

Do We Draw a Line Between Freedom of Speech and Hate Speech in American Law?

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Introduction

Though embedded in the Constitution of the United States, the rights of an American citizen are a crucial aspect of American values. The list of rights and privileges given to us as Americans by the Constitution are to be protected by state and federal governments. One of the many important sets of rights we possess and the first one listed in the amendments is freedom of speech and freedom of expression. As stated in the Constitution, the First Amendment states that, "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."¹ Americans are promised the right to freely express their opinions and are protected from statutes that aim to restrict this freedom of expression.

Though freedom of speech is valuable to American culture, it is still very difficult to define within a social and legal context. Both Americans and American law struggle to find the balance between what is acceptable to be freely expressed and what is hate speech that would oppress certain groups of people targeted by that hate speech. According to William Warner and Julia Hirschberg's article, hate speech is "defined as abusive speech targeting specific group characteristics, such as ethnic origin, religion, gender, or sexual

¹ *U.S. Constitution*, https://www.law.cornell.edu/constitution/first_amendment, (last visited March 11, 2019.)

orientation,” in a

social context.² While this article specifically defines hate speech within a social context, it creates a much complicated and sensitive issue when incorporating this notion of hate speech in the American legal system. How do we incorporate laws relating to hate speech without imposing on our First Amendment rights? Where do we draw the line between the two concepts without causing any violations of the rights granted to us by our constitution?

The legal issue analyzed in this paper questions whether we have the constitutional right to engage in any form of speech, regardless of who the targeted group is and how offensively it may be interpreted, or if some sort of regulation must be established to limit hate speech targeting a certain group of people. This is done by examining the history of cases involving hate speech which has been relevant since the mid-1900s until today as well as studying certain arguments made for and against putting limitations on hate speech. This blurred line between hate speech and freedom of speech has prompted both social and legal issues. Therefore, it is important to draw a distinction between the two concepts in order to promote acceptance and tolerance, while protecting our First Amendment rights.

Regulations

There is an ongoing debate about whether hate speech should be considered a hate crime. In Carl Collison’s article, he describes the

² William Warner and Julia Hirschberg., *Detecting hate speech on the world wide web*, In Proceedings of the Second Workshop on Language in Social Media (LSM '12). Montreal, Canada, 2012, <https://dl.acm.org/citation.cfm?id=2390377>, (last visited March 12, 2019.).

inclusion of hate speech in the *Hate Crime Bills* as raising a concern that restrictions may act as a threat to one's freedom of speech.³

Outlawing hate speech can be regarded as a threat to one of the most important American values and may be a violation of one's constitutional rights of freedom of speech. To many Americans, freedom of speech is considered the essence of democracy and what America is truly about.⁴ Unlike other Western societies that have limitations and hold sanctions on hate speech, America provides protection under the Constitution for freedom of speech and therefore opens the opportunity for hate speech.⁵ Any form of speech that is typically considered merely advocacy or a form of expression is protected under constitutional law and a state cannot form regulations restricting these rights, regardless of these regulations being against hateful or offensive speech. The only unprotected forms of speech that could have restrictions are: "threats, fighting words, obscenity, child pornography and speech that imminently incites illegal activity."⁶ While hate crimes are illegal in the United States, hate speech is not included under the umbrella of hate crime and is protected under the

³ Carl Collison, *Hate speech is not a hate crime*, Mail and Guardian, Nov. 2016, <https://mg.co.za/article/2016-11-02-00-hate-speech-is-not-a-hate-crime>, (last visited March 12, 2019.)

⁴ Samuel Walker, *Hate Speech: The History of an American Controversy*, University of Nebraska Press, 2003, <https://academic.oup.com/ahr/article-abstract/100/3/965/20735?redirectedFrom=fulltext>, (last visited March 12, 2019.)

⁵ Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, Cardozo School of Law, 2002, <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1147&context=faculty-articles>, (last visited March 12, 2019.)

⁶ Heidi Kitrosser, *Containing Unprotected Speech*, 57 Fla. L. Rev. 843, 2005, <http://www.floridalawreview.com/2010/heidi-kitrosser-containing-unprotected-speech/>, (last visited March 12, 2019.)

Constitution. Under 18 U.S.C.A. § 249, a hate crime is considered any physical threat or injury inflicted on a person motivated by race, color, religion, gender identity, sexual orientation, or disability.⁷ While hate speech promotes discrimination against a certain group of people, which some people believe could also promote violence against this particular group, it does not inflict any physical harm or threat. Therefore, it is not considered to be part of a hate crime and is not, in and of itself, against the law. This is what ignites the controversy of hate speech versus freedom of speech.

Protecting All Forms of Speech

Many people believe that any laws against hate speech could put restrictions on freedom of speech, which would then violate our first amendment rights. However, others believe that the absence of these laws promotes the acceptance of discriminating against specific groups of people which could eventually lead to a serious hate crime. To examine one side of the argument, it is important to understand the significance of freedom of speech to most Americans, which is one of the main values igniting this controversy. Throughout history we see that the Supreme Court, through its ruling on cases involving hate speech, has almost always leaned towards protecting the first amendment rights of American citizens.

One case illustrates the importance of freedom of speech to the American people by overlooking the actions of extreme hatred towards a specific group of people because sanctioning them would violate their first amendment rights. In 1992, teenagers burned a cross on a black family's lawn as a sign of hatred towards black people and were

⁷ *Hate Crime Acts*, 18 U.S.C.A. § 249, Cornell Law School, <https://www.law.cornell.edu/uscode/text/18/249>, (last visited March 12, 2019.)

charged with “a local bias-motivated criminal ordinance which prohibits the display of a symbol which arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” This case, *R.A.V. v. City of St. Paul*,⁸ exemplifies the controversy because first it was dismissed by a trial court which claimed that the ordinance was too broad, then it was reversed by the Minnesota Supreme Court and eventually reached the U.S. Supreme Court which had to determine whether the ordinance in question was constitutional or not.⁹ The main argument that this case addresses is whether the ordinance used to arrest these teenagers was too broad and whether this interpretation violated citizens’ first amendments rights by restricting their freedom of expression. The Justices unanimously opposed the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990) which specifically states:

“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”¹⁰

The justices reasoned that this ordinance was too broad, giving the state too much discretion to interpret citizens’ actions which is a threat to

⁸ *R.A.V. v. City of St. Paul*. Oyez, 30 Dec. 2018, www.oyez.org/cases/1991/90-7675, (last visited March 12, 2019.)

⁹ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 1992, *Justia Law*, supreme.justia.com/cases/federal/us/505/377/#tab-opinion-1959077, (last visited March 12, 2019.)

¹⁰ *Id.*

their freedom of expression. If the state has this much discretion, then it is seen to ultimately have too much power over citizens by deciding what can be considered offensive enough to violate this ordinance. The Justices concluded that this broadness in the ordinance violated the First Amendment giving the state government the ability to pick what could be said. In his opinion, Supreme Court Justice Antony Scalia, mentions how the ordinance limits one's freedom of speech "solely on the basis of the subjects the speech addresses," and that the ordinance is a "content-based regulation."¹¹ According to Justice Scalia, this violates citizens' rights of speech. He also included an observation that a state's disapproval of certain content should not be sufficient to suppress one's speech. Therefore, although the teenagers who burnt the cross in front of the family's lawn intended to show their contempt for people of the black race, the fact that they inflicted no physical harm or threat to the family protects them from the law. This brings us back to how the roots of American values protect citizens' right to express themselves regardless of the hate this expression may spread.

In an article by Eugene Volokh, he addresses the Justices' stance on the role hate speech plays in the First Amendment by examining the *Matal v. Tam* case.¹² In *Matal v. Tam*, Tam, a member band called the Slants, planned to register his band's name with the U.S Patent & Trademark Office. However, the U.S.P.T.O. denied them the trademark and "certain protections that trademarks get against unauthorized use by third

¹¹ Id.

¹² *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366, 582 US __ - Supreme Court, 2017,

https://scholar.google.com/scholar?q=Matal+v.+Tam&hl=en&as_sdt=6&as_vis=1&oi=scholart, (last visited March 12, 2019.)

parties,”¹³ because the band name was seen as offensive to those who are of Asian descent. Tam challenged the constitutionality of the U.S. Trademark’s Disparagement Clause of the Lanham Act of 1946¹⁴ which prohibits, “[I]mmoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”¹⁵ The opinion of the *Matal v. Tam* court delivered by Justice Alito found the anti-disparagement clause to be unconstitutional because, “It offends a bedrock First Amendment principle: speeches may not be banned on the ground that it offends.”¹⁶ This statement from the Supreme Court demonstrates the core principle embedded within the First Amendment. The mere idea of a law restricting a citizen’s viewpoint, regardless of it being racially offensive, is viewed as repressive and a threat to freedom. Justice Kennedy also delivered an opinion where he explained how the First Amendment protects citizens from laws that suppress speech based solely on its subject matter and views this as “content-based discrimination.”¹⁷ The unanimous disapproval of this Act by the Justices illustrates why some critics would regard certain hate speech regulations to be restrictive on citizens’ First Amendment rights.

¹³ Eugene Volokh, *Supreme Court Unanimously Reaffirms: There Is No 'Hate Speech' Exception to the First Amendment*, The Washington Post, 19 June 2017, www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/supreme-court-unanimously-reaffirms-there-is-no-hate-speech-exception-to-the-first-amendment/?noredirect=on&utm_term=.8d9c7fe6a947, (last visited March 12, 2019.)

¹⁴ 15 U. S. C. §1052(a).

¹⁵ *Id.*

¹⁶ *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366, 582 US __ - Supreme Court, 2017,

https://scholar.google.com/scholar?q=Matal+v.+Tam&hl=en&as_sdt=6&as_vis=1&oi=scholar, (last visited March 12, 2019.)

¹⁷ *Id.*

Where Protecting Hate Speech Could Lead Us

While many Americans would side with the Supreme Court's interpretation of the First Amendment which supports the utmost protection of our freedom to express, there are also many who, with the legal system increasingly favoring the freedom of any form of advocacy speech, grow fearful of what this could mean for our society. Many see this leeway provided by interpreters of the Constitution as an opportunity to promote intolerance and discrimination against those of different races, ethnicities, genders, etc. Because this interpretation makes people feel they are protected by the law, this could increase some citizens' confidence to voice any viewpoint they have regardless of how much hatred it spread towards a certain group of people. Many argue that this could eventually lead to the promotion of discrimination. While it is true that forms of speech like in the cases of *R.A.V v City of St. Paul* and *Matal v. Tam* have inflicted no direct physical harm or threat to the groups targeted, many believe that as people become more confident to voice offensive and hateful opinions about certain groups that enforce certain negative stereotypes or hatred towards them, this can encourage people to engage in real threats towards a group of people. The argument is that while it starts off as mere speech that expresses one's discriminatory view about a certain group, that then paves a way for more serious threats and harm against that group as it seems that the law accepts the expression of these discriminatory views. Therefore, this encourages perpetrators to build the courage to physically harm this group.

One particular case that sparked fear and worry within a whole community was the *National Socialist Party of America v Village of*

Skokie.¹⁸ This case involves a group of neo-Nazis protesting in a suburb full of mostly Jewish settlers, many whom survived Nazi concentration camps. When it was taken to the Supreme Court, the majority of the Justices agreed that these protestors had the First Amendment right to protest whatever they wanted.¹⁹ An article by Brooke Ross mentions how this case, ". . . helped clarify that all people have the right to rally publicly, no matter how offensive their views are."²⁰ This shows the extent to which U.S laws will go to protect freedom of speech. However, the article also poses a question asked by Lee Bollinger, a free speech expert, "Should free speech to be extended to speakers whose purpose and message is to deny free speech, people who want to overthrow the government by violence and-if successful- bring about the end of free speech?"²¹ Forms of hate speech as offensive as the one mentioned in the case of *National Socialist Party of America v Village of Skokie*, promotes the idea of denying equal citizen rights, like freedom of speech, to certain groups. This is contradictory to what the First Amendment rights aim to achieve, the freedom of speech for all.

While the case of the *Village of Skokie* was offensive to Jewish people, it did not result in violent or physical harm to anyone. However, what

¹⁸*National Socialist Party of America v. Village Of Skokie*, 432 U.S. 43, 1977, <https://supreme.justia.com/cases/federal/us/432/43/>, (last visited March 12, 2019.)

¹⁹ *Id.*

²⁰ Brooke Ross, *Should the First Amendment Protect Hate Speech? Forty Years after the Courts Upheld Neo-Nazis' First Amendment Rights, Is It Time to Reconsider Which Kinds of Speech Deserve Constitutional Protection?*, New York Times Upfront, 2018,

<http://www.addisonlibrary.org/sites/default/files/Should%20the%20First%20Amendment%20Protect%20Hate%20Speech.pdf>, (last visited March 12, 2019.)

²¹ *Id.*

happens when an assembly based on these sensitive and offensive issues turns violent? This is what many people who believe hate speech should be outlawed fear. On August 12th, 2017, a group of white nationalists and neo-Nazis planned to protest the government's plan to remove a statue of Confederate General Robert E. Lee, as many people find it to be a reminder of "a dark time of racism in U.S history and should be taken down."²² As a result, a group of new protestors against white nationalists, some among the Black Lives Matter movement, also assembled that day to counter-protest. However, this resulted in rising anger among the white nationalist protestors to the point where, "one rammed his car into a crowd of counter-protestors", killing one person and injuring 19 others, according to ABC news.²³ The violence that emerges from hate speech is one of the biggest concerns of citizens who support putting limitations on speech that is hateful towards specific groups.

One of the biggest misconceptions most people have about the motives of people who support legislation on hate speech is that they aim to restrict the expression of one's viewpoint. According to Jeremy Waldron's book, *The Harm in Hate Speech*, people supporting legislation on hate speech, ". . . are concerned about the predicament of vulnerable people who are subject to hatred directed at their race, ethnicity, or religion; apart from that predicament" and probably have "little or no interest in the topic of hatred."²⁴ He explains how the

²² Meghan Keneally, *What to know about the violent Charlottesville protests and anniversary rallies*, ABC News, 2018, <https://abcnews.go.com/beta-story-container/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> (last visited Jan 25, 2019).

²³ Id.

²⁴ Jeremy Waldron, *The Harm in Hate Speech*. Cambridge: Harvard University Press, 2012, <https://www.degruyter.com/view/books/harvard.9780674065086/harvard.9780674065>

environment we create for minority groups subjected to hatred is hostile when required to absorb such verbal attacks. The point is not to restrict any form of thinking or forming opinions, but instead, restrict the messages spread through hate speech that promotes the idea that certain people do not deserve equal rights.²⁵

Conclusion

There is difficulty in distinguishing the extent to which one can openly express hateful or even discriminatory opinions about specific groups. While many Americans are rightfully concerned about being restricted from exercising their freedom of speech which is a violation of the First Amendment, many are also worried about the negative effects on society if it continuously accepts hate speech targeted towards minorities and the impact it has on their lives. Therefore, it is important to find a balance between freedom of expression and protection for the rights and safety of individuals targeted by hate speech.

Along with protecting freedom of speech, it is important to create an accepting environment for people of all races, religions, sexual orientations, ethnicities, etc., and one that discourages discrimination. While creating law that puts restrictions on people's freedom to form their own opinions and express them could be a violation of one's basic freedom, the law should limit how far one can go in expressing hatred towards a group of people that could promote the idea of depriving them of equal citizenship rights.

086.c4/harvard.9780674065086.c4.xml, (last visited Jan. 27, 2019.)

²⁵ Id.