

# Freedom of speech and its limits

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# INTRODUCTION

Prof. Nadine Strossen's lecture was delivered as part of the Jean Monnet module, part of the University of Roma Tre's Department of Law project, Rethinking speech in critical times. The seminar was organised in collaboration with Cild. Matteo Bellucci was responsible for the editorial work.

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# FREEDOM OF SPEECH AND ITS LIMITS

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***Although I support the goals of those promoting equality, diversity, and social harmony through the censorship of hate speech, I believe it is unnecessary to choose between resisting such speech and resisting censorship.***

By censorship, I refer to any suppression of speech by the government or another powerful entity that exceeds the limits permitted by the U.S. Constitution or the International Covenant on Civil and Political Rights.

One point I will make is that freedom of speech is not unconditionally protected. As appropriate as strict limits on governmental power of censorship under the First Amendment and international law may be, exceeding those limits fails to promote equality, diversity, and social harmony.

This leads us to a second point: censorship of hate speech is at best ineffective and at worst counterproductive. Censorship laws that aim to curb hate speech are actually harmful to the ability of historically marginalized and disempowered groups to express themselves.

The third point is that there are measures that are potentially more effective than censorship in addressing issues of hate and discrimination. One such measure is anti-discrimination laws, which are enforced with vigor and effectively address discriminatory behavior, particularly in critical sectors like education, housing, and employment. A second measure involves implementing laws against hate crimes. Such laws aim to punish actions carried out for discriminatory reasons more severely, as they cause greater harm to both individuals and society. Another strategy, known as “counter-speech,”

involves utilizing freedom of expression to counter or refute discriminatory ideas expressed in hate speech. To summarize, there are valid reasons to oppose censorship even apart from First Amendment principles. Firstly, there’s no need to choose between resisting hate speech and censorship. Secondly, censoring hate speech can be ineffective or even counterproductive. Finally, promoting equality, diversity, and social harmony can be better achieved through other measures.

These principles are universal and concern fundamental human rights. Their scope extends beyond the First Amendment of the U.S. Constitution, which is known for its protection of free speech. As such, these principles apply to nations without similar constitutional protections for free speech and extend to private spheres where the First Amendment does not apply. Indeed, while governments, officials, and agencies at every level of government (local, state, federal) are obligated by the First Amendment to uphold the right to free speech for all, private sector actors are not held to the same standard. Consequently, in 1964, the United States enacted the monumental Civil Rights Act, which prevents discrimination based on race, sex, religion, and other factors in areas such as restaurants, hotels, housing, and employment.

Let me briefly discuss the two cardinal principles of the First Amendment of the U.S. Constitution.

The principle of viewpoint neutrality, also known as content neutrality, dictates that the government cannot take a stance on the content of a message. Despite how objectionable, offensive, or hateful it may be, the content alone does not warrant censorship.



However, the *secondo* principle, also known as the emergency principle, goes beyond the content of the message to consider the context, facts, and circumstances. If free speech in a particular situation directly causes or threatens imminent and serious harm, and censorship is the only way to avoid the harm, then the speech in question can and should be suppressed. The Supreme Court recognizes various subcategories of emergency, one of which has recently gained much attention due to the events of January 6, 2021: intentional incitement to imminent violence.

Another type of hate speech that may qualify under the emergency test is known as a ‘true threat.’ Under this category, a speaker can be held liable for making threats that cause a reasonable fear of harm to a small audience. The speaker does not need to have the intention of causing harm, but merely the intention to create reasonable fear. This standard is objective, and the key question is whether a reasonable person in that situation would be afraid. The mere fear of a possible attack can cause harm and chill free speech, so it is not necessary for the threat to be carried out for negative consequences to occur.

An example can illustrate the difference between protected hate speech, which is controversial only because of its viewpoint, and unprotected hate speech,

which poses a true threat. When white supremacist demonstrators used their free speech rights to express a loathsome message in Charlottesville, Virginia, in 2017, the American Civil Liberties Union defended their rights, despite our disagreement with their views. However, past events have shown that if the government has the power to suppress speech because of its unpopularity or offensiveness, officials in other parts of the country are likely to follow suit, and similar incidents have occurred at Black Lives Matter and Native American demonstrations. However, the judge agreed with our position that there was absolutely no evidence that there were any plans for violence during the attempted shutdown of the Unite the Right rally.

Of course, hate speech that falls under the category of “protected,” meaning it does not reach the threshold of being a “punishable incitement” or a “real threat,” can cause significant harm. However, the harmful effects of hate speech alone are not enough to justify censorship. Any such measure must demonstrate a tangible reduction in harm and avoid any unintended negative consequences. Finally, there must be evidence that it is the most effective option among those available. Believing that censorship can resolve the issues caused by harmful speech is both a logical and legal fallacy in the United States and





internationally. To justify a restrictive measure, it is essential to demonstrate not only that it serves a beneficial purpose, but also that it is truly effective in serving that purpose, and that there are no less restrictive alternative measures that can promote it with just as much effectiveness.



Moreover, the harm caused by hate speech is not entirely inevitable. First, hate speech can incite discriminatory or violent behavior; second, the utterance of hate speech can be harmful in itself, causing trauma to those denigrated. It is important to recognize the potential negative effects of hate speech. These potential harms are serious, as they negatively impact victims' psyche and represent a cost to free speech. Unpunished hate speech may deter victims from expressing their thoughts freely. Nevertheless, I am confident that we as a society can constructively prevent these harms by taking every possible step. The mere utterance of hateful words promoting white supremacist beliefs does not guarantee that listeners will automatically

adopt such ideas. Additionally, exposure to hate speech does not necessarily lead to emotional, mental, or psychological trauma.

I am not suggesting that victims of hate speech must be resilient, but rather that we can cultivate habits of mental resilience that prevent those who seek to defeat us with hate speech from gaining power.

It is important to acknowledge that victims who are unwilling or unable to oppose hate speech should not be blamed. Nevertheless, it is the duty of everyone who opposes hate speech and is an advocate for equality to be an ongoing and proactive voice in every way possible. Note that the ways to undermine hate speech are limitless, so it is important to think strategically to avoid inadvertently amplifying the voices of those we seek to silence. Many experts in this field caution against college students' attempts to shout down a hateful speaker, despite the satisfaction it may provide. This approach may not be the most strategically effective since those who deliver hate speech often seek attention from the media in such heated situations. In such cases, it may be most effective to ignore individuals promoting hatred and discrimination or to host an event that highlights the positive aspects of diversity and equality.

Beyond the traditional strategies for distributing positive information about groups facing discrimination, the potential to promote equality and value diversity through individual interactions with hate-mongers should be considered. There are many well-known examples of leaders of extremely hateful organizations who were redeemed with the help of kind individuals who interacted with them patiently and compassionately, seeing them as human beings rather than representatives of an ideology.

Martin Luther King, along with most leaders of the civil rights movement in the United States, consistently defended free speech and resisted censorship. King and other leaders recognized that even a message intended to promote racial equality and inclusion could be considered as a hate speech in certain communities. For these reasons, Martin



Luther King emphasized the responsibility to raise our voices, because “in the end, we will remember not the words of our enemies, but the silence of our friends. For this I want to thank all friends of equality and justice: thank you for not remaining silent.



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