

## The Questions and Issues of Limiting Hate Speech

Hate speech arises when we are confronted with the unknown and respond with hostility rather than understanding. At its broadest, hate speech is any form of speech that expresses intense antagonism towards members of a specific group, with membership in that group serving as sufficient justification for that antagonism.

Western style democracies generally believe all citizens are equal and that allowing this type of discrimination against vulnerable groups due to race, religion, or sexual preferences denies them equal protection under the law. While hate speech is considered a verbal expression of discrimination, the very fact that it is spoken communication affords it protection from restriction under the foundational right to free speech. Therefore, hate speech regulation sits at a conflict point between the rights of equal protection under the law and free speech. Restricting or protecting hate speech infringes on one of these rights to the benefit of the other.

Many democracies have attempted to strike a balance between the conflicting rights, as restrictions on hate speech have been enacted in Australia, New Zealand, South Africa and numerous European countries. This essay examines whether or not the US legal framework can accommodate hate speech regulation and how such regulation might impact equal protection and free speech rights..

While hate speech is not currently a regulated form of speech in the United States it shares a key characteristic – the potential to cause harm – with classes of speech which the Supreme Court has allowed to be legally restricted. Harm to the individual or classes of people has been the primary method for both classifying specific forms of speech as eligible for restriction and determining whether or not equal protection under the law has been provided. Therefore the concept of harm is central to any argument seeking to restrict hate speech.

In this paper four questions are used to assess the harm caused by hate speech, the remedies to that harm, and how those remedies fit within the freedom of speech framework established by the Supreme Court.

The questions are:

1. Does hate speech cause harm?
2. Is this harm unique?
3. Does limiting hate speech create harm?
4. Can limiting hate speech resolve harm?

### **The Legal Framework for Restricting Speech**

The First Amendment to the US Constitution states that "*Congress shall make no law...abridging the freedom of speech...*"<sup>1</sup> as the nation's founders believed that free speech was key to a free people and included it among the most important of citizen's rights. Generally, the government is not at liberty to place limits on its citizens' speech, although they are granted more discretion to enact content-neutral restrictions than content-based restrictions.<sup>2</sup> Content-neutral restrictions are usually based on place, time and manner considerations, and do not make judgements about the inherent value of what is being said. For example, the government may limit the hours you can play loud music in a residential area or where you can stage a large protest, but not *what* you may play or protest. Conversely, prohibiting the discussion of a specific topic or ideology is a content-based restriction. Historically, the Supreme Court tends to veto these types of legal restrictions because they "*abridge the freedom of speech*".<sup>3</sup>

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<sup>1</sup> "First Amendment to the United States Constitution." *Wikipedia*. Wikimedia Foundation, 04 Mar. 2017. Web. 06 Mar. 2017.  
[https://en.wikipedia.org/wiki/First\\_Amendment\\_to\\_the\\_United\\_States\\_Constitution](https://en.wikipedia.org/wiki/First_Amendment_to_the_United_States_Constitution)

<sup>2</sup> "Freedom of Expression in the United States." *IIP Digital*. Embassy of the United States of America, 17 Apr. 2013. Web. 28 Feb. 2017.

<sup>3</sup> "Freedom of Expression in the United States."

Yet, the Supreme Court has found compelling reasons to abridge free speech in the past. These actions have been taken with extreme caution and the court has laid out two requirements that must be satisfied in order to restrict speech based on its content: 1) that the restriction is narrowly tailored; and, 2) that the restriction serve a compelling government interest. Furthermore any restriction is subject to the high legal burden of strict scrutiny, so that within this framework it is believed that harm to constitutional rights may be avoided.<sup>4</sup>

The four content-based restrictions that have already passed this test are defamation, true threats, obscenity, and incitement to violence. At their core, these forms of speech all have the potential to cause harm, such as an immediate physical injury in the case of incitement to violence, potential future harm via a true threat, reputational harm via defamation, and harm to the sensibilities via obscenity. Ergo it would seem the main motivation or government interest served in legislating against certain actions or forms of speech is to *limit harm* to its citizens. In keeping with the current restrictions, any proposed legislation restricting hate speech must first prove that such speech causes harm.

### **Does Hate Speech Cause Harm?**

There are several arguments asserting that hate speech causes harm to both individuals, and to communities. In her work *Campus Hate Speech Codes* Mia Alice argues that individual acts of hate speech can directly harm victims by silencing them, ‘*both physically, through intimidation and threats of further harassment or actual violence, and spiritually, by demoralizing [them].*’<sup>5</sup> In *Dignity, Harm, and Hate Speech*, Robert Simpson contends that an individual’s dignity is assaulted when he or she is the object of hateful speech. He states that our sense of dignity is largely based on our conception of self and belonging, that it is “*a matter of how [a person] is treated in light of the attitudes that prevail within the*

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<sup>4</sup> Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997).

<sup>5</sup> Ma, Alice K. "Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights." *California Law Review* 83.2 (1995): 693. Web.

*community, relative to others, and relative to the community as a whole.*"<sup>6</sup> In this way, hate speech communicates to its objects that they are not accepted or considered equal within a community strictly because of their membership in some identity-based group.

Additionally, Simpson argues that while individual acts of hate speech may not immediately seem to have a significant impact, the layering of separate instances of hate speech will cause lasting change in a community, and is akin to social pollution<sup>7</sup>. For example, following the campaign and election of Donald Trump in 2016, the FBI documented '*there were more reported hate crimes [the day after election day] than any other day in 2016*'<sup>8</sup> with more than one Mosque burned and multiple Jewish graveyards vandalized across the east coast.<sup>9</sup> The increase in hate crimes could ostensibly be linked to the media saturation of politically charged and divisive rhetoric. It cannot be denied that hate speech has the power to influence or encourage people to indulge or act upon their prejudices.

Clearly hate speech can cause harm, both on an individual basis and to the wider community. The question remains, is this harm unique enough to require *new* legislation?

### **Is Hate Speech Harm Unique?**

On the surface it would appear that current restrictions governing defamation, true threats, obscenity, and incitement to violence, are extensive enough to also cover hate speech and thus no additional restrictions tailored specifically to hate speech are necessary. Take the 1993 case *Wisconsin v. Mitchell*, in which a group of African American men leaving a screening of *Mississippi Burning* attacked a Caucasian boy walking by on the other side of the street. Before the attack the ring leader asked his group "*Do you all*

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<sup>6</sup> Simpson, Robert Mark. "DIGNITY, HARM, AND HATE SPEECH." *Law and Philosophy* 32.6 (2013): 701-28. *JSTOR*. Web. 06 Mar. 2017.

<sup>7</sup> Simpson, Robert Mark.

<sup>8</sup> William, Aarons. Hate Crimes Rose the Day After Trump Was Elected, FBI Data Show. The Washington Post. March 23, 2016

[https://www.washingtonpost.com/news/post-nation/wp/2018/03/23/hate-crimes-rose-the-day-after-trump-was-elected-fbi-data-show/?utm\\_term=.b4d40add1692](https://www.washingtonpost.com/news/post-nation/wp/2018/03/23/hate-crimes-rose-the-day-after-trump-was-elected-fbi-data-show/?utm_term=.b4d40add1692)

<sup>9</sup> "Trump Effect' Led to Hate Crime Surge, Report Finds." *BBC News*. BBC, 29 Nov. 2016. Web. 06 Mar. 2017.

*feel hyped up to move on some white people? ... There goes a white boy; go get him!*"<sup>10</sup> Here, despite any racial motivations, Mitchell's words already fall into an unprotected class of speech as they are demonstrably inciting violence by provoking his comrades to make the attack on the passerby. What's more, current legislation allows courts the discretion to increase a defendant's sentence if it is proven that the crime was motivated by race, religion, gender, or other identity based group, as an enhancement to some other offense. From this initial examination, the current restrictions, along with these amplification policies, should be sufficient redress for hate speech victims.

However, there is an argument that hate speech causes a unique brand of harm distinct from other forms of unprotected speech or hate motivated crimes and that it is not adequately addressed by current laws. In the recent case *Snyder v. Phelps*, Albert Snyder sued the Westborough Baptist Church for picketing at his son's funeral with signs that contained statements such as '*Fag Troops*', '*God hates you*', and '*Thank God for dead soldiers*.'<sup>11</sup> The picketers did not breach any of the current restricted speech parameters: they were non-violent, did not use obscenity, did not attempt to incite violence or otherwise engage in any other illegal actions. However, the language used by the picketers was characterized as '*disgusting*' and '*outrageous*'<sup>12</sup>, and evidence was introduced to show the psychological harm these statements inflicted on the plaintiff, Mr. Snyder. Yet, he did not prevail because the hateful speech alone could not be prosecuted under any current statutes. In this case hate speech may be considered uniquely harmful in that, even with proof of psychological harm as in the Snyder case, it cannot be prosecuted under existing laws.

The inability of current statutes to protect Mr Snyder from harm strongly supports the need for legislation restricting hate speech..

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<sup>10</sup> Rehnquist. "Wisconsin v. Mitchell, 508 U.S. 47 (1993)." *Wisconsin v. Mitchell*, 508 U.S. 47 (1993). Cornell University School of Law, 11 June 1993. Web. 01 Mar. 2017.

<sup>11</sup> "Snyder v. Phelps." *Wikipedia*. Wikimedia Foundation, 01 Mar. 2017. Web. 06 Mar. 2017.

<sup>12</sup> "Snyder v. Phelps." *Wikipedia*.

### **Does Limiting Hate Speech Create Harm?**

Conversely, it may be argued that protecting people, such as Mr Snyder, from harm will create greater harm to society at large.. Opponents of hate speech restrictions are most concerned that any legislation addressing hate speech will, by its very nature, be overly broad thus threatening first amendment rights. After all, everyone has a race, religion, nationality, gender, or group identity, and all of these have the potential to turn any individual into a target of hate speech. We each stand at the intersection of countless strands of identity, and attempting to protect even just a small number of these could severely stifle the exchange of dialogue in the marketplace of free ideas.

Additionally, it is argued that any interpretation of hate speech is inherently subjective thus precluding a narrowly tailored restriction to free speech as laid out by the Supreme Court requirements. Every person constructs a large degree of meaning through how he or she personally interprets or views a situation. How can any statement be objectively classified as offensive simply because one individual is offended by it, when another may not be? If hate speech harm is inherently subjective how is it possible to reasonably determine which speech acts should be defined as hate speech and therefore singled out for regulation? Opponents of these regulations argue that because of the subjective nature of any definition of hate speech, any legislation cannot avoid ambiguity and will ultimately significantly abridge the freedom of speech.

Proponents of hate speech regulation argue that, while the objections to legislation are valid, these conflicts are not unfamiliar. The existing exceptions to the first amendment have also been subjected to and succeeded against the same arguments. They believe that by reviewing how those exceptions were decided legislation can be successfully designed to regulate hate speech that does not infringe on first amendment rights.

To meet the first prong of the Supreme Court's test requires narrowing the scope of legislation by prioritizing areas of interest that the law would be most intended to serve. For example, obscenity restrictions are based in part on the recognition that children make up a particularly vulnerable group of society, and require greater protection from obscenity than adults do. Minors need to be protected not only from exposure to obscene content, but also from being coerced into its production. This type of positive discrimination recognizes that not all groups suffer equally, and vulnerable groups are sometimes in need of greater or different forms of protection. In the same way, proponents of restriction suggest narrowly focusing legislation to specifically protect historically marginalized groups or recognized classes that have been long term targets of hateful speech. They believe that, although hate speech has the potential to inflict harm on any member of society, it has been systematically used to reinforce oppressive systems of discrimination against members of historically marginalized groups. For example women have historically been relegated to subservient roles and viewed in one dimensional sexual tropes. The terms 'whore' and 'bitch' are largely used as gender specific terms meant to harass and intimidate female recipients. The term 'whore' especially, makes a value judgement about a woman based on her sexuality, both as an individual and within the community. Therefore, to narrow the scope of hate speech restrictions, groups that are recognized as needing the greatest protection from oppressive identity-based social hierarchies could be prioritized. Although arguments regarding what those groups should be are outside the scope of this discussion.

Finally, proponents of legislation tackle subjectivity by advising that a precedent has already been established. Currently, there are speech restrictions applied in cases of obscenity and true threats based on the viewpoint of the so-called 'reasonable' individual. Precedence set in the *Miller v California* and *Roth*



*v United States* cases, appeal to the ‘*the average person, applying contemporary community standards*’<sup>13</sup> and ‘*the perspective of evaluation of an ordinary, reasonable person*’<sup>14</sup> respectively, when making judgements on what constitutes obscenity. Appealing to the Reasonable Individual’s perspective is not new or uncommon when making legal determinations, and has been used by courts to allow for flexibility in legal guidelines, given the myriad cultural and technological shifts we undergo on a regular basis. The Reasonable Individual is able to synthesize and understand information within the prevailing context, and recognize the difference between a statement that is bawdy or offensive, and one that is actually harmful. For example, having a particular physical feature become the butt of a joke, like a big pair of ears or a large nose, could cause considerable offense, but this offense is distinct from that produced by a known derogatory and historically racially charged term like ‘*nigger*’ or ‘*chink*’. What is important is that the so called Reasonable Individual understands this distinction. Much like with obscenities or threats, the reasonable individuals perspective should be used in making determinations regarding what qualifies as hate speech, thereby acting as failsafe so these policies are not applied in an over-broad manner. Hence, proponents of hate speech restrictions believe that a law could be tailored narrowly enough to satisfy the first prong laid out by the Supreme Court allowing for a content based restriction.

### **Can Restricting Hate Speech Resolve Harm?**

While the answers provided above satisfy the two prong test set out by the Supreme Court, they must also be subjected to the burden of strict scrutiny. Strict scrutiny is the highest standard of judicial review which a court uses to evaluate the constitutionality of governmental discrimination<sup>15</sup> including to what degree it meets each of the two prongs and whether such discrimination violates equal protection under the law.

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<sup>13</sup> “*Miller v. California*”*Wikipedia*. Wikimedia Foundation, 01 Mar. 2017. Web. 06 Mar. 2017. [https://en.wikipedia.org/wiki/Miller\\_v.\\_California](https://en.wikipedia.org/wiki/Miller_v._California)

<sup>14</sup> “*Roth v. United States*”*Wikipedia*. Wikimedia Foundation, 01 Mar. 2017. Web. 06 Mar. 2017. [https://en.wikipedia.org/wiki/Roth\\_v.\\_United\\_States](https://en.wikipedia.org/wiki/Roth_v._United_States)

<sup>15</sup> “Freedom of Expression in the United States.”

To revisit *Snyder v Phelps*, despite proving emotional harm, the Supreme Court found that bar of strict scrutiny was not met for the restriction of speech and this landmark case foreclosed the use of emotional harm as a basis for speech regulation<sup>16</sup>. Ultimately, the argument that limiting hate speech has the potential to resolve the harms perpetuated by discriminatory social hierarchies is too abstract and is unlikely to be successful in overcoming this high burden.

Furthermore, this type of legislation may not be effective even if it is enacted because it would only address hate speech itself, not the underlying prejudices and ideas that produce hate speech. Outlawing one set of words, phrases, or gestures would only result in new ways to express the same sentiment in a way that circumvents the law. While the Reasonable Individual's perspective could be used to address some of these shifts, changing case law around each new iteration would create an increasingly complicated web of regulations, effectively becoming censorship. Bennet extended this argument, by contending hate speech also has a political definition, and there is a risk that legislation outlawing 'hate' could be turned into a tool used to ban any statement that is not considered acceptable or is in opposition to the current mainstream political dogma.<sup>17</sup>

Under strict scrutiny the case for regulation becomes dubious, what we gain from regulating hate speech does not seem to outweigh what we risk. After all the first amendment is not abstract or ambivalent; it protects a real and urgent right to speak even if what is said is unpopular, offensive or hateful.

## **Conclusion**

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<sup>16</sup> Bennet, John T. "The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation." *Hastings Constitutional Law Quarterly* 43.3 (2016): n. pag. Web. 1 Mar. 2017.

<sup>17</sup> Bennet, John T.

The case for limiting hate speech is compelling in many regards. Hate speech does cause harm and arguably a unique form of harm not specifically protected by existing laws. Protecting vulnerable citizens remains a government priority as does protecting constitutional freedoms. In light of the preceding, it is clear that in the case of hate speech restrictions, good intentions could not concretely address underlying issues nor be successfully implemented without substantial risks.

When effecting change requires restricting deeply entrenched rights and freedoms, a high standard of proof must be met to show that the limitation is necessary and does not in itself create greater harm. Utilizing the two pronged test developed by the US Supreme Court, it has been illustrated that limiting hate speech specifically would serve the interest of limiting harm to some citizens, but potentially causing greater harm to many others thus infringing on their equal protection under the law. The definition of hate speech and the harm it causes are both subjective and abstract, and therefore, unable to meet the standard of strict scrutiny. Furthermore, it is dubious as to whether these restrictions would be effective in resolving harm, as they could not address underlying issues of prejudice and identity. Therefore hate speech should not be subject to restrictive legislation.

*“The censor is always quick to justify his function in terms that are protective of society. But the first amendment, written in terms that are absolute, deprives the State of any power to pass on the value, the propriety, or the morality of a particular expression.” - William O. Douglas.*