

Transatlantic Forum Session #1 – Minutes

Topic – Making a Rioter: Social Media's Role in Planning and Inciting Civil Unrest

Speaker: Dr. Alexander Heinze (University of Göttingen)

Discussant: Dr. Marie-Michelle Strah (John Jay College)

Rapporteur: Joseph Shiovitz

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Presentation by Dr. Alex Heinze

The speaker uses Alex Schubart and Donald Trump as case studies and provides a brief account of their roles in connection to violent riots. Then, he compares today's form of protests with acts of terrorism related to hierarchy and the degree of formality (or informality) of the structural order. He identifies 6 premises to support his overall argument:

1. Speech is regulated and should be regulated in certain circumstances.
2. Violent protests cause harm and/or endanger certain legal goods or interests.
3. It is morally permissible for the state to suppress expression to prevent the harms it risks inspiring.
4. Between a speech act and violence (harm) lies the element of causation.
5. Free Speech Protections Have the Purpose of Ensuring Free Discourse.
6. Mobs are not responsible as a group but by their individuals. Contagion fuels social movements

The speaker identified free speech as the underlying source for laws protecting protest. He discusses the competing nature of some human rights, for example the right to free speech and the right to be protected from violence, and calls for a counterbalance between protecting speech that advocates violence and protecting the potential victims of that violence. He makes a reference to the imminence test and the US inclusion of inciting wrongdoing within the protected scope of free expression.

The speaker suggested the moral duty to refrain from inciting violence as a limitation upon free speech. He cited Richard Wilson's 'crossing the Rubicon' metaphor to support the argument that drastic remarks made by Trump leading up to the January 6th violence cannot be ignored. He deconstructed the popular argument that dangerous speech cannot have a causal role within liberal democracies and introduced the relevance of group dynamics and hierarchy when analyzing speech that incites violence. He claimed that incitement can be understood as conspiracy under certain circumstances, which would bring forth the relevant application of conspiracy law.

The speaker raised two questions. Is the organizer of a riot to be held responsible for the rioting? Despite not holding a bullhorn in the crowd, Trump's hierarchical position in the group granted him control over the group. Does this control render him responsible for the group's actions? He proceeded to discuss causation and asked whether Trump's remarks triggered a legal duty to act. He concluded that political speech protection is not absolute due to the normative causation of control.

Response by Dr. Marie-Michelle Strah

Dr. Strah introduced the themes of her discussion including multiple components: digital citizenship and cyber components; a more global context relative to human rights, electoral violence and specific elements of online speech; the speech-act, information disorder and group psychology and cybercriminology. She spoke against the characterization of free speech as saying and doing whatever we want and pointed out that governments regulate speech all the time. She asserted that governments have a moral duty to protect other rights besides speech, such as the right to free and fair elections guaranteed within the UDHR, and she mentioned various existing speech regulations. She claimed that the protected stature of one right is not prioritized over another.

Then, Dr. Strah cited Kaminski's argument that inciting riots must be reconsidered for the age of flash mobs. She claimed online communications breed extremism and echo chambers and that the velocity of information leads to rapid mobilization. She discussed the 2017 UN Joint Declaration on Freedom of Expression and "Fake News," and also brought up the competing nature of rights, such as between the right to protest and the right to free and fair elections, when the intention of the protest is to disrupt free and fair elections.

Dr. Strah talked about the relevance of the capitol rioters' racial demographic and the spike in social media activity before and after the event. She mentioned the arrest of Douglass Mackey who mobilized a misinformation campaign to prevent African Americans from voting, and then compared direct and indirect forms of inciting violence, suggesting that the online nuance went beyond the classic 'man in the movie theatre' motif. She discussed transnational organizations using network campaign models, cyber-criminal networks, relying upon an influencer network sometimes used unwittingly, and the notion of corporate responsibility and liability. Finally, she asserted that Facebook has a deep understanding of the hate speech on its platform and referenced Facebook's hate index.

Discussion

Q: You claim that the free speech doctrine risks sacrificing free speech value. As in, doctrine sacrifices values. Can you talk more about the marketplace of ideas in free discourse?

Dr. Heinze: Contrasts regulations and markets; talks about different approaches to discourse; considers that within the marketplace of ideas, regulation permits ideas to flourish while the absence has a stifling effect.

Dr. Strah: Discusses not regulating digital platforms in the US; some types of speech drowning out others; asks, is tolerating speech also about tolerating ideas?; comments on how social media censorship plays a role in people's ability to discern for themselves.

Q: You mentioned in your paper and in your talk that hierarchy and organization distinguish violent protests from terrorism. In your view, what light does the Supreme Court decision in *Holder v. Humanitarian Law Project* shed on this distinction?

Dr. Heinze: Groups do have more hierarchy than I originally thought. Other elements also distinguish group violence from terrorist organizations. Hierarchy is not the distinguishing factor between group violence and terrorism.

Q: I have the impression that all of these arguments like "marketplace of ideas", "mature democracy", etc... rely implicitly on a certain level of moderation in the exchange of opinions and feeling of responsibility in the higher echelons of the hierarchy.

Dr. Strah: The marketplace of ideas as a liberal framework relies on positive intent from all individuals involved and requires a certain level of moderation, whether formally or not. Many groups moderate themselves and have specific rules of engagement. Moderation is considered to be valuable among groups. With man on the corner, only the people present would hear the speech. But online, even something said 5 years ago can be recycled.

Q: If incitement to violence is not protected by the First Amendment and it's being done so publicly on social media, why is it so hard to hold those who incite violence in the US accountable?

Dr. Strah: These are high complexity incidents; Social media lends itself to high complexity; The corporate element also makes it harder to gather evidence, such as requiring subpoenas; There is the question of their responsibility.

Q: Would we have done better in Germany?

Dr. Heinze: Incitement needs to be in itself a wrongful act; We cannot sue everyone and hold everyone criminally liable.

Q: You mentioned that social media is being negligent to hate speech in order for more active users. However, how can we specifically criminalize social media platforms and young social media users who also express hate speech as a "joke" through memes or videos?

Dr. Strah: That is being debated not only from the standpoint of decriminalization but also from issues of anti-trust; Once hate speech is online, it is online, and takes on an indirect element and reaches unintentional audiences.

Dr. Heinze: What is a fact and what is an opinion? Is it still so easy to separate considering jokes, memes, and other online tools? The principled approach would be to ask if someone has been violated. Is the joke element more grave than the rest?

Dr. Momsen: From a criminal law perspective we would need to ask how serious it is, or is it just a joke?

Q: Regarding the January 6th insurrection, law enforcement wasn't prepared for this action. 1. Why wasn't the online presence of these extremist groups monitored by social media platforms? 2. Facebook continues to look to maximize their growth, but won't control the dangerous online talk that sometimes results in violence or death. What will it take to make online platforms like Facebook a safe environment for people to communicate?

Dr. Strah: The online presence of extremist groups was being monitored. A better question is about the effectiveness of the threat and risk factor. What is a true threat? Distinction in monitoring between group violence vs extremist terrorist groups? US laws must change, including the current liability shields.

Q: How can international human rights law be tailored to social media platforms that use end to end encryption to make them virtually untraceable to even the platform they operate under? What sort of regulatory standards can be applied here in terms of free speech and privacy?

Dr. Heinze: Hopefully the Transatlantic Forum will shed further light on this matter. Human Rights Law is very broad, and may not always be the most practical. We need a harmony between freedom of speech and freedom of assembly.

Dr. Strah: Those developing speech laws back then did not conceive of the nuances in today's internet environment.