

Universities and other Institutions – not Hate Speech Laws – are a threat to Freedom of Political Speech

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One of the strongest arguments against hate speech legislation is the so-called Argument from Political Speech. This argument problematizes the restrictions that might be placed on political opinions or political critique when these opinions are expressed in a way which can be interpreted as ‘hateful’ towards minority groups. One of the strongest free speech scholars opposing hate speech legislation is Ronald Dworkin, who stresses that having restrictions on hate speech is, in fact, illegitimate in a liberal democracy. The right to express oneself freely concerning any political decision is, according to Dworkin, a core democratic principle; it is what self-governance – and hence liberal democracies – are built upon. Dworkin and many other free speech scholars based in the United States see hate speech legislation as a threat to expressing oneself freely and critically. I argue that Dworkin and other US-based free speech scholars tend to overlook actual hate speech legislation in countries where such laws have been implemented and have functioned for decades. Furthermore, I argue that the real threat against political speech lies not in hate speech legislation but rather outside of the law, namely, in private institutions such as universities and museums. Restrictions on political speech in various societal circumstances have been on the rise over the last decades – first and foremost in the US. I analyse why these restrictions on political speech are more widespread in the only Western country without laws against hate speech than they are in countries with implemented hate speech laws.

Keywords: political speech, hate speech, hate speech legislation, private institutions, universities, USA

Introduction

The United States has no laws against hate speech, and hate speech is interpreted as political speech by the court (Sumner 2015). Whether this interpretation is plausible or not is an ongoing debate among scholars. Scholars like Jeremy Waldron and Stephen Heyman argue that hate speech legislation is an important component in liberal democracies, pointing to the fact that the right to be met with equal respect and dignity as a citizen is a basic principle of liberal democracies. Other scholars,

like Ronald Dworkin and Thomas Scanlon, argue that limiting hate speech undermines democratic legitimacy, pointing to the necessity for every citizen to have the opportunity to express themselves freely in democratic discussions and stressing that preventing this opportunity undermines democratic legitimacy. Some scholars, including Eric Barendt, explicitly point at expressions of e.g. racial hatred, as falling under political speech (Barendt 2005: 154-155).

I hold that it is a mistake to classify all hateful expressions as political speech. The most obvious reason for this is that interpreting all speech that clearly can be labelled as hate speech as also being political speech, dissolves the concept of political speech. An archetypical example of hate speech is: “All x people are rats.” A comment like this contains no true political message – it is purely a hateful one. There are hateful expressions that fit under the definition of both hate speech and political speech, and in those cases, there may be challenges concerning whether to prioritize the importance of self-government and democratic legitimacy over the right of minorities to be treated equally with respect and dignity. The decision-making in these cases will obviously be up to the respective judges in each specific case.

I do not elaborate on which judgments should be reached in cases like these, where political speech and hate speech may ‘overlap’. My focus is rather on the opinion that political speech and hate speech are separate matters in general – and hence, that the argument from political speech is not a valid reason for dismissing hate speech legislation.

Most European (and other Western) countries do have laws against hate speech. These laws were passed shortly before or during World War II as a reaction to the widespread antisemitism in those days.¹ The laws against hate speech vary somewhat in their formulations across the different countries that have implemented them, but the main principles are in general the same: The speech must consist of coarsely hateful, degrading and generalizing expressions that target minority groups based on characteristics such as colour, ethnicity, religion, sexual orientation, etc. All the members of a specific group are thus targeted when someone utters hate speech. Sometimes the hate speech is expressed on social media, targeting a minority group in general, other times it is targeted against one, two or a few specific individuals, but the speech will still be expressed in generalizing terms about the minority group to which the respective individuals belong. Depending on the gravity of the speech and on how many people hear or read the hateful message, hate speech can, for example in Denmark, be sanctioned by up to two years in prison.

In this paper I argue that:

- 1) Hate speech and political speech are separate matters. Even though hateful expressions can be classified as both hate speech and political speech in certain cases, hate speech as defined by applicable laws generally is not classified as political speech.
- 2) The challenges pertaining to the limits on political speech are not, first and foremost, caused by hate speech laws, but rather, they are caused by other areas of society than the legislative, such as university policies.

During the last couple of decades, the limits of acceptable speech at different institutions – however, predominantly at universities – has shifted. A growing number of restrictions have been placed on political speech in order to protect

target groups against discriminatory, racist or sexist speech. Some of the speech that is banned at U.S. universities would, of course, be labelled as hate speech according to European legislation, but most of it would probably not: it would be fully legal political speech according to European hate speech laws.

There is a paradox in this: U.S.-based scholars criticize hate speech laws for limiting political speech whilst U.S. institutions are limiting political speech independently of legislation. I would indeed go so far as to claim that the lack of hate speech laws in the United States has played a part in normalising the limit-setting on political speech in U.S. institutions. My point is that the fact that minorities in the United States have not been protected against hate speech by law has probably played an important part in leading to demands from students to limit degrading speech at universities. With time, these demands have developed into the setting of limits on speech that far exceeds the limits of what would be counted as hate speech by European laws.

The aim of this paper is, first, to challenge the view that hate speech legislation is a threat to self-government and democratic legitimacy and second, to show that it is, in fact, on the contrary, the limits which are set on political speech independently from legislation that are the real threat to these core democratic principles.

In the first part of the paper, I discuss the argument from political speech and whether hate speech laws are a threat to political speech based first and foremost on Ronald Dworkin's argument from democratic legitimacy as well as Sunstein's and Waldron's counterarguments. These three scholars represent three different views on the question of how to deal with the possible problem of the boundaries between political speech and hate speech, although Sunstein and Waldron are both, to different degrees, proponents of hate speech laws.

In the latter part of the paper, I discuss the historical aspects of freedom of speech as well as of what we nowadays call hate speech. Furthermore, I point to the contemporary challenges we are facing with regard to censorship of political speech, in particular at private institutions. I also address the apparent connection between the lack of hate speech legislation in the United States and the demands of restricting (controversial) political speech in private U.S. institutions such as universities.

Political Speech and Democratic Legitimacy

Attempts to explicitly define political speech are relatively rare (Gelber 2010: 306). Thus, many scholars refer to political speech without defining it. However, some scholars have obviously sought to define the concept of political speech, e.g. in connection with their arguments against the passing of hate speech laws. Cass Sunstein, for example, defines political speech as speech "both intended and received as a contribution to public deliberation about some issue" (Sunstein 1995: 130), while Eric Barendt talks about "participation in social and political deliberation" as well as (and maybe most importantly) "expressions about and against the government: verbally attacking the government" (Barendt 2005: 154-155).

The descriptions of political speech are usually founded on the democratic principle of self-governance – and self-governance thus can be described as the very essence of the argument from political speech – as well as the argument from

democratic legitimacy. Katharine Gelber (2010: 305) stresses that the centrality which political speech has to self-governance warrants “*the highest standards of protection of political speech.*”

Self-governance simply means that the citizens govern themselves: They elect the politicians they want to represent them in political decision making every few years – but they also have a voice that they can use to comment on or criticize political decisions and the passing of new laws. Freedom of speech is essential to the idea of self-governance since it is what ensures the citizens’ right to express their opinions and gain societal influence.

Ronald Dworkin, who is one of the foremost proponents of the argument from political speech, points to absolute freedom of speech as a premise for democratic, governmental legitimacy. Dworkin (2006) argues that laws and policies are not legitimate unless they have been adopted through a democratic process. Further, he argues that a process cannot be considered democratic if the government has prevented anyone from expressing their convictions about what those laws and policies should be.

Dworkin relates differently to laws against discrimination than to laws against hate speech. He acknowledges the need for laws against discrimination, but stresses that such laws are only legitimate if people are permitted to express themselves freely, such as by advocating against these respective laws – and even by uttering what we normally would call hate speech. Hence, according to Dworkin, laws that protect minorities against various forms of discrimination can be both justifiable and valuable. Their value, however, relies on a public debate, free from limitations. A free, public debate can never lead to the outcome that restrictions may be set on speech, since this would be a contradiction. First, such restrictions would prevent future debates from being fully free, and second, they would violate some citizens’ foundational right to express themselves, which, according to Dworkin, is a vital premise of a legitimate democracy.

If weak or unpopular minorities wish to be protected from economic or legal discrimination by law – if they wish laws enacted that prohibit discrimination against them in employment, for instance – then they must be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insult as part of public debate may legitimately adopt such laws. If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to accept. (Dworkin 2006: 87).

According to Dworkin, the people, as a collective, is fundamental to the idea of Democracy. Dworkin looks at liberal democracies as collective self-governments where citizens participate in the governing of themselves as a community – the self-government being a positive freedom: “the freedom to govern oneself” (Dworkin 2011: 365).

Hence, democracy is neither about individual autonomy nor about simple majority rule according to Dworkin. Rather, it is about: 1) citizens being partners who seek to treat each other with equal concern and respect, and 2) democracy not only being a matter of procedures (such as majority decisions), but as much a matter of *the content* of the decisions that must live up to the demand of equal respect (Lægaard 2014: 8).

Dworkin also emphasizes the importance of the voices of minorities. One cannot defend the passing of laws based on a majority's will as long as minorities have not had the opportunity to protest against these respective laws. Hence, to Dworkin, the passing of laws against hate speech would also be a violation against the voices of those in minority. It is important to bear in mind that to Dworkin, the minorities represent those who are politically in the minority – and not necessarily minorities characterized by external factors such as ethnicity, skin colour or sexual orientation. On the one hand, as indicated above, Dworkin stresses that minorities must “be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insult as part of public debate may legitimately adopt such laws” (meaning: laws against different forms of discrimination). On the other hand, he emphasizes the critical right of minorities to express themselves freely – sometimes perhaps hatefully – such as in connection with political decision making. To Dworkin, living with the risk of being (coarsely) insulted or offended is a consequence – or even a prerequisite – for living in a liberal democracy.

Some scholars, like Jeremy Waldron, put greater value on the democratic principle of citizens being equally treated with respect than on the value of absolute freedom of speech:

We protect people's basic dignity because it matters: it matters to society in general, inasmuch as society wants to secure its own democratic order and its character as a society of equals; and dignity matters of course to those whose dignity is assaulted. (Waldron 2014:111).

The difference in emphasis of democratic values is, in truth, also a reflection of different interpretations of democracy itself. One of the ways to distinguish between these different interpretations is to differentiate between the proponents of the so-called *absolutist position* (on freedom of speech) and the proponents of the *balancing position* (on freedom of speech) (Sunstein 1995). Dworkin is a representative of the *absolutist position*. This approach reflects a specific view on Liberal Democracy, namely one in which the Freedom of Speech principle is viewed as the most important democratic principle – and one which cannot be compromised. Waldron, on the other hand, is a representative of the *balancing position*, which reflects a view of Liberal Democracy where the various democratic principles have equal value – something which means that the principles must continuously be balanced against each other. When it comes to hate speech, this balancing position leads Waldron (and other scholars) to point to the protection of citizens' dignity as being more important than the protection of free speech in general.

According to Waldron, people have a basic right – or entitlement – to being treated with dignity as members of society “in good standing” and it is this dignity that hate speech laws are meant to protect.

Dignity, on the other hand, is precisely what hate speech laws are designed to protect – not dignity in the sense of any particular level of honor or esteem (or self-esteem), but dignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction. That is what hate speech attacks, and that is what laws suppressing hate speech aim to protect (Waldron 2014:105).

Waldron stresses that a democracy shall “*secure* its own democratic order and its character as a society of equals” (Waldron 2014: 111, emphasis added) – a statement that reflects the requirement for a democratic government with respect to fulfilling the task of ensuring equality among its citizens. Dworkin, on the other hand, stresses that partners shall *seek to* treat each other with *equal concern and respect*, not that the government shall *ensure* that citizens are treated with respect (Dworkin 2011).

Much more can be said about different understandings of democracy and Dworkin’s position in relation to it, such as his theory of principle and rights. Some people see Dworkin as being a representative of a deliberative democracy, others do not. I do not go into this discussion, but focus solely on Dworkin’s absolutist position in connection with self-governance and absolute freedom of speech. There is, naturally, also more to be said about the absolutist and the balancing positions, including that the balancing position goes hand-in-hand with a so-called *principle of proportionality*.² I do not elaborate on this either, however, since they do not play an important part in my discussion about whether there should be laws against hate speech (and whether hate speech should be labelled as political speech).

The United States has a strong tradition of protecting liberal, democratic principles and the freedom of speech principle has been protected by the First Amendment since 1791.³ However, circumstances change with the *zeitgeist*, and if we take a thorough look at U.S. history, we see that the interpretation of the free speech principle has become ever more liberal with time – to the point where all forms of hate speech are in principle interpreted as political speech by the U.S. courts today (Sumner 2015).

Cass Sunstein, although also a strong defender of the freedom of political speech, is critical of contemporary interpretations of the First Amendment. According to Sunstein, the problem is that the U.S. courts have interpreted hate speech as political speech in recent decades and that the absolutist position on free speech now has become clichéd or even dogma. This means that the opposite position, namely the balancing position has lost most of its influence in contemporary U.S. society (Sunstein 1995:8).

Sunstein stresses that it is “extremely difficult to distinguish between political and non-political speech” (Sunstein 1995: 5). However, Sunstein does not consider hate speech as being political speech – and he stresses that “we should strive to produce an interpretation of the First Amendment that is well-suited to democratic ideals” (1995:16). Furthermore, he is one of very few U.S.-based free speech scholars who actually mentions functioning democracies that prohibit hate speech. As he says, these democracies prohibit “libel on ethnic and racial grounds” with “apparently little harmful effect on the system of free expression” (Sunstein 1995: 15).

This is an interesting point indeed, since most U.S.-based free speech scholars tend not to mention the operating hate speech laws in Europe (and other countries that have implemented hate speech laws). This is, in my view, a weakness in parts of the discussion about hate speech legislation, since taking into account how functioning hate speech laws actually work in practice should be a premise in such a discussion.

Waldron is another of the very few scholars who comment on the European hate speech laws:

It is not clear to me that the Europeans are mistaken when they say that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack (Waldron 2014: 30).

Although the argument from political speech is one of the strongest arguments against the passing of hate speech laws, there is no indication that the implemented hate speech laws of European countries violate the right to express oneself freely about political matters in general.

One can, indeed, argue against Dworkin and plead that it is possible to uphold democratic legitimacy in societies with laws against hate speech. One can even claim that laws against hate speech may promote democratic legitimacy, since these laws protect minorities in a way which may encourage members of minority groups to express themselves politically, knowing that they are protected by the law against verbal attacks.

Even though Dworkin's argument from political speech is founded on a principle – and hence does not take into account the practical implications of hate speech laws – one cannot ignore the fact that the principle of his argument is also built on a practical implication. This implication is that hate speech laws, according to Dworkin, will hinder people from expressing themselves freely about governmental decisions, such as the passing of laws.

When Dworkin and his fellow thinkers claim that restrictions on political speech are illegitimate in a liberal democracy, they are right – and most European scholars will agree on that. However, when they claim that more or less *all* speech is to be considered as political speech and that there shall be no restrictions on speech whatsoever, it has gone too far – or as Sunstein maintains: the interpretations of freedom of speech and the First Amendment have become clichés and dogma.

The problem with Dworkin's premise is that there must be *complete* freedom of speech in order to have a legitimate democracy. Dworkin's view of the speech relevant to protect in order to maintain democratic legitimacy is simply too broad and his premise about self-government (and the need for complete freedom of speech among citizens in order to maintain this) is unreasonable. Citizens can exercise their full capacity to perform self-governance through influencing political decision-making and the passing of laws even if they are restricted from expressing hate speech. One can protest against the passing of laws and oppose any political decision-making without having to express hate speech at all – based on how existing hate speech laws (e.g. in Europe) are formulated. Hence, 'complete freedom of speech' is not required in order to actively participate in self-governance in a liberal democracy.⁴

I hold that the uncompromising interpretations of the First Amendment, which Sunstein stresses have become ever more dominant in the United States through the last decades, have not only led to an unfortunate disregard of other crucial democratic principles (than Freedom of Speech), but that these interpretations have also proven to be counter-productive. What I mean by this is that the neglect of minorities' need for protection against hate speech has led to demands for censorship, e.g. from minority students at numerous U.S. universities.⁵

Even though these demands to restrict certain forms of speech is an understandable reaction from minorities who are trying to protect themselves against hate speech, they are also problematic for the democratic principle of

freedom of speech. The reason for this is that when the demands are not based on legislation, they tend to become more arbitrary and they can easily go too far. In many cases they may far exceed – and have done – what would be allowed according to contemporary hate speech legislation in other countries.

The counter-productivity of the absolutist position is hence reflected by people demanding stricter restrictions on speech where this position is practised (as in the U.S.) than is the case where the balancing position is practised (and laws against hate speech have been passed, as in European countries).

These unfortunate – and quite surprising – side effects of holding so rigidly to the principle of free speech should make us look to the balancing position as the more sensible option in the debate about freedom of speech and its role in modern liberal democracies.

Waldron's argument about people's entitlement to be treated with equal respect as citizens supports the reality of life in modern democratic societies where many minority groups have to live among a majority. Waldron's claim that a democratic society must protect its citizens from hate speech points to two important factors. First, a safer and more just society for minorities to live in, and second, a society where there will not be growing demands for censorship born out of despair and anger, since people will not feel let down by the government.

Defining Political Speech

I shall try to define political speech in this section and argue why hate speech, in my opinion, cannot be categorized as political speech in general.

The term 'political speech' covers a wide range of aspects. First and foremost, it is speech about governmental matters, such as having the right to comment on and criticize one's own – or any – government's decision-making and way of ruling. It is also having the right to express where one stands politically and ideologically and to try to gain societal influence. It is the right to criticize any societal matters and to suggest new ways of organizing social institutions and society in general. It is the right to reveal hidden political or societal agendas and the right to protest and demonstrate against political decisions of any kind. This speech is characterized by intention: it seeks to criticize as well as gain influence on the exercise of governmental power. The term political speech may also cover speech which is simply the exercise of governmental power, like speech expressed by political rulers. However, the argument from political speech (as well as the argument from democratic legitimacy) focuses primarily on the intentional form of political speech – speech which seeks to influence the political exercise of power.

To emphasize the difference between what is to be considered political speech and what is to be considered hate speech according to implemented hate speech laws, one can look at examples like these:

- 1) A citizen is dissatisfied with the many Middle-Eastern immigrants who have moved into her neighbourhood lately. She criticizes the authorities' decision to allow so many of these immigrants to move into the neighbourhood since she finds it to have a negative impact on the neighbourhood. The local children will be influenced by the foreign children who don't speak their language, and the women might feel threatened by the men when meeting them alone in the local community, she reflects. The

dissatisfied citizen posts her thoughts on Facebook and other social media where she has a great number of followers.

- 2) Another citizen living in the same neighbourhood is likewise dissatisfied with the authorities' decision on these matters. She also decides to post her opinion on Facebook where she, as the other citizen, has a large number of followers. Her post says that all Middle Eastern men are terrorists who come to the West with the sole purpose to kill Western citizens through terror attacks.

According to hate speech legislation in European (and other) countries, the second example falls under the label of hate speech while the first falls under protected – and perhaps political – speech. The second example generalizes and coarsely degrades Middle Eastern men (they are grouped based on their ethnicity) by calling them terrorists who are on a mission to kill Western citizens.

Although the first example reflects an opinion which also generalises a minority group in some respect, it is not as generalizing as the opinion expressed in the second example – nor is it as extreme or coarsely degrading as the second example. Hence, according to functioning hate speech laws, the first example does not fall under the label of hate speech.

As already mentioned, some expressions may not be easy to define as either political speech or hate speech, but even though this is the case, dismissing hate speech laws in general is not a valid argument. Some expressions are simply what they express; namely hate speech. These include expressions like the earlier mentioned: “All x people are rats.”

Although defenders of the argument from political speech do focus on the central foundations of democracy, namely the right to criticize any government as well as the right to self-governance, these rights do not justify the dismissal of hate speech legislation. First, not all hate speech is also political speech, and second, hate speech that is also considered political speech may in some cases be enforced by law, if the harm that the speech leads to outweighs the importance of the political speech, for example. Third, political speech that is also considered hate speech may in some cases be accepted as legal speech, if the political importance of the expression outweighs the potential harm of it.

The bottom line is that although the argument from political speech is an argument of great relevance and importance in any liberal democracy, its reach does not extend as far as to validate the dismissal of hate speech legislation.

Political Speech in a Historical Context and the Problems of the Absolutist View on Freedom of Speech

When the idea of liberal democracy was developed during the late 18th century, freedom of speech was one of the core principles connected to it. In order to have a state ruled by the citizens themselves – to be self-governed – the right to express oneself was imperative. One cannot be part of governing a state if one is not free to express oneself, i.e. to criticize respective decision-makings, the passing of laws and the abuse of power. In a liberal democracy, every citizen shall have the possibility to gain influence through expressing themselves freely. These basic principles are

clearly reflected in Dworkin's argument from political speech/democratic legitimacy.

However, some circumstances indicate a much more 'straightforward' interpretation of political speech – in the times of the Enlightenment and the following century – than the tendency among many scholars today. First, there are implications that what we nowadays call hate speech was not counted as political speech – or as speech of any value. An example of this is when Mill writes that one should ignore “distasteful citizens” in the third chapter of his essay *On Liberty* (Mill 1859). Mill argues for the utter importance of freedom of speech, but clearly counts “distastefulness” – or what scholars nowadays might call low-value speech or hate speech – as speech without any value. Second, the aim was to promote critical thinking and political (as well as personal) freedom, something which was born out of the oppression of citizens – a tendency which had dominated for the preceding centuries. The foremost aim was to be free to criticize every oppressor and every institution of power. In this context, protected speech would implicitly be political. Hence, the aim was to criticize authorities – not to mock and degrade minorities.

The point is that the principle of freedom of speech was implicitly about the freedom of political speech when the idea of democracy arose (again). What we call hate speech nowadays was not seen as speech of any value. In fact, even the ancient Greeks had a law, which protected exposed groups from discriminating and hateful speech.⁶

Realizing that both the ancient Greeks and the thinkers of the Enlightenment and the years thereafter did not estimate what we nowadays call hate speech as being speech of any value might make us question why some contemporary scholars interpret this form of speech as having political value.

There has clearly been a shift in relation to how scholars interpret political speech. The rise of the internet has no doubt played a part in this shift, simply by moving the boundaries of what we are exposed to and what we get used to hearing/reading. When the argument from political speech was developed during the twentieth century, people were far less exposed to hate speech. Proponents of the argument did not have to take into account hate speech in the same way that they are forced to do today. Thus, in order to hold on to the principle of the argument from political speech, contemporary scholars have had to accept – or have taken as a natural consequence – the interpretation of hate speech as political speech.

Another factor following the rise of the internet is that we now find ourselves in a forum where the possibility for expressing ourselves critically has never been more available – something which in general must be seen as a potential strengthening of liberal democracies. Yet, at the same time we are having to deal with an ever-growing exposure to hate speech.

In the discussion about whether hate speech should be restricted, those who see the internet as a forum that strengthens democracy by letting every citizen have a more or less public voice, tend to lean towards the absolutist position. Thus, the rise of the internet may have played a part in the fact that more and more scholars – and citizens in general – have become proponents of the absolutist position compared to a few decades ago.

The absolutist view on free speech claims that the right to freedom of speech supersedes – or is even a premise for – any other civil or human right. The absolutist

view therefore regards the balancing view as meaningless, since the right to express oneself freely is a prerequisite for a legitimate democracy from the absolutist point of view.

There are several problematic issues concerning the absolutist view on free speech. First, this view neglects the many inevitable cases where other basic democratic principles are violated through speech. Second, the absolutist view can lead to counter-productive consequences by promoting a less democratic society rather than protecting democratic legitimacy, since this view may lead to the majority's oppression of minorities. As Sunstein states: "Some regulatory efforts might not be "abridgments" of freedom of speech; they might increase free speech" (Sunstein 1995: 43).

Sunstein's view on this is a common one among proponents of hate speech legislation. The point is that if you allow oppression of minorities through hate speech, this will in many different aspects lead to the silencing of the respective minorities' voices. First, the minorities will want to avoid attention, since that could lead to more negative consequences from hateful speech uttered about them in public, from different forms of societal discrimination – and in the worst-case scenarios, even in terms of hate crimes.⁷ Second, targets of hate speech who are exposed to (systematic) degrading speech and the accompanying lack of respect as citizens and human beings are likely to develop low self-esteem which will naturally also affect their participation in political and societal debates. As Sunstein stresses in the above-mentioned quote, restricting some forms of speech may therefore lead to increased free speech and encouragement to express oneself more freely as a member of any minority.

Thus, although Sunstein underlines that it is "extremely difficult to distinguish between political and non-political speech" (Sunstein 1995: 5), this does not mean that one must give up on making a distinction when it is appropriate – and even very necessary – to do so, such as when protecting groups of people from being coarsely degraded and dehumanized. It is reasonable – even crucial – to distinguish what we might call 'pure hate speech' (or speech of low value) from political speech, according to Sunstein. First, it is the duty of a democratic government to protect its citizens from being treated unequally and second, restrictions on hate speech can function to promote free speech among members of minorities.

It is interesting that freedom of speech was mostly referred to as freedom of *political speech* both in ancient Greece as well as during the Enlightenment and subsequent years. Mill, who was one of the most liberal proponents of freedom of speech, focused on "the expression of opinions" with particular concern for "morals, religion, politics, social relations, and the business of life" (Sumner 2015: 27). Hence, it was the *expression of opinions* on matters such as the above mentioned which were at stake. Personal matters – and personal attacks – were clearly not considered as expressions of opinions.

The Real Threat to Political Speech

Political speech is what the right to freedom of speech originally addressed: the right to express one's opinion about and criticize every authority, e.g. the church and the government. With the founding of liberal democracies followed the principle of self-governance, for which freedom of speech was a foundational premise.

The irony in how the argument from political speech is presented nowadays by a number of scholars, like Eric Barendt, is that some of their main concerns relate to hate speech legislation. These scholars see hate speech legislation as a threat to the freedom to express one's political thinking as well as to criticize authorities and contemporary norms and conventions. However, the threat to freedom of political speech is to be found elsewhere.

While the respective laws against hate speech are narrow and formulated fairly specifically in order not to be abused, certain private institutions are increasingly practicing a worrying form of censorship regarding political expression. This tendency, which started in the United States a few decades ago, has also spread to Europe over the last five to ten years. We have seen it in the form of a so-called 'cancel culture' as well as in the form of professors losing their university jobs based on their expressions of certain political opinions.⁸

'Cancel culture' is a relatively new term and does not have a fixed definition yet. In general, the term is used when a (prominent) public figure has expressed a controversial opinion on some political or societal matter and, as a consequence is told not to attend venues to which he or she has already been invited. These public figures are thus basically being shut out of their normal environments, which are often universities and the media.

One example of this was the case of Steven Salaita who was to begin a professorship at the University of Illinois in August 2014. Only days before the start of his new job, Salaita was told that the University had 'cancelled' the offer due to his critical opinions of Israel, as expressed on his Twitter account.⁹

An example from Europe was when the writer J.K. Rowling in June 2020 tweeted critically about transgender women's right to use women's public bathrooms (arguing it could be unsafe). The reactions were massive and Rowling had to (and to an extent, still has to) live through everything that follows from being a victim of the cancel culture, including institutions withdrawing their invitations to have her hold talks and participate in debates, associations removing her name from their homepages, and being attacked on social media.¹⁰

Many further examples beyond these two specific ones depicting the so-called cancel culture can be found in the media. A thorough report, concluding that a cancel culture is growing both in the United States and in Europe (only with a delay) was also published in 2021.¹¹

The point is that this movement of 'political correctness' significantly restricts the expression of political opinions, not through the law but rather through the means of social exclusion, as exemplified by cancel culture. In addition to this, certain institutions such as private (and mostly U.S.) universities, are going by their own rules and authorization to dismiss professors who express certain political opinions.

It is interesting that the only Western country without laws against hate speech, namely the United States, is also the country with the strictest forms of restrictions on political speech in private institutions such as universities. The country with some of the strongest voices arguing that hate speech laws will violate the freedom of political speech has, hence, become the country with more restrictions on political speech than any European country with hate speech laws in place!

My point is that in the United States, where you can express yourself as coarsely and hatefully as you want, the reason being that they have not passed any laws

against hate speech, you are prohibited from expressing certain political views at private institutions such as (some of the) universities. Further, my point is that this reality contains a contradiction, and that there is a connection between, on the one hand, the lack of laws against hate speech in the United States and, on the other hand, the prohibition of certain political views and expressions at (U.S.) universities. My point is also that U.S.-based free speech scholars have underestimated the counter-productivity of not having any laws against hate speech – something which has revealed itself through the rise of extreme political correctness at private institutions – and to an extent – more generally in the U.S. society.

One can, of course, pose the question as to whether other reasons might factor in to the growing demands for restricting speech in U.S institutions. One reason could be that minority rights have been on the rise more or less all over the world in recent years and that this also leads to stronger demands from minority groups in relation to restrictions on hate speech. This fact does not contradict my argument, however, since these demands are much stronger in the United States than in countries that have implemented hate speech laws. Another reason could be the rise of the internet which exposes minorities much more to hate speech than before. This does not contradict my argument either, however, since the same consequences occur, namely that the demands for restrictions on (hate) speech are much stronger in the US than in Europe (and other countries with implemented hate speech laws). These other probable causes are perhaps rather an explanation as to *why* the demands for restricting speech have been on the rise in recent decades.

I have focused solely on the demands for restricting speech at universities in this paper. I could also have problematized the social media platforms and other types of institutions. Much can be discussed about freedom of speech in relation to the various social media platforms and whether these platforms take enough responsibility when it comes to hateful speech – or whether they, on the contrary, are censoring too much. This is an ongoing and very important contemporary discussion. However, the discussion involves different premises than those concerning restrictions of speech at universities, and hence, I have chosen not to go further into it in this paper.¹²

Conclusion

Most proponents of the argument from political speech hold that hate speech must be legal in order to protect the foundation of democracy, namely self-governance. According to Ronald Dworkin, restricting any speech at all delegitimizes liberal democracies by taking away parts of the people's possibility to influence political decision-making and the passing of laws. I hold that one can be a proponent of the argument from political speech while at the same time advocating for hate speech legislation, since most hate speech does not fit under the label of political speech.

Proponents of hate speech legislation emphasize that there are other components in a democracy which are as important as freedom of speech. One of these components is the equal respect with which every citizen of a democracy has the right to be met. According to scholars like Jeremy Waldron, hate speech disrespects and violates the dignity of its targets, and therefore legalizing hate speech is anti-democratic.

The United States has no laws against hate speech, and the most prominent defenders of the argument from political speech are U.S.-based scholars. However, there has been an ever-growing number of restrictions placed on political speech in the U.S. during the last decades. These restrictions are found in private institutions like universities and museums. I hold that an important reason for this development is the fact that people in the United States have not been protected against hate speech through legislation and hence, they have more or less been forced to demand restrictions in their educational institutions and workplaces in order to protect themselves against hateful speech.

Ironically, neither the argument from political speech nor the lack of hate speech legislation has protected political speech in the United States. On the contrary, the lack of hate speech legislation seems to have played a significant part in placing restrictions on political speech in American society in general. The real threat to freedom of political speech is not hate speech legislation – it is the restrictions imposed by private institutions such as American universities.

Notes

¹ In Denmark, for example, the law was passed in 1939 on the grounds that anti-semitism had become a problem (as a result of the ideas of German Nazism).

² The principle of proportionality plays an important part in the balancing position. It is not always an easy task to decide what should be prioritized when, since different rights and principles of apparently equal value may in many cases clash.

³ That is when the First Amendment was adopted, on December 15, 1791.

⁴ I base this on the public political debate in Europe, which is no less critical of its governments than the debate in the USA – perhaps even moreso.

⁵ There are many examples of this in numerous newspapers and other media. Here is one example, retrieved June 05 2022, from <https://www.sandiegouniontribune.com/opinion/commentary/story/2022-04-10/sdsu-n-word-j-angelo-corlett-academic-freedom>

⁶ This law concerned merchants and craftsmen (who were often not citizens). See: Hansen, M.H. (2010).

⁷ Results from a number of studies have shown a causality between hate speech and hate crimes, see e.g., Williams, Burnap, Javed, Liu and Ozlap. (2020) and Eggebo, H. & Stubberud, E. (2016).

⁸ There are, of course, many examples of this to be found in various media, but there is also one report from 2021 which documents some of these issues more specifically, see: Kaufmann, E. (2021).

⁹ Steven Salaita (1975-) is a scholar, public speaker and a writer. He was born in Buefield, West Virginia and educated within American Literature. See e.g., retrieved June 05, 2022 from https://en.wikipedia.org/wiki/Steven_Salaita_hiring_controversy

¹⁰ J.K. Rowling (1965-) is a writer who is mostly famous for her children's series *Harry Potter*. Rowling was born in Yate, Gloucestershire. Retrieved June 05 2022 from: <https://www.theguardian.com/books/2019/dec/19/jk-rowling-trans-row-court-ruling-twitter-maya-forstater>

¹¹ This refers to the same report mentioned in note 8.

¹² Although the premises for these different institutions are different when it comes to the discussion about freedom of speech, professors have sometimes been fired on the basis of what they have expressed on social media (as was the case with Steven Salaita). However, this by no means infers that the expressions are deleted from the respective social media platforms.

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