A COMPARATIVE VIEW ON THE RESTRICTIONS OF FREE SPEECH IN THE UNITED STATES AND EUROPE

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The freedom of speech is the right to express opinions and ideas without the fear of punishment and censorship. However, while this may be an essential right there are certain forms of speech that are restricted in the United States and Europe. Within the U.S., the freedom of expression is protected through the First Amendment and a stronger emphasis is placed on maintaining the freedom of expression by implementing a more categorical approach to regulating free speech, specifically categorizing and restricting speech that is deemed to be unprotected. In contrast, through Article 10 of the European Convention on Human Rights ("ECHR"), Europe employs a broader approach to restricting speech, balancing the value of the speech against its societal costs so that only the collective view of accepted speech is protected. This commentary explores the distinction between these two standards and analyses their benefits in protecting free speech as well as their possible detriments in chilling it. Part I examines the more categorical approach that the U.S. implements in restricting free speech, focusing on three main forms of unprotected speech: those that incite imminent danger, true threats, and fighting words. Part II explores Europe's more broad approach to protecting free speech and how it focuses on enforcing what is societally acceptable. Part III analyses the benefits and detriments of both standards, deducing which standard allows for the most discourse that would enable a better cultivation of valuable speech.

* J.D., Rutgers Law School, May 2019.

I. THE RESTRICTION OF SPEECH IN THE UNITED STATES

Within the U.S. Constitution, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] However, this protection is not guaranteed to all types of speech. For instance, speech that incites imminent danger, true threats, and fighting words are all types of speech that may fall outside the protection of the First Amendment.

Fighting words are defined as words that are used with the intent to incite hatred or violence from their target.[2] These words fall under the "fighting words" doctrine, which was first seen in *Chaplinsky v. New Hampshire*. In *Chaplinsky,* the United States Supreme Court found that a state statute prohibiting a person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," did not violate the First Amendment.[3] In forming this opinion, the Court found that the statute only forbade expression and speech that had a direct tendency to cause acts of violence by the person whom the remark was addressed to.[4] Additionally, the Court found that such words had no essential part in any exposition of ideas and had such a "slight social value as a step to truth" that any benefit that may be derived from them was outweighed by the social interest to maintain morality and order.[5] Thus, the Supreme Court held that, 'fighting words,' which by their very utterance "inflict injury or tend to incite an immediate breach of the peace," are among the "well-defined and narrowly limited classes of speech," whose prevention and punishment have never been thought to raise any constitutional issues.[6]

However, while this doctrine has been upheld, it has also been narrowed in its application. In *Cohen v. California,* the United States Supreme Court found that a state penal code that prohibited "any offensive conduct" that is "maliciously and willfully disturbing the peace or quiet of any neighborhood or person," violated the First Amendment.[7] In *Cohen*, the Supreme Court held that wearing a jacket that said "Fuck the Draft" to protest the Vietnam War and its draft was not considered fighting words since there had been no "personally abusive epithets" that were directed at a particular person, and so the speech did not constitute

1. U.S. CONST. amend. I.
2. Cohen v. California, 403 U.S. 15, 20 (1971).
3. Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).
4. *Id.* at 770.
5. *Id.* at 769.
6. *Id.*
7. *Cohen*, 403 U.S. at 15–26.

an incitement of an immediate breach of the peace.[8] Additionally, even though the words "Fuck the Draft" could be seen as crude, and the public had the ability to see such words, the viewers of the jacket actually had the ability and freedom to easily look away and not see the offensive language.[9] Thus, no one was powerless to avoid the speech. Therefore, it was held that the U.S. government can only regulate discourse, and prevent others from hearing it, if a substantial privacy interest has been invaded in an essentially intolerable manner, such as making one powerless in avoiding the objected upon speech.[10] However, the sensibilities of the public do not significantly justify regulating such speech, especially in cases like *Cohen* where the speech can be easily avoided. Additionally, expletives do not always fall outside Constitutional protection since such language could be seen as normal speech to some and not offensive. Thus, the unprotected "fighting words" category can include explicit and profane words, but only if the speech conveys with it some type of indication or provocation of violence or public disturbance at a particular person or group.[11]

The holding in *Cohen* illustrates the importance of self-expression of emotion. The right to the freedom of expression under the First Amendment is very broad and powerful, created to remove governmental restraints from public discussion, allowing valuable speech to be cultivated and protected. Additionally, while offensive speech may contain little social value, it could create a catalyst that cultivates valuable speech by sparking discourse. Therefore, as in *Cohen*, states may be required to tolerate certain offensive speech in order to limit the risk of suppressing ideas and discussion. However, while the protection of ideas and discussion is an essential part of the First Amendment, such protection is limited in other areas of speech.

Consequently, speech that is likely to incite imminent lawless action has also been held to fall outside the protection of the First Amendment. This incitement category of unprotected speech was analyzed in *Brandenburg v. Ohio*, which illustrated the importance of differentiating between advocacy, which may be protected speech, and incitements to "imminent lawless action," which is not protected by the First Amendment.

In *Brandenburg*, a leader of the Ku Klux Klan in the State of Ohio was arrested for violating an Ohio statute that criminalized advocating

8. *Id.*
9. *Id.*
10. *Id.* at 22.
11. *Id.* at 16.

violent ways to bring about social and economic change.[12] In this case, a news reporter, whom the Klan leader invited to a Ku Klux Klan rally, filmed the leader burning a cross and uttering speech that was derogatory to African Americans and Jews.[13] Conversely, the Supreme Court held that the Ohio statute violated the First Amendment and found that the government could only forbid speech that advocated the use of force or violence if that speech were directed and likely to incite as well as create imminent illegal activity.[14] In *Brandenburg*, the Klan rally was a private event that advocated the need to commit violence in order to achieve a political goal.[15] This form of advocacy was distinguished from actually preparing and encouraging a group to act and commit violence. Therefore, the Supreme Court found that since the Ohio statute did not differentiate between speech that merely advocated violence and speech that actually incited it, the statute was over-inclusive and violated the First Amendment.[16] This ruling illustrates that there are different levels of risk between advocating for violence and actually causing the violent act that is being advocated. Therefore, advocacy for the use of violence or criminal activity will not get First Amendment protection if the advocacy is directed to inciting or producing imminent lawless action and such advocacy is likely to incite or produce such action.[17]

The holding in *Brandenburg* illustrates a contrasting need to have both freedom of expression as well as the need to ensure public safety and morality. However, one unresolved complexity exists regarding this incitement test, and that is the scope of its coverage. While the *Brandenburg* case clearly shows that the incitement test can apply to a state's criminal sanction of speech that is considered advocacy, there is a divide on whether the test would apply to non-criminal sanctions. Nevertheless, the incitement test in *Brandenburg* showcases that the context, intent, and resulting imminent violent or illegal conduct will weigh greatly in whether or not certain speech will get First Amendment protection. Furthermore, while speech that is likely to incite lawless action does involve some level of advocacy for violence, this category of unprotected speech is separate from another category of unprotected speech called "true threats."

"True threats" are statements that involve some type of threating communication, including intimidation, that are not made in jest or

12. Brandenburg v. Ohio, 395 U.S. 444 (1969).
13. *Id.*
14. *Id.* at 449.
15. *Id.* at 448.
16. *Id.* at 449.
17. *Id.* at 447.

hyperbole and carry with it an intent to commit an act of unlawful violence to a particular individual or group of individuals or to place the victim in fear of bodily harm or death.[18] This category of unprotected speech was most strongly expressed in *Virginia v. Black*, where the United States Supreme Court found that a state may criminalize cross burning as long as it can be proven that the act was intended as a threat and not as a form of symbolic expression.[19] The case of *Virginia v. Black*, involved two cross burnings, one at a Ku Klux Klan rally, and another in front of an African American's home.[20] The Court found that while cross burning may have been an expressive act, it could be banned as a true threat when it is done with the intent to intimidate.[21] Intimidation includes directing a threat to someone with the intent of placing the recipient in fear of bodily harm or death, and since the act of burning a cross with the intent to intimidate has historically signaled impending violence, it could therefore be considered a true threat in those circumstances.[22]

Consequently, the Supreme Court held that the intent to intimidate cannot be inferred from the actual act of burning a cross because not all cross burnings are done with the intent to intimidate and can instead be done to represent a shared ideology.[23] Thus, a person does not need to actually intend to carry out a threat. Instead, it must be proven that the speaker subjectively intended to communicate a threat, evoking fear of bodily harm in the one listening, in order for it to fall under the unprotected category of a true threat.[24] The importance of proving intent, instead of actually carrying out the threat, centers on the view that the threat itself still harms the recipient, even if the threat was not actually carried out. Threats are therefore seen as being bad acts on their own, not an unacted upon harmful act. Thus, a person will not be protected for making a speech that was made with the intent to harm if a reasonable person could foresee that the threating words, in the context given, would create fear of harm in the recipient. True threats therefore require not only the intent to harm but also the intent to harm in the particular circumstance in which they were said.

Accordingly, true threats, fighting words, and speech that incites imminent lawless action are all forms of speech, whether verbal or written, that involve words or actions that could harm the recipient of

18. Virginia v. Black, 538 U.S. 343, 347 (2003).
19. *Id.* at 358.
20. *Id.* at 348.
21. *Id.* at 343.
22. *Id.* at 358.
23. *Id.*
24. *Id.*

the communication by inciting or threating violence on the targeted listener. One criticism that could arise from the criminalization of these types of unprotected speech is the fear that it could chill free speech. If people fear being punished for the things they say, they may refrain from adding more valuable speech to society, which goes against what the First Amendment is meant to protect and cultivate. However, since all these categories of unprotected speech seem to focus on restricting speech that carries with it the intent to do and incite harm, the words actually offer little valuable expressions of speech and ideas. Thus, both the harm that may occur from allowing these exceptions to be protected as well as the need to uphold the morality of society outweigh the need to protect such speech and prevent the fear of chilling free speech; this provides a legitimate reason why such speech should be restricted.

Additionally, while these unprotected categories of speech may be punishable, there are limits on what is unprotected, lowering the risk of chilling free speech. Each of these unprotected categories of speech seems to be limited to speech that has the intent and imminency of producing harm. This shows that the context of the situation must also be taken into account to help determine whether such speech will fall into one of these unprotected categories. This is important because while it may be okay to ban certain forms of speech that will likely create violence or harm to others, the right to free speech still requires discourse, so that valuable forms of speech can be cultivated. Furthermore, in order to have discourse people must be able to feel safe enough to share their views, even if they are unpopular, without the fear of being punished. Therefore, these categories of unprotected speech cannot be over-inclusive, and so the limitations implemented onto these categories helps protect against the risk of chilling free speech. Conversely, having unprotected forms of speech is important because while the freedom of speech is a central foundation within the U.S., not all speech should be allowed without punishment, especially speech that is likely to incite and cause harm to others. Accordingly, even though there exists an opposing need to maintain the safety of society as well as cultivate free speech, the U.S. seems to allow a broader protection of speech with more narrowly defined limitations compared to other areas in the world, such as Europe.

II. THE RESTRICTION OF SPEECH IN EUROPE

In Europe, freedom of expression is protected by Article 10 of the European Convention on Human Rights ("ECHR"). Under Article 10, everyone has the right to freedom of expression, including the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[25] However, these rights are restricted by Article 17 of the ECHR, which states that no "State, group or person has the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms" set forth in the ECHR.[26] Accordingly, it has been held that any "remark directed against the Convention's underlying values" is removed from the protection of Article 10 by Article 17.[27] Therefore, in deciding whether certain conduct falls within the scope of Article 10 of the Convention, an assessment must be made of: the nature of the act or conduct in question, particularly in its expressive character seen from an objective point of view, as well as the purpose or the intention of the person performing the act or carrying out the conduct in question.[28]

Consequently, through Article 17, certain restrictions have been found to fall outside the protection of Article 10. These restrictions include actions that are lawful, necessary, and proportionately needed to: "protect national security, territorial integrity or public safety, prevent disorder or crime, protect health or morals," as well as, "to protect the rights and reputations of other people, prevent the disclosure of information received in confidence, and maintain the authority and impartiality of judges."[29] Thus, in Europe this right to freedom of expression can be restricted as long as the value of speech is balanced against the societal costs, and the societal costs are found to be greater. This rationale follows a more "free-floating test" where free speech is seen as important but not absolute and, instead, must be balanced against other important societal values.

For instance, in *Handyside v. United Kingdom*, the European Court of Human Rights stated that the freedom of expression "is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[30] *Handyside*

25. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950 [hereinafter "ECHR"].
26. ECHR, art. 17.
27. *Id.*
28. Vural v. Turkey, App. No. 9540/07 § 54 (Eur. Ct. H.R. Oct. 21, 2014).
29. ECHR, art. 10.
30. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

v. United Kingdom involved a book publisher who published a book called "The Little Red Schoolbook," which contained information about sexual subjects, such as pornography, abortion, and illegal drug use.[31] Since the publisher stated that his book was intended for children ages 12 and above, copies of the book were seized and ultimately destroyed by the British authorities pursuant to the Obscene Publication Acts.[32] The publisher argued that such action violated his right to freedom of expression under Article 10 of the ECHR.[33] However, the Court held that the government's actions were justified in pursuance of the protection of the rights of others, in this case children, and was therefore a permissible restriction on speech.[34]

This case demonstrated the balancing approach Europe takes in determining what speech should be protected. In this case, the Court balanced whether the book weighed more in favor of being for the "public good," which would protect it, or if it weighed more in favor of regulation.[35] The Court found that the book was obscene since it was intended for children who were at a critical age in their development and such material could have a negative impact on their development, potentially encouraging illegal activities such as underage sex and drug usage.[36] Thus, the book was held to be unprotected speech and was destroyed.[37] Furthermore, the Court stated that freedom of expression "constitutes one of the essential foundations of a democratic society" and is "one of the basic conditions for its progress and for the development of every man."[38] However, the Court held that even though the publisher exercised his freedom of expression by making this book, he did not undertake the "duties and responsibilities" attached to the freedom of expression in a democratic society, since the book was weighed as being "illicit and dangerous" to its viewers.[39] Thus, this case showcases the European view that even though freedom of expression may apply to inoffensive and favorably accepted speech, it can also apply to offensive and shocking speech as well, as long as the shocking speech weighs more favorably toward being for the "public good" and not as a danger to the viewer and society.

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

III. COMPARATIVE ANALYSIS

Europe's balancing or "free-floating test" approach, which broadly limits speech that does not conform to the perceptions of the general public, contrasts with the U.S. approach to regulating speech. The U.S. places a stronger emphasis on maintaining the freedom of expression by implementing a more categorical approach to free speech, specifically categorizing, limiting, and singling out what is not considered protected speech, such as: speech that incites imminent danger, true threats, and fighting words. Additionally, the U.S. Supreme Court has specifically rejected the notion that a simple balancing test, which balances the value of the speech against its societal costs, should be used to decide whether or not speech should be unprotected.[40] One reason for this conclusion is that the First Amendment already strongly tilts this balance in favor of free speech. Thus, Europe's balancing standard concerning free speech seems lower than the U.S. standard, which specifically restricts the government from prohibiting an expression of an idea simply because society finds the idea offensive, both morally and socially.

Furthermore, the weight Europe puts on protecting the collective view of accepted speech strays somewhat from the U.S. standard, which follows a more individualistic approach where personalized views or speech, on their own, cannot be prevented from occurring. In fact, in order to prohibit speech within the U.S., the speech would have to fall under one of the unprotected categories of speech, such as speech that is likely to incite harm, true threats, and fighting words. Additionally, in the U.S., the intent of harm is not enough for harmful speech to be restricted and punishable; there has to also be some type of imminent harm that is likely to occur in the context of the situation, or some type of substantial privacy interest invaded in an essentially intolerable manner. Thus, Europe seems to have a broader definition of what can be restricted speech, while the U.S. view is more narrowly defined and limited. This distinction illustrates how the U.S. has a strong belief in cultivating free speech and the marketplace of ideas. The marketplace of ideas is a rationale that the truth will emerge from the competition of ideas when there is free and transparent discourse. Thus, through competition, the inferior ideas will be removed by the more superior views, cultivating valuable speech.

Consequently, free and transparent discourse is important in the U.S. because even bad ideas are deemed to help cultivate valuable speech. This contrasts with the European view that even vile ideas can

40. United States v. Alvarez, 567 U.S. 717 (2012).

be regulated and restricted. However, both rationales have beneficial and undesirable effects. While the U.S. rationale allows for more discourse, it puts a larger burden on ordinary citizens to police objectionable speech that falls outside the specific unprotected categories of speech. For instance, the U.S. has created politically correct words that are to be used concerning certain races, genders, and sexual orientations. Thus, if a person says certain words that are not politically correct, the result could be mass social judgment and controversy in the public domain, which helps bar the words society as a whole deems to be unfit.

In comparison, the European restriction on harmful speech allows the burden on the public to be lifted and instead places it on the government. However, this European rationale can be stifling since it limits the ability to have transparent discourse, which is an essential component in creating valuable speech that can benefit society. Thus, although vile speech can be horrific, such speech may create conflicting ideas, and these ideas are an essential part of the cycle that allows valuable speech to be born. Additionally, the European rationale could go beyond mere hate or harmful speech and actually restrict a range of political views just because they may promote speech that is not favored by society. Thus, repressing these types of speech could stint society's ability to grow, learn, and become more tolerant.

Therefore, while it is important to silence speech where there is intent and a significant chance of creating harm since the value of that speech is diminished by the need to maintain the safety of society, such restrictions must not be over-inclusive as is seen in Europe. Consequently, while the European view of free speech has its merits in restricting harmful speech, it is a rationale that increases the risk of chilling free speech, which is a result that contradicts what free expression is all about in the U.S. Therefore, within the U.S., the freedom of expression under the First Amendment and the specific categories of speech deemed to be unprotected help to cultivate discourse, making more valuable speech present and available to society as a whole.