that were unnoticed or ignored by many. The fear of some that the government will start with small restrictions and slowly build to a full-blown

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² ERIC BARENDT, FREEDOM OF SPEECH 36 (2d ed. 2005).

totalitarian regime may be unlikely, but it is not impossible. Additionally, an inverted form of the same argument is used by Parekh himself as a reason to ban hate speech. Parekh states that "a climate of intimidation and violence against identified groups develops over time" and that this can be better prevented when "limits are enacted before hate-based organizations have built up powerful networks and support and before their rhetoric has coarsened public sensibility."⁵³ If racism and hate can usurp public opinion over time, it seems illogical to believe that a government cannot or will never try to usurp more control over time.

D. Moral Neutrality

Another reason provided to limit speech regulations is that rules limiting speech require the state to pass moral judgment upon some types of speech.⁵⁴ Doing so, it is feared, can harm political debate and possibly give advantages to one side or another if certain ideas are silenced or severely weakened. This view hopes to maintain governmental neutrality, so that society can sort out its own problems and ideas without the big brother skewing the process. A government, like any other entity, can have its own interests at heart when making decisions, rather than the common good or the will of the people.

This argument is flawed, it is believed, because governments rightfully pass moral judgments on speech all the time.⁵⁵ Examples of governments passing judgments on the content of speech include bans on cigarette advertising, the crime or tort of libel and regulation of pornography. These moral judgments that occur regularly, coupled with the fact that there is no outright prohibition on governments passing judgment on speech, leads

⁵³ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 46 (Michael Herz & Peter Molnar eds., 2012).

⁵⁴ *Id.* at 49.

⁵⁵ *Id.* at 50.

Parekh to conclude that the moral neutrality argument is no reason to prevent speech regulation.⁵⁶

It is further stated that not only are states not prohibited from making judgments about speech, but they actually should be doing just that.⁵⁷ Democratic societies are based upon certain values, and it is those values that make the individual states democratic and unique in their own ways. The government does control ideas and norms by what is taught in schools and what sort of laws are passed, and these tools should be used to encourage a pluralistic and respectful society. Parekh believes that governments have a duty to pass and enforce judgments made for the common good because "a state committed to human dignity, gender and race equality, or the spirit of free inquiry cannot be neutral between forms of speech or behavior that uphold or undermine these values."⁵⁸

A major problem with the thought of governments passing moral judgments is the fear of subjectivity which these decisions usually entail. Rational people may disagree on any number of issues, even when evidence seems to favor one side or another. There are still vigorous debates going on regarding smoking. No one can reasonably deny the fact that smoking causes health problems, but there are still millions of people around the world who choose to light up every day in spite of the risks. When we move away from the issue of smoking and onto the issue of voluntary abortion, the decisions to be made become more difficult. There are objective scientific reasons for which to oppose smoking, while abortions are a purely moral issue. Performing an abortion does result in a loss of human life. Performing an abortion may also prevent lifetimes of poverty and suffering for the mother and the child. Weighing these interests and choosing to allow or prohibit abortions comes

⁵⁶ *Id.* at 50.

⁵⁷ *Id.*

⁵⁸ *Id.*

down to a subjective moral choice. You either approve of it or you do not. After such a decision is made, a government can always point to the reasons behind the decision, and people who oppose the decision can always point to contrary reasons.

Bans on hate speech require similar moral judgments, and the question is not as simple as allowing or banning an abortion. Questions of drafting and limits can create a very gray area right around where the line is drawn. The drawing of a line, figuratively speaking, is subjective. When speech is limited or banned, a line must be drawn somewhere. There will be people who get are prosecuted when perhaps their offense was of a low gravity, and there will also be people who get away with quite offensive behavior because of the location of the line. Ultimately, the subjectivity of drawing lines may leave all parties dissatisfied.

E. Autonomous Individuals

Taking away the ability of people to make their own choices makes no sense in a democratic society, according to this justification. People were born with free will, and the purpose of democracy is to allow people to use and develop their own selves in ways that are unlikely in an authoritarian regime. It is hoped that the free exchange of ideas will provide people with the knowledge to discount or eliminate hateful ideas. Furthermore, democracy stresses the freedom and equality, and people should be allowed to make decisions not only for their own lives, but also for the country.⁵⁹ The government should not restrict speech just to prevent people from adopting the opinions expressed in that speech.⁶⁰

Parekh believes that this justification gives too much credit to the common woman or man.⁶¹ In this view, personal autonomy must be looked at in the context of a person's educational and social backgrounds. This argument states that if people are as self-critical as

⁵⁹ *Id.* at 50-51.

⁶⁰ ERIC BARENDT, *FREEDOM OF SPEECH* 170 (2d ed. 2005).

⁶¹ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 51 (Michael Herz & Peter Molnar eds., 2012).

the "autonomous individuals" justification suggests, then we would see no racism, no xenophobia, and surely none of the genocides that were witnessed during the 20th century.⁶² Other commentators have agreed that this view probably assumes too much about the attitudes and decision-making abilities of the general public.⁶³ The ability to exercise autonomy, it is claimed, is developed through education and access to outside thought, and some people lack these skills because "in almost all societies, including western ones, racism, sexism, nationalism, and xenophobia represent powerful currents of thought reflected in and regularly reinforced by the media."⁶⁴ Parekh believes that this is why the law needs to create norms for public discourse, even though such ideas cannot be eliminated in private conversations.

Parekh's somewhat elitist reasoning for controlling the autonomy of individuals may be the exact type of government parenting that opponents of speech legislation are afraid of. The ability to be self-critical and to evaluate ideas and make decisions are abilities that Parekh says some people develop "to a greater degree than others."⁶⁵ Though the point he makes does make some logical sense, it is just another area of grey subjectivity for people to deal with, and it seems to go against the whole reason behind having a pluralistic society. If people should be empowered to join in political debates and to participate in the political process, how can someone try to justify reasoning based upon the idea that some people just don't have the skills needed to participate? Parekh does not set out who should be allowed to fully participate in democracy, but undoubtedly liberal-minded professors at elite universities would be included in that group. Although Parekh is not suggesting disenfranchising voters or removing ordinary citizens from the political process, the reasoning involved is at least a

⁶² *Id.*

⁶³ ERIC BARENDT, FREEDOM OF SPEECH 32 (2d ed. 2005).

⁶⁴ Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE 37, 51 (Michael Herz & Peter Molnar eds., 2012).

⁶⁵ *Id.*

reason to give pause. The thought of "you are not smart enough, so the government will make your decisions for you" is unsettling, and gives some credence to those who oppose government regulation in general.

F. Internal Beliefs

The last justification given for opposing bans on hate speech is that such bans would make little difference, if any. Internal beliefs, it is said, are those which a person chooses to believe in and the law cannot change a person's internal belief system.⁶⁶ From this point of view, bans on speech are like a new coat of paint on an old car, they cover up some problems but don't actually solve anything. This approach also creates a very real risk of groups moving underground and attracting new followers just as before.

The response to this given by Parekh is that the combined influence of legal sanctions and community attitudes can and does create change in societies.⁶⁷ To go further, he argues that the point of hate speech regulation is mainly to control conduct, but there are deeper benefits. Stopping public hateful conduct is reward enough for such bans, it is argued, but controlling a person's conduct can also have the effect of shaping that person's thinking over time.⁶⁸ This subtle change in attitude, brought about by a legally-mandated change in public behavior, could lead a lot of people to dissociate themselves with hate groups and hate activities. Many people, when confronted with the choice of participating in hateful activities and becoming an outcast or avoiding such groups and being a respectable member of society will choose that latter. This is just the type of situation that the law is good for and in which

⁶⁶ *Id.* at 51.

⁶⁷ *Id.*

⁶⁸ *Id.* at 52.

legal regulation can be successful, according to Parekh.⁶⁹ Simply put, a forced change in behavior may yield a voluntary change in attitude.

The possibility of hate groups moving underground and recruiting new members is a very real concern. It is beyond doubt that hateful groups operate below the radar of society and law all over the world. There is a question of how successful they are in their clandestine forms, but their existence cannot be doubted. Even if decent or respectable or educated persons would avoid these groups due to legal sanctions or personal choices, the people who still choose to join pose a threat to liberal society. Driving these groups underground may create members who are even more hardened because of the perceived oppression that they feel from the government. Additionally, if the groups were then only able to recruit less sophisticated members who are quite subject to persuasion, the groups could end up being more dangerous than before. The other option would be to keep the groups out in the open and let the marketplace of ideas take over. The hope being, of course, that the members of the various groups would look like fools in the light of day, and being ridiculed and shunned by all members of society. Unfortunately, neither approach will completely rid the Earth of racism and hatred.

The reasons presented for the limiting of hate speech regulation all raise important points that must be considered by legislators when deciding whether to create hate speech restrictions. Freedom of speech surely is integral to the functioning of a healthy democracy. Democracy is founded upon the exchange of ideas so that people can choose the best course for the future, as opposed to being subject to authoritarian rule-making. The debate needed to come to a consensus on which values are most important in a society does take place in a marketplace of ideas. People can only find the best solution by exploring many solutions,

⁶⁹ *Id.*

and ambiguous or vague laws regarding speech can affect this marketplace. The chilling effect that may be created is a valid fear which could be used by some to maintain the status quo or to promote government-backed (though not necessarily popular or wise) policies. Many believe that the state should maintain a morally neutral stance, and not try to decide delicate issues on its own. The concept of autonomous individuality goes hand in hand with this belief, and promotes the idea of individuals weighing ideas and making decisions of their own free will, and not because of a mandate from the government. Lastly, regulating speech may not solve the problem that it seeks to address. It can be argued that laws may modify behavior, but the law cannot modify the mind. Undoubtedly, hate still exists in many forms, and critics argue that we have lost some portion of freedom and liberty in the process of gaining nothing.

Conclusion

The discussion above highlights the legal and policy considerations that go into the different types of speech regulation that are used in Europe and the United States. The proactive approach used in Europe likely stems from the recent history of that continent. The terrors of war and genocide devastated the lives of hundreds of millions of people in the 20th century. Undoubtedly, an element of prevention is at play in the European approach. The American system is very concerned about the preservation of liberty, and is particularly concerned with the government chipping away at rights over time. The fear of losing great amounts of liberty were racist speech to be completely banned may be real, but it seems that the likelihood of the loss of personal autonomy and choice may be greatly exaggerated.

The American approach of protecting speech over all other concerns is outdated in the light of modern developments. It is true that regulations can create a chilling effect. It is true that people need to discuss ideas in public to evaluate their options. It is true that free speech is essential to the functioning of a modern democracy. But there are many other concerns that have been presented. It is true that hate speech violates the dignity of millions of people. It is true that racism can and does lead to violence. It is true that xenophobia creates instability in democracies. Despite the evidence presented, the American approach simply chooses to ignore the deleterious effects of hate speech upon society in order to protect liberty. This approach further fails to appreciate the fact that this liberty to speak freely creates a detriment to the liberty of the minorities who are abused.

The legal systems of both continents have the perfect tool to use to accomplish the effective and reasonable banning of hate speech: the courts. Every day, the courts successfully handle difficult, complex, and often subjective problems. The regulation and prosecution of hate speech offenses would be challenging, to say the least. It is also very

challenging to adjudicate cases involving commercial speech, obscenity, treason, stalking and criminal harassment. Legislatures pass these types of statutes because these offenses violate norms of decent society and the courts handle these cases with a great degree of success.

Due to the harmful effects of hate speech upon modern society, and due to the fact that democratic states have an excellent regulatory tool at their disposal, hate speech should no longer be tolerated in public discourse.

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