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# RIGHT TO FREE HATE SPEECH: A DWORKINIAN ANALYSIS

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## ABSTRACT

The constitutions of all the so-called liberal democracies around the world place some restrictions on the free speech of the citizens. Even the right of free speech constitutionally protected through the First Amendment in USA has its own exceptions<sup>1</sup>. The point of debate is what is the line at which any hateful or vituperative speech loses its protection under right to freedom of expression. We shall see this in context of racial discriminatory speech. The context, however, is just for better conceptualisation and the author has refrained from attaching real incidents. Through the jurisprudential analysis given, we will try to answer the question of when, if at all, and to what extent is the restriction on freedom of expression justified in fighting against racism. The paper takes up the views on unrestricted freedom of expression as a necessary element of democracy offered by Ronald Dworkin as the base theory for the problem.

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<sup>1</sup> Kathleen Ann Ruane, *Freedom Of Speech And Press: Exceptions To The First Amendment*, CONGRESSIONAL RESEARCH SERVICE 1-35 (2014).

## I. Introduction

Egalitarian liberals have lived through and experienced many instances where the right to freedom of expression was pushed to its limits, defining them at each point. The instances like internet pornography and hate speech sites and forums, the Skokie case, holocaust deniers, the flat earthers, etc. Ronald Dworkin is one such liberalist who considers free speech to be a constitutive element for equal opportunities. Dworkin contends that the political legitimacy of the laws is only achievable if every citizen has a voice to shout out its opinions. Through the essay we will try to answer the question if the state is justified in imposing laws that restrict freedom of expression and what political legitimacy such laws enjoy in the eyes of citizens. The term hateful speech used in the essay indicates to the speech that can have certain kinds of effects of being hateful or threatening to a targeted group. These speeches can even be a subset of what is generally defined as hateful speech in regular contexts.

The essay opens with giving the context of racist speech in America as the hateful speech being referred to. The next section takes up different jurisprudential stances that can be or can not be used to justify the problem of restriction on free hate speech. The following section delves into the jurisprudential stance taken up by Dworkin that allows no censorship or restriction in any matter with political or moral subject. The subsequent section takes into account the possibilities that arise with the strict application of free speech model. The paper furthers by discussing the two major lines of criticisms taken up by Catherine MacKinnon against Dworkin's theory, which is supplemented by another line of criticism taken up by the author. This is followed by the conclusion of the paper.

## II. Can free speech be racist?

In American context, racist speech falls into the realm of hate speech<sup>2</sup>. The victims of hate speech often lack social standing and are frequently the minority social group. By focusing on racist hate speech, I define the same as speech offensive to a particular individual or group of individuals by virtue of being from a particular race, colour, ethnicity or nation of origin. The African Americans in the USA have faced racist speech while living in their homes<sup>3</sup>, in their workplaces, etc. Those who argue for restrictions on such hate speech base their arguments on the impact it has on the receiving minority. The psychological effects on the victim might be

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<sup>2</sup> SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 8 (1994).

<sup>3</sup>. Rhoda A. Pickett, *Mobile-Area Families Grapple with Race-Driven Vandalism*, MOBILE PRESS-REG. 1A (2002).

as drastic as lower self-esteem<sup>4</sup>. *Racist getting Fired* is a blogpost that celebrates the termination of racist people from institutions. For example, a principal was fired for passing a racist comment in the graduation ceremony of his students<sup>5</sup>. However, the existence of debate around the topic is due to the mixed public response to such posts. The other hand claims that firing an employee violates his right to freedom of speech and that free speech and “dissent” is essential for an operating democracy<sup>6</sup>. So arises the question of when the restriction on free speech can be justified for protecting the minority. Another question that can be entertained is what stimulates the prejudiced to take defence under free speech against retribution for expression of their prejudice.

### III. The Jurisprudential Stance

Ronald Dworkin is a liberalist who considers free speech to be a constitutive element for equal opportunities. We take his views on unalienable right to expression as the base theory to explain restriction of racist hate speech. Utilitarians like Bentham are focused on maximising welfare and see individual rights as selfish as opposed to common interest of the society. Bentham’s utilitarian thought will only allow restriction of hate speech when majority of the society will be against freedom of such hate speech. That is unlikely to happen in a society where the ones opposing the hate speech are mostly constitutive of the targeted minority race. Some interests like right to liberty of thought are too important to be left to utilitarian cost benefit analysis. The positivist analysis might not do justice to this topic as it is excessively difficult to find out which past authorities speak for the people. However, Austin’s speech act theory is taken up to explain the criticism posed to Dworkin’s position by feminist theorist Catherine Mackinnon and further expanded upon by critical race theorists Rae Langton and Jennifer Hornsby. A part of naturalist school sees right to expression as a god given right which must be unalienable, and the other part sees this right as a natural right which must be protected by the State at all costs, but the author chooses to analyse the liberal standpoint, it seeming most relevant to the democratic political institutions and societies in the contemporary.

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<sup>4</sup> MARTIN KAZU HIRAGA, Anti-Gay and -Lesbian Violence, Victimization, and Defamation: Trends, Victimization Studies, and Incident Descriptions, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 109, 109–10 (Laura J. Lederer & Richard Delgado eds., 1995).

<sup>5</sup> H. Hanson, *School principal fired after racist remark about ‘Black people’ at graduation*, THE HUFF POST (May 14, 2015), [https://www.huffpost.com/entry/nancy-gordeuk-fired-racist-graduation\\_n\\_7283774](https://www.huffpost.com/entry/nancy-gordeuk-fired-racist-graduation_n_7283774).

<sup>6</sup> M. Rosenfeld, *Hate speech in constitutional jurisprudence: A comparative analysis*, 24 CARDOZO LAW REVIEW, 1523–1556 (2002).

#### IV. Dworkin's stance on free speech

Ronald Dworkin claims freedom of speech and expression to be the foundation of a democratic society. To understand his argument better let's understand the distinction that he makes between the reasoning that sees institutional role of freedom of speech and a reasoning that holds freedom of speech to be a constitutive element of democratic society. The former view argued by Mills upholds freedom of speech as an element maximising utility in a society. This reasoning suffers from the obvious vulnerability that it in fact can generate disutility, but in disregard of that Dworkin does not consider this claim to be problematic. He just explains that this claim cannot encompass the fundamentality of right of freedom of expression. In his justification of freedom of expression as a constitutive element he clarifies "supposes that freedom of speech is valuable, not just in virtue of consequences it has, but because it is an essential and "constitutive" feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible and moral agents.<sup>7</sup>"

It is not debatable that moral independence is basic to democratic culture as freedom of thought facilitates rights such as right to independent vote. It is also acceptable that freedom of expression is instrumental to such moral agency. However, Dworkin's claim is that free speech is not merely instrumental but constitutive of this moral agency. He argues that such moral agency and choice of independent decision making regarding moral questions is a prerequisite for democracy itself. Freedom of speech grants this choice. Dworkin argues that this moral agency is the foundational basis for the equality that democracy aims to achieve. This claim is twofold. For a viable Democracy, firstly, the individuals must themselves be moral agents (or have the innate ability to be one) and secondly, the government should treat them so.

Mere citizenship into the society that protects free speech does not guarantee an individual the moral agency. The first part of the claim proposes that it is up to the individual as to how, and if at all, and to what extent does she want to engage with the subjects and concepts of the society to be a moral agent. That is, it depends on her choice of participation and expression as to how much of a moral agent she is. Dworkin's second part of the claim involves the government to acknowledge this moral agency by not restricting its expression no matter how, if at all, and to what extent is this agency exercised. This requires no censorship and restriction in any matter with political or moral subject. Any curtailment of this freedom means an insult to the citizen and denies that they retain the moral responsibility to hear the morally relevant

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<sup>7</sup> RONALD DWORKIN, *FREEDOM'S LAW* 200 (Oxford: Oxford University press, 1996).

opinion of other and disseminate their own opinion therefrom. When Dworkin connects moral agency to freedom of expression, then any limitation on freedom of speech would mean breach of this moral agency, thus infringing the democratic ideals itself and this must not be tolerated<sup>8</sup>.

## V. How does the phenomenon in the real world interact with these theories?

It is important to note at this juncture that Dworkin is not oblivious to the rights of the minorities or violation thereof due to the hate crimes that could be birthed due to uncontrolled speech. He agrees that it is the duty of the law to protect the vulnerable from discrimination, from unfairness and inequality in employment or education or housing ... for example.”<sup>9</sup>. Like all proponents of equality, he recognizes that adoption of such laws will always be contended by some who favour discrimination. Usually, the majoritarianism enjoyed by these laws in a democracy is sufficient for its legitimacy but Dworkin doesn’t believe so. He contends that each citizen must not just have a vote but also a voice<sup>10</sup>.

The effect of emphasis on moral agency is so that each citizen must have a fair opportunity to express his attitudes or opinions or fears or sense of morality, not just in hope of influencing others’ opinions but also to reassure his status as an active moral agent, rather than being a passive bystander or victim to the newly enforced laws. Thus, free speech and consequences thereof, according to Dworkin are a cost for political legitimacy of laws<sup>11</sup>. Legitimate laws against violence or discrimination can be made by letting the racists be considered in the process through their freedom of expression and then legitimize the law through majoritarianism. To understand the application of “political legitimacy through moral agency” proposal of Dworkin on the contemporary free speech debate we must understand the two sorts of laws, that Dworkin categorizes as upstream and downstream laws, that will be talked about. The upstream laws are laws that restrict the expression of hate speech and the kind. The downstream laws protect the people that are supposedly protected by the upstream laws – i.e., the laws against discrimination on the basis of race, against racial violence, etc. So, for example, the legitimacy of the downstream laws on discriminatory bigots will lose its

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<sup>8</sup> A. Levin, *Pornography, Hate Speech, and Their Challenge to Dworkin's Egalitarian Liberalism*, 23(4) PUBLIC AFFAIRS QUARTERLY 357-373 (2009).

<sup>9</sup> RONALD DWORKIN, Foreword, in *EXTREME SPEECH AND DEMOCRACY* v-ix (Ivan Hare and James Weinstein eds., 2009).

<sup>10</sup> Id at vii.

<sup>11</sup> Jeremy Waldron, *Lecture 3: Libel and Legitimacy*, HOLMES LECTURES: HARVARD LAW SCHOOL 1-20, 4 (2009).

legitimacy if the discriminatory bigots were not allowed to convey their views on such laws “upstream”.

A refined version of the legitimacy argument would be a better standpoint to judge the laws made by the liberal democracies of this age. If only the slanderous and politically irrelevant substance of the hate speech is regulated it would not destroy or impair the political legitimacy of the downstream laws. Weinstein also contended this line of thought. He was afraid that absolute restriction on hate speech would also penalise non-abusive expression of bigoted views and hence undermine the legitimacy of laws as proposed by Dworkin<sup>12</sup>.

A strict application of a free speech model protecting all extents of hate speech might result in depriving the minorities protected by downstream laws of an adequate and relevant political voice. This drawback of silencing through free speech is further discussed in the next section. For citizens facing such discrimination, the legitimacy of law fails as they would not be willing to surrender to or accept these deprivations as a way of being. These deprivations will also undermine the “upstream” mechanism in rendering the deprived minorities to not look at the “downstream” laws as legitimate ones.

The fallacy underlying the Legitimacy Argument is that it assumes that societal conditions stay unchanged that make an ideal democratic procedure possible when they do not. In fact, the state can be placed in a position where certain people would not be able to participate entirely in political deliberation, whatever course of action it takes with regard to the regulation or non-regulation of hate speech. In such circumstances, there are clear reasons not to regulate hate speech on democratic grounds, but they are not always considered reasons, and there are also reasons to regulate hate speech that in certain cases may outweigh them<sup>13</sup>. The argument proposed by Dworkin would hold in the real world if hate speech could not undermine democratic legitimacy. The restrictions on hate speech are reasonable if they operate to ensure that all citizens enjoy equal opportunity of participation in public discourses. Therefore, I agree that if the hate speech undermine equality in nature of democratic voice then it should be restricted.

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<sup>12</sup> James Weinstein, *Hate Speech Bans, Democracy and Political Legitimacy*, 32 CONSTITUTIONAL COMMENTARY 527, 561–562 (2017).

<sup>13</sup> Andrew Reid, *Does Regulating Hate Speech Undermine Democratic Legitimacy? A Cautious ‘No’*, 26(2) RES PUBLICA 181, 181 (2019).

As any restriction on free speech limits effective participation in the political process and poses a risk that the state might overdo in its duty to enforce these norms, thus, any specific extent of restriction or one particular framework is not suggested to be implemented. Such decisions must be taken on a case to case basis that weighs the reason of restriction on hate speech and that of absence of restriction against each other in a political scenario. However strong my beliefs in favour of restriction of hate speech may be, I want to draw a caveat in always siding with this side of the argument. Those who are silenced through this process, even when there is a good justification, suffer through social and political stigma. Most of the democratic societies do not live up to its ideal definition. The racist speech in this context draws attention to the unrepresented group with no effective political voice. Even though there are justifications to quiet down the racist hate speech regarding the minority and weaker sections of the society but the fact that these groups gain attention is because a sizable portion of them feels unrepresented in the political discourse often lacking political power to do so. More generally, the critics of legitimacy argument have also made too idealistic claims about better articulated political views in case of restriction of certain kinds of speech. We, by which I mean the political institutions of the state, must see this question as a trade-off between the benefits and harmful effects of restriction of free speech as both have the potential to undercut the legitimacy of laws. If we believe the legitimacy argument then by infringing the moral agency of the citizen the damage done to the legitimacy of laws and the idealistic democracy is much more than done in case of censorship and restriction of hate speech. The limitations to this thought are elaborated in the next part of the paper.

## **VI. Criticism of application of Dworkin's version of free speech**

There are two critical arguments offered by Catherine MacKinnon against the Dworkin's theory of free speech<sup>14</sup>. These arguments were made in context of hate speech against minorities in general and pornography as hate speech against women, but they very well apply to the focused case of racist hate speech. The first argument is that of Subordination wherein Mackinnon asserts that state's protection and tolerance towards hate speech in the interest of liberty leads to a compromise in the equality interest of the targeted minority race. In context of jurisprudence of the USA, MacKinnon claims that Dworkin's analysis privileges the right to freedom of expression guaranteed under First Amendment over the right to equal protection to the minorities under Fourteenth Amendment and that such privilege is rooted not on legitimate

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<sup>14</sup> CATHERINE A. MACKINNON, ONLY WORDS, 71-73 (Cambridge: Harvard University press, 1996).

right but the racist cultural power dynamics that have been operative in the past. Mackinon argues that by mere utterance of hate speech against minority race, a view is generated against the group targeted by such utterance. The minority then deals with the world in which such view is prevalent and that leads to its subordination. The works of Langton and Hornby explain this better by using Austin's speech act theory<sup>15</sup>. The acts of hate speech can be thought of as an illocutionary speech acts that change the state of affairs in the world by its mere utterance, like the effect of words "I do" in a marriage ceremony creates a legally binding marriage.

The second argument presented by Mackinon is that of silencing. This argument entails that protection of freedom of expression of some threatens the freedom of expression of others. It can be so that the effect of racist speech is so widespread and powerful that it automatically "silences" the minorities in the sense that they might not be even trying to deny such speech, or their denials would be totally disregarded or severely misconstrued by the society in the light of the more powerful hate speech. Thus, of course, while minority race is technically as free as others to express their opinions, but the background of their speech is dictated by the racist, more powerful speech, creating a subordinating position for them in the society and furthering that oppression as their speech will be not taken seriously and hence, equivalent to being silenced, due to the subordinated position they are in.

Apart from these, another criticism that I advance for the Dworkin theory is that the moral agency of all individuals if only accepted by the state will not lead to the equality Dworkin thinks it would. The moral agency of each individual has to be respected by the fellow individuals to make freedom of expression the cornerstone of equality. This mutual respect might be undermined due to hate speech involving racist comments, as individuals might see a particular group to be lacking the deliberative capacity that they themselves possess. Even the most liberal minded citizen might strive to influence the views of others without taking into consideration the merits of the opinion presented to them by others. Respecting the moral agency of the fellow citizens also becomes a requisite in maintaining Dworkin's view of free speech as constitutive of equality. The state might respect the moral agency of the citizens but the task to force citizens to respect each other's moral agency is not only illiberal and requiring coercive measures, but also impossible to achieve by the state.

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<sup>15</sup> Rae Langton & Jennifer Hornsby, *Free Speech and Illocution*, 4(1) LEGAL THEORY 21, 21-37 (1998).



## **VII. Conclusion**

By analysing the gaps in application and the criticisms it seems that we cannot constitutively tie moral agency with freedom of expression as in some cases the exercise of freedom of expression leads to denial of moral agency to its victims. We also saw how non-regulation of hate speech can lead to decreasing legitimacy of the democracy as against argued by Dworkin that its regulation would lead to decreased legitimacy. Dworkin fails to interact with power dynamics between the hate speech speaker and target groups in his understanding of freedom of expression. This paper actually sides with those that believe that restriction of hate speech will lead to increased democratic legitimacy of laws. Dworkin's arguments fail to consider that free speech is not free of its consequences and can impede equality in some cases. Protecting racist speech in non-ideal circumstances that exist in the real world restrict the effective political voices of the target groups. I have argued through the paper that some laws restricting hate racist speech do not frustrate legitimacy of downstream laws and enhance it in some cases, but at the same time the paper fails to offer an understanding as to when and to what extent should hate speech be restricted. In author's defence, the Dworkin analysis is used to reflect upon a framework for interpretation of relationship between hate speech and legitimacy and it must be used in the specificity of context to determine apposite restriction on a case-to-case basis maximising such legitimacy.