

Vincent Munoz ([00:00](#)):

I think what we need to do is explain how our principles of free speech, free inquiry will help serve the cause of justice.

Betty Friedan ([00:12](#)):

The First Amendment, the constitutional freedom of speech and freedom of conscience that is the bulwark of our democracy.

Bettina Aptheker ([00:22](#)):

There was a passion in what was being said, affirming this what people considered a sacred constitutional right, freedom of speech and freedom of association.

Michelle Deutchman ([00:34](#)):

From the UC National Center for Free Speech and Civic Engagement, this is SpeechMatters, a podcast about expression, engagement, and democratic learning in higher education. I'm Michelle Deutchman, the Center's Executive Director and your host. Since SpeechMatters launched one year ago, we have spent virtually every episode discussing free expression, rights, and responsibilities in the United States. Today we're going to look at speech from an international vantage point. Our guests today, David Kaye, will guide us on this journey. David is a clinical professor of law at the University of California, Irvine, and the former United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. We will touch on protests occurring around the globe, content moderation of platforms, artificial intelligence, and the possibility of a TikTok ban. But first, let's turn to class notes. A look at what's making headlines.

([01:31](#)):

There is lots of speech related news on US campuses. Shout downs at Stanford, cancellation of drag shows at West Texas A&M, and an ongoing conversation about academic freedom and how it intersects with diversity, equity, and inclusion. But in keeping with today's international focus, we're going to talk about speech headlines from around the world. During a demonstration against transgender rights that took place on the steps of Australia's parliament House a few weeks ago, approximately 30 people dressed in black engaged in nazi salutes. This followed a wave of neo-nazi demonstrations that have taken place across the country in the past few months. The display shocked political leaders who are now considering banning the nazi salute, a symbol that is already banned in Germany, Austria, Poland, and Slovakia, among other places.

([02:21](#)):

Protestors in France and Israel have taken to the streets in opposition to decisions by their governments. Following French President Macron's decision to push through legislation raising the retirement age without a vote from the National Assembly, more than 1 million people have demonstrated. Likewise in Israel, hundreds of thousands of people are protesting Prime Minister Netanyahu's firing of his defense minister after the minister opposed Netanyahu's plan to overhaul the nation's judicial branch. Back in the US, the CEO of TikTok, the Chinese owned social media app, appeared before Congress to defend the app's handling of US user data. In recent weeks, representatives on both sides of the aisle, including President Biden, have expressed desires to ban the app altogether. US lawmakers are not only concerned by the Chinese government's ability to mine sensitive user information, but also by the spreading of Chinese propaganda on the app.

([03:16](#)):

Now back to today's guest, David Kaye is a clinical professor of law at UC Irvine, where he directs the International Justice Clinic. Appointed by the United Nations Human Rights Council in June 2014, David served as the UN Special Rapporteur through July 2020. In this role, David acted as the global body's principle monitor for freedom of expression issues worldwide. He reported to the UN on issues including COVID-19 and freedom of expression, online hate speech, the impact of the global private surveillance industry on freedom of expression, and encryption and anonymity as promoters of freedom of speech. David is the author of the 2019 book *Speech Police: The Global Struggle to Govern the Internet*. To his credit, he's a double graduate, undergrad and grad, of UC Berkeley, go Bears! He was also an inaugural member of the Center's Academic Advisory Board and has been an ardent supporter of the Center's work. David, thanks for joining us and sharing your perspective on expression outside of the United States.

David Kaye ([04:16](#)):

Michelle, thanks for having me.

Michelle Deutchman ([04:18](#)):

Let's start by discussing your work at the UN. How did you find yourself as the Special Rapporteur, and I hope I'm saying that right, on the global promotion and protection of the rights to freedom of opinion and expression, and can you share with us what that role entailed?

David Kaye ([04:34](#)):

Absolutely, thank you for asking. So the Human Rights Council, which is the central human rights body of the UN system, it's actually a subsidiary body of the General Assembly. It has over the last 50 years or so, developed a kind of cadre of expertise related to pretty much every human right that's out there. So there are about 50 different Special Rapporteurs, working groups, independent experts that address different issues related to human rights around the world. The one that I was appointed to monitor was the freedom of opinion and expression. I tended to work with other rapporteurs on things like the right to protest, the rights of human rights defenders, the right to be protected against arbitrary detention or deprivation of life, things like that. And the work that Special Rapporteurs do tends to focus on three different things.

[\(05:40\)](#):

So one is rapporteurs communicate with governments around the world, and that is all governments that are members of the UN, actually. So it's not that they have to be a party to a particular treaty, it's all states, actually. So we would communicate with those states whenever there were issues about their compliance with human rights norms. So in my case, a journalist is detained, we might reach out to that government and say, we've learned about this, and we might learn about it through activists in the country or through a media outlet. We'd reach out to the government and say, look, we've learned about this. What's it all about and what are you doing to ensure this person's human rights are being protected? We would also conduct visits to countries around the world. So the same kinds of things that we would do by sending letters, we would do more intensively on visits. And so I visited countries that you might not think of as human rights offenders like Japan, but also visited countries like Turkey, Liberia, Mexico, many other countries on official visits that I then report to the UN on where the situation for journalists and others is really very difficult.

[\(07:02\)](#):

And the last thing, and I'll stop here, is that Special Rapporteurs produce thematic reports. So I would report, and you mentioned Michelle, some of those reports in the setup, I would prepare reports, as other rapporteurs do, on key thematic issues. And the thematic issue, which I don't think is a surprise to anybody who is sentient these days, is how do we think about freedom of expression in the digital age? So the balance of my reporting focused on things involving, for example, hate speech online or surveillance online and how it impacts free speech. And also some kind of, I'll say meta issues, although I'm not just talking about Meta the company, but meta issues like what's the responsibility of companies to observe human rights of people using their platforms or the public when human rights law is really written for states or at least to bind states. But that was the work that I did for basically six years.

Michelle Deutchman ([08:15](#)):

Thank you so much. That's a pretty exciting job and we're definitely going to be moving on to talk about a lot of those thematic issues you mentioned, but I'm first going to have to ask you maybe one thing that you found really surprising or really particularly interesting in your time. It could either be an issue, it could be a place that you visited, just because I have to ask.

David Kaye ([08:36](#)):

Yeah, it's such a great question. The role was a privilege. I saw it every day as a privilege, although as anybody who lives and works on the West Coast knows, working with people around the world is a time zone problem. That part wasn't the privilege, but it really was a privilege. And I would say, I don't know if this is surprising, but it's something that just continually impressed me was how human rights defenders, activists, even lawyers and government officials around the world use the vocabulary of human rights. I think that was striking to me in particular because in the United States, I like to say that Americans don't speak human rights. I mean, the truth of the matter is human rights and human rights law, which is law. It's not just sort of this airy fairy thing out there that we need to observe, it's actually law.

([09:40](#)):

The United States is a party to the central treaty, the International Covenant on Civil and Political Rights. But it has no, or virtually no, impact on the concrete legal discourse in the United States. And yet around the world, people really rely on the vocabulary, the norms, the mechanisms of human rights law. I think that I went into the position knowing that in an abstract way, but not really experiencing it in the way that I was allowed to. And I don't think it was only because I was Special Rapporteur and so activists might think, oh, they need to frame their conversation with me in human rights terms. I think that they really, around the world, regardless of where they are, they see human rights as a framework that they can use to actually claim what they're due under international law. And to me that was just, again, not a surprise, but just impressive, continually, consistently impressive to me.

Michelle Deutchman ([10:52](#)):

I'm really glad you shared that and I'm going to be the first to admit that, I mean, I do first Amendment expression issues day in and day out, and I definitely don't use that framework. So this is going to make me rethink why it is that I am not. And so with that, let's kind of hop to some of the issues that you cover during the six years you spent at the UN. If I'm remembering correctly, towards the end of your tenure, but towards the beginning of the pandemic, you reported to the UN on COVID and freedom of expression. And in that report you laid out two possible paths forward. One path was that COVID could serve as an opportunity for countries to realize that cooperation is the key to success and apply that to the work of democracy and freedoms or that authoritarian governments could use the pandemic as a

means for consolidating that power and increasing repression. And so I want to ask, which path do you believe was taken and what have been the repercussions since?

David Kaye ([11:53](#)):

Yeah, I love thinking back on that period, especially when you think about it, right now is almost exactly three years since the global lockdown, since a pandemic was actually identified by the WHO. I never had unrealistic high hopes that governments around the world would sort of like a kumbaya moment realize that we have this shared threat and so we should cooperate in order to address it, and we should ensure things like access to information and deal with problems like health disinformation. That didn't happen. In fact, I think some states probably came out of it with a strengthened regime of health information and attention to the population's needs for robust freedom of expression so that disinformation can be debated publicly. That's ideally how it should work. Unfortunately, I think there were a combination of things that resulted in states often using the new openness to deal with, say, disinformation in real negative ways.

([13:15](#)):

So for example, in places like Egypt where they've for a long time had a rule in criminal law against the dissemination of false information, well, that's a problematic rule no matter what. Pretty obviously contrary to human rights standards. But the government really used that, doubled down on that in order to deal with criticism of the government's approach to handling COVID. Saw the same kind of thing in places like South Africa. So this kind of use of this new era of the digital world intersecting with this pandemic, I think gave states a lot of opportunities to crack down on freedom of expression in really problematic ways. Of course, we also saw this in other places.

([14:19](#)):

Consolidation of repression of the media in Hungary. Certainly did not hurt Viktor Orbán that most of the population was in a kind of lockdown. Very difficult to protest. Or in a place like Hong Kong where these deep and I think understood, I mean the population largely understood this, approach to dealing with protest as a public health issue just happened to coincide with the development of the national security law that the Chinese government adopted to really put pressure on protest and freedom of expression just happened to coincide with this health emergency. So I think that we come out of the pandemic worse off in a lot of respects. That's depressing to say, but I think that's the reality.

Michelle Deutchman ([15:20](#)):

I like that you left open the possibilities, and it is sad to hear that it kind of went in one direction, but who knows? Hopefully the pendulum at some point swings back.

David Kaye ([15:30](#)):

It's true. The thing is these issues are still front-page, which is amazing to me. So just one example is the recurring debate over how the pandemic started. So it's now news again in mainstream papers for all sorts of reasons, but the core problem, I mean there's two problems that I think facilitated that. One was the Chinese government's repression of information which gave rise to all sorts of uncertainty and also conspiracy theories and so forth. And that collided with, or happened in parallel with, the incredible politicization of health information in the United States and in parts of Europe. So I think we see in those examples just how repression of freedom of expression, it wasn't about authoritarianism per se, but the repression of expression definitely worked against health, open debate, public participation, other

values that we have in democratic societies. So anyway, sorry to interrupt. I get very enthusiastic, let's say, about some of these issues as they continue to dominate the discourse.

Michelle Deutchman ([17:00](#)):

Well, there's no apologizing and I'm glad that you're excited and passionate about it. It sounds like a lot of it, like you said, was a collision of both timing and issues and already authoritarian tendencies. You've already talked about how during the time you were at the UN, the use of social media and the internet continued to grow exponentially. And with that growth, more dilemmas about content moderation, also still front-page news, who should be doing it? How should it be done? So this past October, the European Union approved the Digital Services Act, which goes into effect next year. And among other requirements, it places substantial content moderation expectations on large social media firms, many of which are based here in the US. This includes limiting false information, hate speech, and extremism. I'm curious how that's going to work given the First Amendment largely precludes the US government from restricting these types of speech. So let's start there and then ultimately I want to ask you, do you think Europe is on the right track? But we can take those one at a time.

David Kaye ([18:04](#)):

Yeah, it's so great and I'm so glad that you raised the DSA. So the DSA is already, to a certain extent, it's in effect, to a certain extent, it's not. I mean, it's in effect in the sense that legally there are already some requirements, but you're absolutely right that it's full effect is kind of unknown in a lot of ways. And in part it's unknown because just bureaucratically, the European Union's enforcement mechanisms for the DSA are still being rolled out. So we're left in a position of we have this law, but how it actually gets implemented and its effect is really going to be, I think it's very uncertain. So some of what I'll say should be understood as a kind of, we'll see what happens. But I do think there's two innovations in the DSA that are worth American policymakers thinking about. Although you're also totally correct that some of these issues may pose First Amendment concerns that don't exist in Europe.

([19:11](#)):

So the first is that the DSA adopts this approach of risk assessment. So it doesn't actually say specifically, at least the DSA itself, that the social media companies have to act in a particular way toward particular content. So I mean, of course illegal content like child sexual abuse materials, stuff like that, that's long been prohibited and when the companies have notice of that kind of content, they need to take it down pretty much immediately. More or less everybody understands that. But what the DSA does generally is say to the companies, look, there's certain areas where social media, the platforms have such power and such an impact on both human rights and also public space that we want you to do this regular assessment of the risks that your platform might pose to human rights.

([20:18](#)):

It'll be fairly open-ended. We want you to tell us the kind of assessment that you're doing, but we want to know that you are actually carrying out a kind of assessment of the risks that you might be posing to the public and to individual human rights. So to my mind, that's really interesting, but it also is something that comes from a process of the last 10, 15 years where the UN has been pushing companies to observe their responsibilities to prevent or mitigate human rights harms. And so the UN adopted about 10 years ago this thing called the UN Guiding Principles on Business and Human Rights. And I think this document is actually having an impact in Europe because this risk assessment is a direct result of this thinking that it's true companies don't have human rights obligations the way states do,

but they certainly have human rights impact. So we want you to at least take the steps of identifying what those impacts are and reporting them to us. So that's one part of the DSA.

[\(21:39\)](#):

The other part is transparency. So the DSA has these rules about the kind of transparency regarding how it's implementing its content moderation rules, how it is dealing with online hate speech. So things that in Europe might be considered illegal speech. Terrorism, so extremist content, which we could talk about has some problematic freedom of expression angles to it, but generally speaking, there are rules about that in Europe. So what the DSA says is not specifically that you need to deal with this particular content, but you need to be transparent about what you're doing here. And I think that in combination, the risk assessment and the transparency are designed to crack open the platforms to better public understanding about what they're doing, the impact that they have. And I think the theory here that the EU is working on is that openness, that transparency, that risk assessment will create a more even playing field so that policy makers and legislators will have as much information as the platforms do about potential harms. And they can legislate or at least have more open discussions with the platforms than has really otherwise been the norm in the absence of that kind of transparency over the last five to 10 years. That's the hope at least.

Michelle Deutchman [\(23:23\)](#):

That's really interesting. I'm not going to ask, I'm just going to wonder aloud about feasibility. Because I like the idea of risk assessment, it's very intentional, but the feasibility of doing the risk assessment on each individual piece of information. I guess I am going to ask, is there a global way that they can do that kind of assessment because that seems very labor-intensive?

David Kaye [\(23:44\)](#):

It is very. I mean, that's where the proof is in the pudding kind of aspect of this, because we don't have those risk assessments yet. We don't know yet how the companies will comply with these new rules. The way the DSA works, and it's consistent with the European Union generally, is that different digital service coordinators are going to be basically appointed in every state of the European Union. So there'll be over 25 of these coordinators who will have particular questions once the companies start to issue their risk assessments and once they start to be more transparent about their rules. Whether it's kind of an economy of scale issue where once the companies do this for Europe as a whole, it's a little bit easier to do it kind of country by country, that's a really an open question. I mean, I think for an American audience, one of the really interesting things might be whether it might be possible for the companies, given that they're already doing this for Europe, what's the added expense to do this for the United States as well?

[\(25:03\)](#):

In other words, might US policy makers or the US public be able to piggyback on the DSA and say to the companies, look, we could adopt legislation here that forces you to do these things. Although there are people who argue that that might be inconsistent with some First Amendment rules, but putting that aside just for the moment, maybe that threat might be such that the companies could say, okay, look, we don't want to go down the path of this being legislated, but given that we're already doing it and the lessons that we're learning from doing it, we'll do it for the US as well. I mean, I think that would be a good step for them to take. It'd be really great for the US market and American users to have the kind of information that's going to be available for Europeans. Whether that can happen in the absence of legislation, I don't know, but that might be one of the positive knock on effects of the DSA.

Michelle Deutchman ([26:12](#)):

So before we leave this area, I think since we're talking about companies and what their human rights responsibilities are, before we get to protests, I think I'm going to ask you to talk a little bit about AI and about ChatGPT, and maybe consult your crystal ball a little and tell us how you think some of these newer developments are going to affect not just expression, but human rights around the world.

David Kaye ([26:38](#)):

Yeah, I mean, I love this question. I also don't know that I have any better answer than anybody else at the moment, mainly because we're obviously at the beginning of something new and different. But I would say a couple of things. So one thing that we do know from our experience with AI on the platforms is that the platforms are real really bad and AI is really bad at context. So for example, when you think about hate speech or disinformation. The platforms, they have an interest in tamping down on the kind of disinformation that might lead people to, for example, ingest bleach to deal with COVID or something like that. So how do they deal with that? How do they use tools of automation to distinguish between a warning not to do that and a suggestion to do it? AI is not very good at that, and that's because of context, it's because tone, it's because things like satire and humor are not often captured very well.

([27:51](#)):

I mean, we see this even in GPT-4. From what I've seen in just the early experiments that people are posting online over the last week, is that it's still not very good with humor and satire. So that leaves open the question of, just in terms of how we think about these tools, are they going to be a replacement for the kind of robust expression that we've been used to? And will they be a tool for dealing with the kind of harms loosely understood that course through the veins of social media? I don't know that these large language models are any better than the preexisting models to deal with that kind of problem. So I mean that's sort of one just open question that I have about them. The other big question I have, and this goes back to the DSA in a way, but also the UN approach through its Guiding Principles on Business and Human Rights is in the rollout and the development of these tools.

([29:02](#)):

Are the companies doing any kind of assessment as to the kind of human rights harms that they might cause? Are they doing any assessment about, for example, what do they do when these tools are used by governments in order to, say, predict crime, to profile individuals or profile communities? What kind of guardrails are they proposing that would be applied to these tools so that human rights standards can continue to be observed, or in some places just observed? I don't see any of that. I don't see OpenAI, I don't see any of Bing, I don't see as a public issue any of these companies saying, we've done the human rights assessment and here's what we found and here's what we're doing. Here's how we're going to try to constrain these tools. I think we need to see some of that because these tools are being released into the wild as beta tests and we're the Guinea pigs. We're both the testers and the Guinea pigs. It's almost as if we've learned none of the lessons that we thought we had learned from the introduction of Twitter and Facebook and YouTube without any of these guardrails in the first place. So I'm pretty concerned about it, but I also don't have a good basis for knowing what the next week, let alone the next five years will look like in this space.

Michelle Deutchman ([30:48](#)):

Thanks. Yeah, I think I was trying to prognosticate too far ahead and I can only speak for myself. I see so much more negative than positive, but we'll wait and see. So now I want to move us a little bit from just

talking more specifically about content moderation and talk a little bit about protests and challenges to authoritarian regimes. When I think about the internet and protests, I immediately think of the Arab Spring, which was now 13 years ago. Much was made of how important social media was, especially how critical it was in communicating to the rest of the world what was happening on the ground. I'm interested in your thoughts how over that time, especially as we look at things happening now, the war in Ukraine and protests in Iran and continued suppression in China, what kind of role is social media playing? Is it helpful, is it harmful to the work of dissidents and others who are challenging regimes?

David Kaye ([31:47](#)):

Yeah, it's amazing, you mentioned like Tahrir Square and the emergence of social media as a tool even in the run-up to the Arab Spring. When we think back then to that time, yeah, it was like this time of, I don't know if I'd say of hope, but it was certainly a time in which those of us who were looking at... I mean really you didn't have to be a social media person or an internet person to understand that these tools were having a really great impact on how people organized, how people shared information and so forth. And I think that if you plot the development of public attitudes toward the platforms from like 2010, 2011 to 2015, it's like the high watermark of wow, these tools are going to open new avenues for sharing information, for organizing protest, for peaceful protest, and so forth.

([32:55](#)):

I mean, that changed around 2015 and it changed in part because 2015 was the massive migration from the war in Syria and war and dislocation in North Africa coming into Europe. And Facebook and YouTube were in particular were being used as tools like to organize, but to organize by the far-right. The extremist right was using these tools as a tool against migrants and to coordinate protests against Chancellor Angela Merkel and her idea of allowing about a million migrants to enter and get on the path to residence in Germany. So from 2015 to today, it's more like social media as a cesspool rather than social media as a tool. However, I think you're exactly right to highlight that there's still, today, in places from Iran to Hong Kong to Myanmar to many, many other places, to the United States, and we think about Black Lives Matter. There has been a continued civil society use of these tools to organize, to share information and so forth. It's just that we understand the risks in a way that we probably weren't as alive to in 2011, 2012.

([34:42](#)):

So just two that I would mention, two of the risks, one is the risk of surveillance. So it's become clearer than ever that as much as individuals use these tools to coordinate their behavior and coordinate their activity and communicate, they're being surveilled by governments, democratic and non-democratic, who want insight into what they're doing. And that's been a huge problem. It's a particular life and death problem for people in places like Iran of course, but that's something that has changed the way a lot of people use these tools. The other, I wouldn't say new development, but the other development that has changed the way people think about social media and the internet is the rise of messaging applications as a tool for coordinating.

([35:43](#)):

So tools like WhatsApp and Signal or Telegram are much more likely to be used to coordinate activity than Facebook and Twitter in the past. Twitter, by the way, we could have a totally different discussion about Twitter and how it's kind of collapsed as a tool for robust conversations. But these other tools, in particular I would say WhatsApp, really kind of raise the stakes in complicated ways. On the one hand, the idea of encrypted messaging to enable people to share information is amazing. It's like a historic opportunity for activists to use these tools to share information because they're encrypted, so the



content of their messages cannot be read by outsiders. The problem is that these tools can also be used by actors who have bad faith interest in using them to coordinate disinformation and hostility and hate and so forth. We've seen that particularly in places like India, but they also open up opportunities for governments to gain access to these communities that might think that they are safe, but they're really not. And so lots of new issues, I think these tools are still being used, but they're very serious threats in all sorts of ways.

Michelle Deutchman ([37:19](#)):

So you mentioned surveillance, which means I feel like I'm going to have to piggyback and ask you about TikTok since that is also front-page news. I don't know if you have the thoughts on the ban or thinking about the ban?

David Kaye ([37:30](#)):

Oh, I have thoughts.

Michelle Deutchman ([37:31](#)):

Okay, well, I want to hear those thoughts.

David Kaye ([37:32](#)):

Definitely have thoughts. So the big problem that I've had when it comes to the debate over TikTok is that it comes in an environment of two things, and it's kind of a collision. One is just high levels of hostility, some of which are justified, some of which are not, toward China. So I mean, look, China as a domestic actor when it comes to Hong Kong, when it comes to treatment of the Uyghur community, when it comes to Tibet, when it comes to domestic surveillance, it's a very, very bad human rights actor. So I'm not discounting that at all. The problem is that that factor and also all of the geopolitical issues related to the US relationship with China and the competition, that's collided with a more general fear of how social media impacts youth, how it impacts the public institutions, and that's not a TikTok specific problem. That's an issue of what sometimes is called surveillance capitalism.

([38:59](#)):

I mean, it's an issue of how all of the companies collect massive amounts of data about us and use all sorts of algorithmic tools in order to shape what people see. So those two things are kind of happening in tandem. So when it comes to TikTok, my big concern is that those who are advocating at least for a national ban or severe restrictions at a national level or at a state level, and this can be true of Europe and Canada as well, they're not really making the case that the evidence demonstrates that TikTok is any worse than the others. And they're sort of basing it at least, and this is subject to change because there could be evidence of this, but there isn't really strong evidence that the fears of Chinese access to, say, US user data, or even worse, let's say manipulation of US users, is any more than a fear as opposed to something rooted in concrete evidence.

([40:15](#)):

I'm not saying that that isn't possible, but I'm saying that the debate so far hasn't really provided the public with the evidence that the fears are totally justified. Also, that we should do something as draconian as limit, really, tens of millions of Americans from accessing this tool because of fears. There should be a very high bar to do that. We're also marking the 20th anniversary of the invasion of Iraq, and I'm sort of mindful of the fact that when government talks about security, there's a lot of deference that is paid to the government. And I think this is an example where we should not defer, we should use

the tools of human rights law, which actually require the government to demonstrate any restriction on speech must be necessary and proportionate in order to meet a legitimate objective, we should be pushing government to make that case. I don't think that they are, and it probably is the case that we're not forcing it to either.

Michelle Deutchman ([41:37](#)):

No, I appreciate that. I am going to use this legal term slippery slope, and I think it's one of those things a little bit like be careful what you wish for.

David Kaye ([41:45](#)):

Well yeah, I mean absolutely. And the slippery slope goes in both directions. So on the one hand it's like, if we're talking about ban, why don't we ban other things that are potentially harmful? So that's one part of it. The other part of it, and this comes from my work with the UN that I'm very alive to, is the United States and the UN has spent the last five to seven years strongly criticizing governments that are banning platforms in their countries. China bans Facebook or it bans YouTube or Iran does the same or name the government. Nigeria banned Twitter last year. Well, we were very critical of that. Those governments might respond by saying, well, we have national security or public order concerns, and who are you to tell us how to respond to those concerns? Well, if we go ahead and ban TikTok with limited evidence, it's going to make it very hard for us to make those arguments. And so slippery slope is a really good term for that, actually. I think you're right to use it.

Michelle Deutchman ([43:02](#)):

I just have so many more questions, so I'm just going to go with it even though we're running a little long, because I really want to ask you something about hateful speech. We're talking a lot about protests outside of the US, but of course one of the things that we're seeing, especially as of late, is instances where hate speech has been introduced to campus communities and the struggle that these communities are having reconciling the dual responsibilities to free speech and to other institutional values. In other places in the world, they sanction certain types of hate speech. For instance in the EU, denying the Holocaust and other atrocities is criminalized. Some would like to see hateful speech punished in the US, and as you're someone who's had a chance to observe and study both systems, I'm wondering if you see pros and cons of each? Or another way to ask it is, do you think the US should think about making changes to the First Amendment and what we sanction?

David Kaye ([43:59](#)):

Yeah, so that is a gigantic question, Michelle, but I love it. It's a really rich question and there's a few different ways that I might answer that. So the first way I would answer it is to say, well, let me start with human rights law. So human rights law actually doesn't have a definition for hate speech. Hate speech is not a term of art in human rights law, and it is a difficult subject for international lawyers just as it's a difficult subject for Americans and for American companies. But what human rights law does restrict or it requires states to prohibit, so I'm going to get legal for a second. Article 20 of the International Covenant on Civil and Political Rights says that states shall prohibit any advocacy of national, racial, or religious hatred. So that's sort of your hate speech part, advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

([45:19](#)):

So we think of that as sort of the hate speech provision, even though it doesn't say hate speech. So it requires us to think about, well, what is advocacy of hatred, on the one hand, but also, and this is where I think the international standard has moved a bit closer to the First Amendment standard, although not all the way there. And that is that as a matter of international human rights law at the global level, so not the European level necessarily, but at the global level, states can't just restrict speech or hate speech because they think it's hateful. They have to connect it to that speech inciting discrimination, hostility, or violence. Now, discrimination and hostility are still extraordinarily broad frameworks. Violence, though, is a little bit closer to a standard. Whether we get to imminent violence and so forth, other kinds of questions that will sound a little bit more First Amendment light. But generally speaking, as a matter of international law, the international human rights community has moved to, let's say, tighten the definition so that states don't think that they have this sort of broad ability to restrict hate speech just because they don't like the speech or even just because it's offensive.

[\(46:45\)](#):

There's been a real push for there to be a link between the content of the speech, the quality of it, and it's consequence. And I think that's an important thing to insert into the debate and certainly for Americans to understand about human rights law because it isn't as if human rights law just sort of says, oh, any state can define hate speech however they want, therefore it can be restricted. That is definitely not how human rights law operates here. Now, does that mean that states are very good at this? No, they're not. They're terrible. Constantly states are defining hate to include defamation of government officials, or even fundamentally problematic, there was this move by the organization of Islamic countries several years ago to restrict what they called defamation of religions. And defamation of religion as a kind of form of hate speech as they understood it was problematic for all sorts of reasons that our listeners would understand. But it was really problematic because it was also designed to cut off debate around religious subjects.

[\(48:09\)](#):

So there's a real risk that hate speech could be used in problematic ways, but human rights law at least does try to put on some guardrails. I mean, I'll say two other things quickly, I'll try. One is it's true that Europe has a broader, say, deference to states that want to restrict hate speech. So you mentioned Holocaust or genocide denialism. They have a whole kind of reason for doing so. I don't think it means that Europe is any less committed to freedom of expression than Americans are. I think they just see a kind of version of harm, particularly on a continent that has actually experienced in at least relatively recent history, and you could even include the Balkan Wars examples where hateful speech has kind of merged into genocidal violence. That it's fair to give them to at least think about how they see these issues as they might see them in a way that might be a little bit different from ours. And that's not to say I agree with the way Europe implements it, but I think it's worth just understanding the good faith approach that they might be taking, even if we think that they're wrong on the merits.

[\(49:42\)](#):

The other thing is that this often comes up in the context of what the companies are doing. And I think that on the one hand, I'm a strong proponent of the companies thinking about their responsibilities in analogous ways to human rights laws. So they're not bound by it, but they should also be thinking, we don't want to be just restricting hate speech in a way that allows either the algorithm or our content moderators to take down robust speech, say, about immigration reform that might look like hate speech, but maybe it's not. You don't necessarily want the companies to be put in that position. On the other hand, the companies have a big role to play.

[\(50:32\)](#):

And so it's a place where I think the companies can use these tools and use the framework of human rights law in particular, the ideas of incitement, the ideas of necessity and proportionality, to really evaluate whether are things different on their platforms? Do they create environments that even though as a First Amendment or human rights law standard, a government wouldn't take down or criminalize that speech, but in the context of the platforms, does it make it harder for, say, marginalized communities to participate? I think they can take that into account and should take that into account as they think about what does it mean to have broad freedom of expression and access to information for everybody who might be on the platform, not just the speaker.

(51:27):

One last thing, and this is where I think it's helpful in thinking about what the companies are doing. Human rights law, this is Article 19 of the ICCPR, the covenant that I mentioned. It guarantees everyone's right to seek, receive, and impart information and ideas of all kinds. The reason I mention that is because it suggests that the right of freedom of expression isn't just the speaker who might want to spew hate speech, it's also the right of the audience, the seeking and receiving. And I think that kind of multi-directional approach is useful, in part because in the US context we often think about free speech as the speaker only. And I think human rights law opens it up for us to think about not just the speaker, but the audience.

Michelle Deutchman (52:17):

I'm going to respond just with two quick thoughts. First, that the clarifications about how things work, for instance in the EU and other places, is really helpful because I do agree that some people imagine that it's sort of a free for all and that governments have the power to really shut down all kinds of "bad speech". So I think it's helpful that you shared that it really is more limited and actually much more akin to some First Amendment boundaries than one might expect. And the second thing I would say is that when you talk about the right of the audience, I love that you mentioned that because when I talk about heckler's veto, I talk about how it's not just the person who's speaking whose right is impinged upon, but also the audience members who have whatever, come from far away, taken their time, bought a ticket, any number of things. So I really like that.

David Kaye (53:11):

Absolutely. And just to underline that because I think you've done so much great work over the last several years on campus speech, and this comes up, it came up in the Stanford context a couple of weeks ago. It's a recurring theme. I mean, I think human rights law, that framework, since it's law and the US ratified the ICCPR, it's a great framework to use in campus settings because it reorients us away from just the right of that one speaker, but also the audience to hear what the speaker's saying. I think it just gives us a way to think about like heckler's, veto, but also just what a university is for. I think that the human rights standards are just helpful as a framework for thinking through these problems.

Michelle Deutchman (54:04):

Absolutely. And I'm thinking to myself that one of the things I'm going to do after we finish talking is to learn more about human rights law. I'm hopeful that maybe we'll be able to share some resources per your suggestion that people can dip their toe into some of these concepts. I'm so appreciative of your giving us your time and your wisdom and your expertise. I know that I have learned so much and it's been really helpful to look through a different lens because I think doing that changes not just how we see, but what we see. So I'm grateful to you for doing that. And if you have anything else you want to add, now would be the time.

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David Kaye ([54:44](#)):

No, this has been so much fun, Michelle. And just thank you for all that you're doing, both UCI, but across the UC and across the country and sort of pushing a thoughtful way of thinking about free speech, which is sadly, in our environment, so politicized. It's great to have a center like ours to really address these issues in good faith without all the politics, with an idea of how do we solve problems, not just create new ones. So I'm grateful to you too.

Michelle Deutchman ([55:22](#)):

Thanks, that means a lot. Thank you to everyone who attended the center's SpeechMatters conference: Fighting for our Democratic Freedoms last week. If you missed it, recordings will be up on our website soon. I'm thrilled to share that next month our guest will be Dahlia Lithwick. Dahlia hosts the amazing podcast, Amicus, reports on the Supreme Court, for Slate and is the author of Lady Justice: Women, the Law, and the Battle To Save America. Talk to you then.