

No Tolerance for Intolerant Speech: Justifying the Restriction of Hate Speech in America

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“Democracy entails political equality, that all members of the polity are included equally in the decision-making process and have an equal opportunity to influence the outcome” (Young 2000, 52).

The election of Donald J. Trump to the United States Presidency on November 8, 2016 has in many ways marked a significant turning point in American history and political life. One shift in American life post-election is reflected in the sharp and sudden rise in hate related incidents.¹ A report released by the US Federal Bureau of Investigation in November 2017 reported that the year following Trump’s election marked the first year since the FBI started tracking hate crime data that the number of reported hate crimes did not decrease. Observers note that the rise in hate crime reported by the FBI in 2016 occurs alongside of an increase in political conversations about racial animus and hate speech nationwide (Petulla et. al. 2017).² Put bluntly, there seems to be a glaringly obvious connection between racial intolerance or animosity, hateful speech that seeks to express that intolerance or animosity, and hateful incidents or crimes, some of which turn devastatingly violent, even deadly.

One such event³ grabbed the attention of Americans and sparked heated debate about the veracity of free speech claims occurred on August 11, 2017, when self-proclaimed white

¹ What the Southern Poverty Law Center (SPLC) has deemed “The Trump Effect” was indeed immediate: in a post-election study looking at harassment and intimidation in the 10 days immediately following the election, the SPLC counted 867 hate incidents. This number rose to 1,094 hate incidents in only 34 days following the election (Potock 2017).

² It is important to note that the so-called “Trump Effect” is not restricted to the United States alone. Nadia Naffli reports a 600% increase in the amount of intolerant and hate speech social media postings by Canadians over the course of one year. Some analysts have indeed blamed the “Trump Effect,” but Naffli suggests that Canadian media outlets shouldn’t be “too smug” about their adherence to practice of fair and balanced journalism, and the effect that this has on the rise in hate speech postings in Canada (Naffli 2017).

nationalists, neo-Nazis, and Ku Klux Klan members descended on the University of Virginia campus bearing torches and shouting well-known Nazi chants to protest the removal of a statue of Confederate general, Robert E. Lee (Spencer and Stolberg 2017). The rally, which centered on the white nationalists' hopes of "taking America back," turned violent when the protestors clashed with counter-protestors, culminating with a white nationalist protestor plowing a car into a group of counter-protestors. The driver's violent act left 19 injured and one, 32-year-old Heather Heyer, dead (Heim et. al. 2017).

The events in Charlottesville put questions of hate speech and potential limits to free speech at the center of passionate political dialogue. The intensity of these debates was heightened by the initial decision of the American Civil Liberties Union (the ACLU) to defend the free speech rights of the white supremacists who organized and participated in the rally, despite the rally's lethal outcomes (Reardon 2017).  The ACLU's logic in defending the rally organizers and ultimately helping them sue the city of Charlottesville,  was that in order to ultimately protect equality (and equal free speech rights for all), the principle of freedom of speech must be consistently applied. This is the only way to ultimately ensure equality for all, the ACLU claimed. The problem with this sort of argument, as K-Sue Park (2017) aptly notes, is that it "implies that the country is on a level playing field, that at some point it overcame its history of discrimination to achieve a real democracy" (Park 2017).  Such ahistorical and "color-blind" approaches, while admirable in theory, have never secured equal freedom and safety for all in practice. The fervent protection of the First Amendment does little to support the speech of marginalized communities, whose power of expression is often "impoverished for reasons that have little to do with the First Amendment," but instead are the result of many cultural factors that "chill their voices but amplify others" (Park 2017). And furthermore, while the unwavering

(and perhaps uncritical) support of the First Amendment's right to freedom of speech seems unable to actually secure the free and equal speech of marginalized populations, it may also have the opposite of this intended effect, viz., it may actually compound the factors that already make it difficult for marginalized groups to speak on free and equal terms. To this effect, Park (2017) raises the question:  "Could prioritizing First Amendment rights make the distribution of power in this country even more unequal and further silence the communities most burdened by histories of censorship?" If this question can be answered in the affirmative (as Park is suggesting it can be), then those committed to the First Amendment right of freedom of speech for all should be interested in  the boundaries of that right, which if enacted will actually ensure the widest right to speak freely. The ACLU and other organizations concerned with freedom and equality, must then take seriously the *spirit*  of the law—those values it is taken to enshrine—and not simply the letter of it (Reardon 2017).

In what follows I want to  suggest that those committed to the principle of free and equal speech ought to be willing to endorse limits on that freedom, in the service of protecting the principle itself. The paper will  proceed as follows. In section I, I will introduce what has been called the "paradox of tolerance," and draw out its significance for free speech debates. In section II, I will attempt to make sense of the value of freedom of speech—why we are so committed to its protection, and thus why we ought to be concerned with protecting it uniformly for all. In section III, I argue that the unrestricted proliferation of hate speech is counter to the values and goals promoted by a commitment to the freedom of speech, and that hate speech thereby ought to be restricted in the service of free speech values. In section IV, I consider the unique difficulties facing legal restrictions on hate speech within the US context. Finally, in section V, I argue that  despite these challenges, legally restricting hate speech in the United

States is still justifiable, and such legal restrictions ought to be pursued. My conclusions circle back to the paradox introduced in section I, ~~and I ultimately argue that~~ to promote a tolerant society, intolerant speech cannot be tolerated.   