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Offensive is not Enough: Hate Speech, Free Speech, and the Free Circulation of Ideas

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This article interrogates the boundaries of the legal debate around hate speech in the U.S.. It departs from the argument that too often conversations about and against hate speech safely put the speakers on the right side of a divide: scholars and intellectuals critique and condemn discourses of hatred against minorities and disenfranchised communities, denouncing the violent speech and the anger of the powerful against the powerless. But both hatred and anger are central emotional qualities of the human mind, and in fact, we sometimes celebrate the rightful anger of the oppressed and of activists in the process of achieving justice and equality.
Free speech is a fundamental right sanctioned by the First Amendment of the US Constitution, stemming from the argument that the protected circulation of "more speech", regardless of how disturbing or uncomfortable it may be, is in any case a healthy antidote to totalitarianism and censorship and that it is instrumental in the development of a civil society. Nonetheless, in some rare cases, the Courts have defended their authority to regulate it. Focusing on some landmark cases from the cultural history of the U.S. Supreme Court's decisions, this article explores the intellectual premise that a democratic state should never limit speech on the basis of its content, but rather on the careful evaluation of its mode of production and its concrete consequences. This article offers an exploration into the significance of free speech regulation, and into the blurred space between speech and action, for our contemporary understanding of hate speech in an increasingly polarized and compartmentalized public sphere.

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The following pages attempt to interrogate the boundaries of the debate around hate speech concentrating on the U.S. context and with a particular focus on the First Amendment and its cultural history. I will depart from the argument that too often conversations about and against hate speech safely put the speakers on the "right" side of a divide: scholars and intellectuals typically critique and condemn discourses of hatred against minorities and disenfranchised communities, denouncing the violent speech and the anger of the powerful against the powerless. But hatred and anger are central emotional drives of the human mind, and many of us, after all, do *hate* sexist and homophobic assumptions, are *angry* about racist policies and politicians and feel deep emotional responses against violations of civil, human, and environmental rights. Furthermore, we sometimes proudly celebrate the rightful anger of the oppressed and of activists in the process of achieving justice and equality.

Free speech is a fundamental right sanctioned by the First Amendment of the US Constitution, resulting from the argument that the protected circulation of "more speech", regardless of how disturbing or uncomfortable it may be, is in any case a healthy antidote to totalitarianism and censorship and that it is not only instrumental but essential in the development of a civil society. Nonetheless, in some rare cases, the Courts have defended their authority to regulate it. Focusing on some landmark cases from the cultural history of the U.S. Supreme Court's decisions, this article aims at exploring both the U.S. regulation of free speech and the intellectual premise that a democratic state should never limit speech on the basis of its content, but rather on the careful evaluation of its mode of production and its concrete consequences. There is indeed a speech that hurts, a speech whose impact prevents or inhibits the free circulation of ideas. But identifying it, within a democratic and progressive framework, has never been an easy task. This article explores the significance of free speech regulation, and the blurred line between speech and action, for our contemporary understanding of hate speech in an increasingly polarized and compartmentalized public sphere.

Let me start from the geographical location where this very journal is published: in Italy, free speech is guaranteed by Article 21 of the Constitution, from 1947. It reads, among other things, that:

> Everyone has the right to freely express their ideas through speech, in writing and by any other means of communication. The press shall not be subjected to authorization or censorship. Seizure shall be permitted only by a measure for which reasons must be stated issued by the judicial authority [...]. [1]

And it ends with "Printed publications, public performances and any other events contrary to public decency are forbidden".[2] I would like to stress in passing how much this otherwise historical landmark, following World War Two and the Italian fascist regime, and ensuing the Italian Resistance, even in this short, quoted passage reveals a few deep contradictions between freedom and regulation: let me just draw your

[1] Here the original Italian version: Articolo 21: *Tutti hanno diritto di manifestare liberamente il proprio pensiero con la parola, lo scritto e ogni altro mezzo di diffusione. La stampa non può essere soggetta ad* autorizzazioni *o censure. Si può procedere a sequestro soltanto per atto motivato dell'autorità giudiziaria [...].* (1947). My translation.

[2] *Sono vietate le pubblicazioni a stampa, gli spettacoli e tutte le altre manifestazioni contrarie al buon costume.* My translation.

attention to the words "seizure…permitted", or the mention of the extremely slippery category of "decency", and the much dryer and definitive notion of "forbidden".

In the United States, free speech is protected by the First Amendment of the Constitution, which is included in the *Bill of Rights*, from 1791, some one hundred and fifty years earlier. It reads:

> 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.[3]

It links together freedom of religion, of speech, and freedom of assembly. It does not address the individual in its ability and right to say or do things, but primarily the Congress, telling them, the legislative power, what they will not be allowed to do. It protects the citizens from the actions of the government. Free speech protection in the US has an almost *legendary* status, and by this I mean that it is both the object of veneration and national pride, as in "this is a free country and I can say what I want!", and that a legend is… well… not a fact. Interestingly, though, despite some notorious issues in its XX century evolution, the First Amendment enables what is arguably the most radical defense of free speech in the world.

Traditionally, the liberal position is that speech must be considered as one of the fundamental elements of a democratic society. Scholars consider speech as a crucial instrument for both self-realization and social growth. The remedy for "problematic" speech should never be control and censorship by a government or an authority, but "more speech" (as Justice Louis Brandeis established in 1927 in his characterization of the counter-speech[4]), in the pursuit of truth. The goal of the Bill of Rights was to limit sovereign power, quite often historically a tyrannical power, and to guarantee inalienable rights (as opposed to benevolence or concessions) to the people.

The first amendment however does not protect all kinds of speech, but which ones? To begin with, there should be a "time, manner and place": that is, a citizen can't go around in the middle of the night yelling his speech from a loudspeaker assuming it will be protected. Nor, if she is a doctor or a pilot, protest for better pay or working conditions in the process of performing her job. Protected speech must be public in nature, deemed expressive and with a "subject", an idea, which may have social or collective significance. The exception to this type of protection cannot depend on the content of the speech (this is in fact how censorship traditionally works). And particularly, the exception to its protection cannot apply to those opinions "we", a vaguely defined majoritarian community, do not like, or find offensive. Additionally, the cases in which a speech is not under the protection of the first amendment must be clear and tailored very specifically.

The first issue I mentioned above is content neutrality, and the legislator must avoid what is called "a viewpoint discrimination", aimed at preventing the cases in which an authority or government prohibits a speech because it does not agree with the ideas and messages the speaker is trying to convey. For most cultural and legal scholars,

[3] https://billofrightsinstitute.org/primary-sources/bill-of-rights

[4] Justice Louis D. Brandeis established it in his classic concurring opinion in *Whitney v. California* (1927). See "Counterspeech Doctrine", *Free Speech Center*, https://firstamendment.mtsu.edu/article/counterspeech-doctrine/

freedom of speech is most crucial when it applies to "the worst speech possible" (Fish 2019, 6). In 2018, Marc Zuckerberg controversially allowed on Facebook a voice to a group of holocaust deniers. As a response to a wide range of criticism, Zuckerberg, at the time the proponent of a radical free speech approach whereby his company refused to double check politicians' false statements, then changed his approach and argued that he would proceed to block the *disinformation* which is aimed at a direct and explicit incitement to *violence* (Dwoskin 2020). But the problem here is that the violence of antisemitic holocaust deniers is often not explicit at all, or not explicit "enough".

Marketplace of ideas

Another central concept in the debate about free speech is "the marketplace of ideas". Zuckerberg's argument, which actually echoes weakly some historical justifications about the First Amendment, may be deemed reasonable if we believe that these abhorrent opinions will be, in the free arena of public speech, exposed and rejected for stronger, "better" opinions. Flat-earthers, creationists, a wide range of deniers and conspiracists must be allowed to join the democratic "marketplace of ideas" so the best ideas, and in a few cases the truest idea, may triumph. You can easily detect a powerful and unquestioning optimism, which has its roots in the Enlightenment and the belief that humans can perform and have a shared interest in performing rational choices, increasing their knowledge, and pursuing truth, in one's own reasoning and in the others'. But is this really the case? The explosion of post-truth advocates, or deliberate misinformation campaigns online aimed at manipulating public opinion, should push us to doubt it.

This approach also conveys the view that all players have equal ground, and their voices have equal volume and power: in short, it entirely ignores issues of systemic inequality in the production, access, and circulation of voices and speech. The marketplace of ideas is possibly the most pervasive metaphor in the defense of the First Amendment: the test of truth, and the establishment of ideas depends on their free competition in the public arena, not on the censorship or regulation by an authority. A strong analogy with the economy is apparent, of course, which is obviously very problematic (remember Adam Smith's "invisible hand" of the free market economy). A similar idea that truth is rarely maintained in solitude but rather through discussion, is at the center of John Stuart Mill's classic *On Liberty*. In 1859 he wrote:

> [M]an is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it. (Mill 2010, 21)

To go back to Zuckerberg's willingness to block disinformation aimed at inciting violence, and more broadly to the issue of the impact any speech may have, a careful consideration of the context is necessary: a speech that is harmless in one context may be explosive in another. Additionally, quite often the most powerful speeches are precisely those that move to action, they are in fact incitements for a community: let me just mention here Emmeline Pankhurst, a celebrated British suffragist from the early XX century, or Malcolm X, the African American leader from the 1960s. For the largest part, the cultural history of free speech is a history of how to limit harmful speech

without becoming arbitrary censors, and how to assess the potential harm not in the perspective of keeping safety and stability (maintaining the status quo), but in the perspective of advancing knowledge and achieving justice.

As I think most of us intuitively know, speech can hurt. The issue of language violence and its capacity to injure have been famously explored by Judith Butler in her work *Excitable Speech*. In this classic investigation, the philosopher applies the theory of interpellation and of performative speech acts to an understanding of the violence of language and of ourselves as fundamentally linguistic beings. She writes:

> [T]he problem of injurious speech raises the question of which words wound, which representations offend […] and yet, linguistic injury appears to be the effect not only of the words […] but [of] the mode of address itself […] that interpellates and constitutes the subject" (Butler 1997, 2).

In questioning easy understandings of "words that wound", Butler adds that

> the recent regulations governing lesbian and gay self-definition in the military or, indeed, the recent controversies over rap music suggest that no clear consensus is possible on the question of whether there is a clear link between the words that are uttered and their putative power to injure" (Butler 1997, 13).

Furthermore, Butler calls into question the very notion of context (as necessary to assess the potential for injury):

> Paradoxically, the explicit legal and political arguments that seek to tie such speech to certain contexts fail to note that even in their own discourse, such speech has become citational, breaking with the prior contexts of its utterance and acquiring new contexts for which it was not intended (Butler 1997, 14).

It is appropriate to ask, with regard to the specific context I am exploring, what is it that we mean by speech? And, if it is more than just "speaking", how do we tell speech from action? For example, according to the US Supreme Court, burning a flag is "speech", while yelling to a cop's face "you're a fascist!" is not. In the first case, the Supreme court asserts that desecrating the US flag is a form of symbolic protest protected by the First Amendment (*Texas v. Johnson*, 491 U.S. 397, 1989). An action is considered *speech* because it sends a message that the State has an interest in protecting (namely, a protest towards national politics). While in the second case a verbal act, the use of "fighting words", is considered a symbolic *action* because it produces an aggressive impact that the State deems distressing, painful, and harmful (more specifically, in the case that I evoke, *Chaplinsky v. New Hampshire*, 315 U.S. 568, from 1942, it does not constitute an expressive action for a broader audience). In this 1942 opinion, the Supreme Court wrote that fighting words are not protected because:

> by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 1942).[5]

[5] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 1942. Available at: https://supreme.justia.com/cases/federal/us/315/568/. All the cases and opinions from the US Supreme

The blurred boundary between action and language, or conduct and speech, has been historically contested and debated, and most of the advocates of the symbolic, public, and expressive nature of some actions *as* speech have had the goal of protecting those actions from regulations under the umbrella of the First Amendment: a case in point could be the controversial landmark ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010)where the Court's majority held that the freedom of speech clause prohibits the government from restricting independent expenditures for political campaigns by corporations (therefore arguing that financing a political campaign is in fact *speech*, besides the even more contestable notion that corporations are people). Conversely, as Butler argues,

> the collapse of speech into conduct, and the concomitant occlusion of the gap between them, tends to support the case for state intervention, for if "speech" in any of the above cases can be fully subsumed under conduct, then the first Amendment is circumvented. (Butler 1997, 23)

Clear and Present Danger

There are two traditional tests for the Supreme Court, two criteria to assess a case in which Free Speech may be regulated. The first one is the classic statement from a decision in 1919, *Schenck v. United States*, 249 U.S. 47 (1919), when two socialists were prevented from distributing informational materials against the military draft in Philadelphia, and advocated for a rebellion against what they saw as a form of slavery, prohibited by the Thirteenth Amendment. In ordinary times, their brochure and informational materials would have been protected by the First, but in time of war the opinion was controversially different, and the protection was lifted. Justice Oliver Wendell Holmes Jr. wrote:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create *a clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[6]

Therefore, the Court should determine whether the speech (and the action it may incite) creates a clear and present danger.

The second criteria is the Brandenburg test, established in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to determine when inflammatory speech intending to advocate illegal action can be restricted. In the case, a Ku Klux Klan leader gave a speech at a rally to his fellow Klansmen, and after listing a number of derogatory racial slurs, he then said that "it's possible that there might have to be some vengeance taken." The government may restrict a speech that promotes the use of violence or crime only if there are both conditions: 1) The speech is "directed to inciting or producing imminent lawless action," and 2) The speech is "likely to incite or produce such action" (*Brandenburg v. Ohio*, 1969). In this specific case, it was argued that there was not enough evidence to limit the

Court quoted in this article are public documents. They will be referenced parenthetically in the text without page number, since they are easily accessible from various websites, most reliably here: https://supreme.justia.com/cases/federal/us/.

[6] A full transcript is available here: https://supreme.justia.com/cases/federal/us/249/47/. Emphasis mine.

speaker's freedom of speech. In other words, if a speech promotes lawless actions in an indefinite future, and is therefore not directed at creating "imminent disorder", it is protected by the First Amendment.

A case in point is the decision about *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). In this case, the court argues that a certain anti-abortionist discourse, including its online expression, constitutes a "true threat", and is therefore not to be protected by the First Amendment. The ACLA published "Wanted" posters and lists on their "Nuremberg Files" webpage with names and addresses of abortionist doctors. The posters were used as intimidation, not as persuasion. The court's opinion states that while advocating violence is protected, threatening a person with violence is not. According to this opinion, we need to distinguish between political, rhetorical hyperbole, which is protected, and true threats, which are not. The definition of true threat is "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault" (from a precedent in United States v. Orozco-Santillan, 903 F.2d 1262, 9th Cir.1990).

Those who propose regulations for hate speech argue that the legal decisions on free speech are based on the protection of free speech against the powerful, and cannot be applied to the protection of speech against groups that are already oppressed. One of the issues here is why should we as a society have an interest in protecting a speech that has no social value but that actually damages socially and psychologically marginalized minorities? For example, in an attempt to prevent antisemitism, some local governments may decide to prohibit the use of swastika (in the US it is protected by the First Amendment), but this decision may have legal unpredictable consequences for the restriction of other speech that someone else may find offensive or threatening. Furthermore, as I said earlier, free speech legislation is based on the idea of content-neutrality: we cannot restrict speech just because we find that particular message offensive. Activists for the regulation of hate speech aim at finding a new balance between freedom of speech and social equality.

Many aspects of hate speech regulations are juridically arguable and often slippery (Garton Ash 2016, 214), starting from the very definition of hate: should we define it as incitement to hatred, therefore considering hatred as a clear and present action, or as the verbal expression of a feeling? Obviously hate speech is not hate crime, but how these two notions may intertwine is a fundamental question that should not be simplified.

Free Speech on Campus

Hate speech should be legally fought to the extent that it produces noticeable harm. According to the above-mentioned decision from 1942, *Chaplinsky V. New Hampshire*, fighting words, harassment, intimidation, bullying, are forms of discrimination and are not protected: their very utterance inflicts injury, they have slight social value and they are not essential to any exposition of ideas or pursuit of truth. But limiting hate speech should not just mean appealing to ideas of offensiveness, or insult, these criteria are dangerously slippery, and a public discourse whose main preoccupation is to "not offend anyone" may be a very ineffective, and inadequate discourse, in several cases. The appeal to regulate offensive speech is very problematic, as we can see in some countries that have implemented these regulations.

In fact, some State regulation of speech may appear less effective than intended: in the UK, the Public Order Act limits offensive conduct, so to hold up a placard that says "Scientology is not a religion, it is a dangerous cult" may get you in trouble, as will brandishing a handmade sign that says "Jesus is Lord. Stop immorality, stop homosexuality, stop lesbianism" (see Garton Ash 2016, 228). In the US, on the contrary, the Westboro Baptist Church (and its "godhatesfags" website), like anti-abortion groups crowded outside US clinics, have a right to protest, and the State may at best regulate the distance from the entrance to create a safe perimeter that they cannot cross.

The Westboro Baptist Church is a small independent church based in Topeka, Kansas, founded by pastor Fred Phelps. The church embraces extremist opinions and is infamous for picketing military funerals arguing that military victims are a desire of God who is punishing the evil United States for its blaspheme and immoral choice (most especially on issues like LGBT rights). On their official website "godhatesfags", the church declares that it is conducting "peaceful demonstration opposing the fag lifestyle of soul-damning, nation-destroying filth". In 2011, the family of an American serviceman whose funeral had been boycotted attempted to sue Phelps in the case of *Snyder v Phelps*, but the US Supreme Court ruled eight-to-one in favor of Westboro on appeal (McAskill 2011).

In conclusion, we may go back to the initial liberal antidote against hate speech: we need more speech, better speech, counter-discourses that may extinguish false or toxic speech. These remedies however seem futile in an online world complicated by customizing algorithms and a multitude of echo chambers, where paradoxically there is no real "marketplace of ideas", no competition of different viewpoints, and where in fact we can only hear our own opinion, repeated, magnified, and radicalized. As a civil society, we should aim at creating the conditions that would facilitate an open and enlightened public discourse, in schools and universities, on the workplace, in our media. But looking at countries that adopted hate speech regulations decades ago, we could wonder if these regulations really work (Garton Ash 2016, 219-20). It is ultimately an open question, but according to Garton Ash, if the goal is to produce or strengthen a civil society, they often do not work.

I want to conclude by providing a further example that may help us to question the "marketplace of idea" imaginary, but also to engage issues of systemic inequalities in the access to the public arena, and to stress again the problems inherent in appeals to offensiveness. Quite often, advocates for hate speech regulation on college campuses evoke the Heckler's Veto, even in the most recent students' protest across the US asking for a ceasefire in Israel and demanding that their universities divest from Israeli corporation and military. The Heckler's veto indicates the suppression of speech because of the possibility of a violent reaction by hecklers. For the sake of maintaining public order, is it reasonable to limit a speech that someone may find disturbing and offensive, and which is likely to provoke a hostile reaction in the listener? (As you can imagine by now, contrarily to the recent events which I mentioned before, the Courts typically say no, but exceptions to the First Amendment are very rare). In *Bible Believers v. Wayne County* (2015), the 6th Circuit of the US Court of Appeal ruled that some Michigan officials had violated the First Amendment of a group of Evangelical "Bible Believers" who were protesting outside of the Arab International Festival in Wayne County, with offensive images and anti-Islam slogans, when they removed them from the festival in order to protect them from a group of violent counter-protesters who had been predictably irritated by the offensiveness and anti-Arab hatred of the Evangelicals.

With regards to campus speech, the Heckler's Veto happens when an opponent silences a speaker causing a disturbance or threatening one. Universities propose to prevent this veto by defending the right of the victims: a student who is victim of a verbal attack may be intimidated to the point of not replying (and therefore refusing to contribute the marketplace of ideas). Along these lines, in order to guarantee everybody's free speech, offensive speech (not just by the opponent, but by the original initial speaker) must be restricted. In various cases, the courts have ruled that these approaches are too vague, overboard, and rely problematically on their content, that is why they rarely pass any test for free speech exception.

The problem with the Heckler's Veto is that it would allow the suppression of a speech because its opponents are angry, it would provide a perverse incentive for the opponents/listeners to threaten the use of violence, rather than responding to an idea with other ideas. To go back to the example of the recent "pro-Palestinian" or "anti-genocide" students protests, some reasons why some universities have intervened in limiting protests and encampments did not entail directly "speech", but rather occupation of property, trespassing, while some evoked precisely issues of public safety (for examples when Asna Tabassum, a USC valedictorian, in Los Angeles, was denied a stage for her address at the commencement ceremony), in the perspective that some pro-Israeli groups would protest, disturbing and disrupting the graduation ceremonies. Typically, the courts protect the speakers in these cases: the scenario where two divergent speeches clash is the typical "public arena" where the marketplace of ideas seem to fulfill its aspiration. None of the two groups of speakers can be limited in their first amendment—insofar as they confront each other's speech, not by means of actions in violation of the law.

The issue of regulating harmful speech is a central one in our age, and a complex one. If our goal is ultimately the strengthening of a civil society, we may wonder whether restrictions on speech are the best or the most effective strategy, and what is the role that education may play in countering echo chambers and in developing respect for diversity, appreciation of complexity and ambiguities, and ultimately in acknowledging the relentless work it takes to be a citizen in a democratic society.

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