Should we ban dangerous speech?

Jeffrey Howard thinks through the arguments.

The problem

On 17 June 2015, a twenty-one-year-old named Dylann Roof walked into the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, one of the oldest black churches in the American south. After sitting in on the evening bible study for an hour, he unsheathed his .45 calibre Glock handgun and opened fire on the parishioners, killing nine of them.

According to a manifesto discovered by police that Roof wrote prior to the attack, his motivation was to ignite a race war between whites and blacks. It is difficult to say with confidence who or what first inspired him to become a white supremacist, but the manifesto points to one important influence: a website run by an organisation called the Council of Conservative Citizens. The website documented crimes committed by black Americans against white Americans, reinforcing stereotypes that black people are inherently dangerous. It defended segregation, urging readers to 'oppose all efforts to mix the races of mankind'. And its imagery glorified the days of the short-lived Confederate States of America, where slavery was legal.[1]

For all we know, had Roof not encountered that website and others like it, he would not have come to acquire his hateful views. For all we know, had he never been exposed to incendiary messages of hate online, those nine parishioners from Charleston would still be alive. So why was the Council of Conservative Citizens legally allowed to publish such vitriolic, dangerous material? Why was Roof legally allowed to access it?

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A stand-off

Consider the fact that websites that spread hate are broadly prohibited in most of the western world. *Hate speech* refers to expression that maligns members of marginalised and vulnerable groups, and it is a criminal offence in many democratic societies. Predictably, different jurisdictions define it in different ways. Canada bans expression that incites 'hatred against any identifiable group where such incitement is likely to lead to a breach of the peace'.[2] Germany bans speech that impugns 'the human dignity of others by insulting, maliciously maligning or defaming segments of the population'.[3] And the United Kingdom bans 'threatening, abusive or insulting words' that 'stir up racial hatred'.[4] Regardless of these important definitional differences, in any of these jurisdictions, those who publish online content advocating white supremacy can face criminal prosecution.

The United States of America, in contrast, refuses to ban hate speech. The explanation lies in a 1969 case

1. Roof's manifesto is cited in David A. Graham, 'The White-Supremacist Group that Inspired a Racist Manifesto', *The Atlantic*, 22 June 2015.
2. Canadian Criminal Code (R.S.C., 1985, c. C-46).
3. German Criminal Code, Special Part, Ch. 7, Section 130.
4. Public Order Act 1986, revised by Racial and Religious Hatred Act 2006 to incorporate incitement to religious hatred.

before the US Supreme Court called *Brandenburg v. Ohio*.[5] That case concerned the leader of a local chapter of the Ku Klux Klan, Clarence Brandenburg, who organised a televised rally in which speakers advocated violence against black Americans and Jews. He was arrested by police for violating an Ohio law that banned advocacy of violent crime, but he protested that this law violated his rights under the First Amendment to US Constitution. The US Supreme Court agreed with Brandenburg. By stopping him and his associates from preaching racist violence, the police violated their constitutional rights to *freedom of speech*. The Court reasoned that so long as incendiary speech is not likely to trigger an *imminent* violation of the law – so long, in other words, as there is time for people to reflect on the speech, or even argue against it – it must be allowed, no matter how repugnant it is.

That, in a nutshell, is why the Council of Conservative Citizens was allowed to incite racial hatred online, and why Roof was able to access such hateful content. And that raises a basic question: who is right? Do the Americans have it right in thinking that hate speech should be allowed? Or do the Europeans have it right in thinking that it should be banned?

Note that this stand-off is not restricted to the matter of hate speech. Speech that advocates terrorism also receives much more protection in the US than in other countries. For example, under the Terrorism Act of 2006, it is a crime in the UK to engage in speech that encourages terrorism – including speech that does so only implicitly, by 'glorifying' terrorist attacks.[6] Such legislation would clearly be struck down as unconstitutional in the US, where speakers must be broadly free to advocate terrorism, and listeners free to listen to such advocacy. The stakes couldn't be higher.

Free speech: the philosophical debate

We can use the term 'dangerous speech' to mark out speech that risks inspiring listeners to engage in criminal violence – be it the sort of speech we tend to call hate speech, which operates by fomenting hatred toward some particular group, or direct advocacy of violence, such as terrorism.[7] So our question can be put like this: should dangerous speech be banned, or is protected by the right to free speech?

This is, at root, a question of political philosophy, which requires that we reflect on the moral principles that should guide the decisions of citizens and policy-makers. And unsurprisingly, political philosophers disagree about this question. But the vast majority of political philosophers writing on this question believe that dangerous speech *is* (with perhaps some exceptions) protected by the right to free speech. Here are just a few reasons that show up, in some form or another, in the contemporary debate:

1. A democracy is a society in which the citizens debate and decide the laws for themselves. To truly be a democracy, then, citizens must be free to discuss any idea, no matter how repugnant it may seem.[8]
2. Part of respecting people's autonomy is letting them express who they are and what they think, even if we vehemently disapprove.[9]
3. Treating people as adults means letting them hear bad ideas, so that they can make up their minds for themselves.[10]
4. Laws restricting speech are counter-productive, antagonising citizens and forcing them underground, making them more dangerous.[11]
5. It is dangerous to give the state the power to restrict dangerous speech, since it is likely to misuse that power (either by making mistakes about what is genuinely dangerous, or by abusing the power for political purposes).[12]
6. By permitting the expression of dangerous ideas, we are better able to defuse their danger by arguing against them.[13]

There are, to be sure, other reasons that scholars have offered to explain why freedom of speech should include dangerous expression (such as hate speech), but these are some of the most important arguments.

Three lessons

I don't buy it. That is, I am not persuaded that dangerous speech is properly protected by the right to freedom of expression. In forthcoming work, I take these six arguments (and others) to task – explaining why some are mistaken, and putting others in their proper place. Rather than review the intricacies of my counter-arguments here, I want to sketch three broader lessons for how we should go about *thinking* about this debate. Even

5. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
6. UK Terrorism Act 2006, Section 1, Subsection (3).
7. For the terminology of 'dangerous speech', see Susan Benesch, 'Dangerous Speech: A Proposal to Prevent Group Violence' (World Policy Institute, 12 January 2012).
8. Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016).
9. C. Edwin Baker, 'Autonomy and Free Speech', *Constitutional Commentary*, 27 (2011), 251–282.
10. T.M. Scanlon, 'A Theory of Freedom of Expression', *Philosophy & Public Affairs*, 1 (1972), 204–226.
11. Nancy Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (Princeton University Press, 1998).
12. Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (W.W. Norton. & Company, 2014).
13. For the origin of this idea, see the concurring opinion of Judge Louis Brandeis in *Whitney v. California*, 274 U.S. 357 (1927).

Photographs of the nine victims killed at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, are held up during a prayer vigil in Washington DC on 19 June 2015. PHOTO: WIN MCNAMEE/GETTY IMAGES.

those who disagree with my substantive conclusions, I hope, should find these lessons congenial.

First: *focus on duties, not just on rights.* So much ink is spilled on why those who preach hatred or violence might have a moral right to do so, that very little attention has been given to the matter of whether they have a moral duty *not* to do so. To my mind, it is obvious that people have moral duties not to preach hatred and violence. In the absence of a compelling reason, we owe it to innocent people not to engage in speech that risks inspiring others to harm them. So those who think we have a moral right to engage in dangerous speech need to explain how this squares with the conviction that there is a moral duty *not* to do so. One way to do that is to argue that the moral duty in question should not be enforced by law (for whatever reason). Refocusing the debate around that much more specific question would itself be welcome progress.

Second: *distinguish between moral and legal rights*. To say that someone has a *moral* right to do something implies that we would seriously wrong him by preventing him from doing it. To say that someone has a *legal* right to do something, in contrast, simply means that the law of the land protects his choice to do it or not. This distinction matters. For example, some people think that dangerous speech shouldn't be banned because it gives the state too much power. It follows from this view that the legal right to free speech ought to include dangerous expression, to guard against government abuse. But this is totally consistent with the distinct thought that citizens have no *moral* right to preach hatred and violence; *they* would not be wronged if a trustworthy government preventing them from doing so. Failing to distinguish between moral and legal rights leads to philosophers talking past each other.

Third: *distinguish considerations of principle from considerations of strategy.* One of the central features of the American position on dangerous speech is its insistence that we should respond to dangerous speech by arguing against it, not by banning it. It may well be that counter-speech, rather than criminalisation, is a more effective strategy. But it is important to see that one can endorse this claim while still insisting that the moral right to free speech does not include dangerous speech. Crucially, one can insist that dangerous speech is not morally protected while simultaneously *condemning* efforts to criminalise dangerous speech. The deep questions of moral principle leave open the issue of what the appropriate strategy is.

That last insight points the way forward. Even if we disagree about whether dangerous speech is or is not protected by the moral right to free speech, we can nevertheless agree that criminalisation is an ineffective strategy. This insight is lost on most scholars engaged in the contemporary debate, but it opens up the possibility of an engaging research agenda on counter-speech. What are the most effective ways of combatting dangerous ideas – in the streets and online? Who, in particular, should be expected to do what? And how can the state create the conditions for effective counter-speech? It is these questions, I hope, on which scholars of free speech will concentrate in the decade ahead.

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