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HATE SPEECH IN
CONSTITUTIONAL JURISPRUDENCE:
A COMPARATIVE ANALYSIS

Michel Rosenfeld*

INTRODUCTION

Hate speech—that is, speech designed to promote hatred on the basis of race, religion, ethnicity or national origin—poses vexing and complex problems for contemporary constitutional rights to freedom of expression.¹ The constitutional treatment of these problems, moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next. There is, however, a big divide between the United States and other Western democracies. In the United States, hate speech is given wide constitutional protection while under international human rights covenants² and in other Western democracies, such as Canada,³ Germany,⁴ and the United Kingdom,⁵ it is largely prohibited and subjected to criminal sanctions.

The contrasting approaches adopted by the United States and other Western democracies afford a special opportunity to embark on a comparative analysis of the difficult problems posed by hate speech and of the various possible solutions to them. As we shall see, in the United States, hate speech and the best ways to cope with it are conceived differently than in other Western

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¹ I use the term “constitutional rights” in a broad sense that encompasses both rights arising under national constitutions and those established by international human rights covenants, notwithstanding that, strictly speaking, the latter may be treaty based rights rather than constitutional rights.

² See discussion infra Part III.D.

³ See discussion infra Part III.A.

⁴ See discussion infra Part III.C.

⁵ See discussion infra Part III.B.
democracies. This is due, in part, to differences in social context, and, in part, to differences in approach. It may be tempting, therefore, to endorse a purely contextual approach to hate speech encompassing a broad array of diverse constitutional responses ranging from American *laissez faire* to German vigilance. Given the trend toward globalization and the instant transnational reach of the internet, however, a purely contextual approach would seem insufficient if not downright inadequate. For example, much Neo-Nazi propaganda is now generated in California and transmitted through the internet to countries like Canada or Germany where Neo-Nazi groups have established a much more significant foothold than in the United States. In as much as such propaganda generally amounts to protected speech in the United States, there seems to be little that can be done to limit its spread beyond American soil. Does that justify calling for a change of constitutional jurisprudence in the United States? Or, more generally, do present circumstances warrant a systematic rethinking of constitutional approaches to hate speech?

In this Article I will concentrate on these questions through a comparison of different existing constitutional approaches to hate speech. Before embarking on such a comparison, however, I will provide in Part I a brief overview of some of the most salient issues surrounding the constitutional treatment of hate speech. In the next two parts, I will examine the two principal contrasting constitutional approaches to hate speech. Part II will focus on the United States and analyze hate speech within the broader free speech jurisprudence under the American Constitution. Part III will deal with the alternative approach developed in other Western democracies and largely endorsed in the relevant international covenants. Finally, Part IV will compare the two contrasting approaches and explore how best to deal with hate speech as a problem for contemporary constitutional jurisprudence.

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I. HATE SPEECH AND FREEDOM OF EXPRESSION: ISSUES AND PROBLEMS

The regulation of hate speech is largely a post World War II phenomenon. Prompted by the obvious links between racist propaganda and the Holocaust, various international covenants as well as individual countries such as Germany, and in the decade immediately following the war the United States, excluded hate speech from the scope of constitutionally protected expression. Viewed from the particular perspective of a rejection of the Nazi experience and an attempt to prevent its resurgence, the suppression of hate speech seems both obvious and commendable.

Current encounters with hate speech, however, are for the most part far removed from the Nazi case. Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies it is by and large opponents of the government and, in a wide majority of cases, members of marginalized groups with no realistic hopes of achieving political power who engage in hate speech. Moreover, in some cases those punished for engaging in hate speech have been members of groups long victimized by racist policies and rhetoric, prosecuted for uttering race based invectives against those whom they perceive as their racist oppressors. Thus, for example, it is ironic that the first person convicted under the United Kingdom’s Race Relations Law criminalizing hate speech was a black man who uttered a racial epithet against a white policeman.

Like Nazi racist propaganda, some of the straightforward racist invectives heard today are crude and unambiguous. Contemporary hate speech cannot be confined, however, to racist
insults. Precisely because of the strong post-Holocaust constraints against raw public expressions of racial hatred, present day racists often feel compelled to couch their racist message in more subtle ways. For example, anti-Semites may engage in Holocaust denial or minimizing under the guise of weighing in on an ongoing historians’ debate. Or, they may attack Zionism in order to blur the boundaries between what might qualify as a genuine debate concerning political ideology and what is pure and simple anti-Semitism. Similarly, American racists have on occasion resorted to what appears to be a scientific debate or invoked certain statistics—such as those indicating that proportionately blacks commit more crimes than whites—to promote their prejudices under the disguise of formulating political positions informed by scientific fact or theory.

Even these few observations suffice to establish that not all contemporary instances of hate speech are alike. Any assessment of whether, how, or how much, hate speech ought to be prohibited must, therefore, account for certain key variables: namely who and what are involved and where and under what circumstances these cases arise.

The who is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but the target of that statement and the audience to whom the statement in question is addressed—which may be limited to the target, may include both the target and others, or may be limited to an audience that does not include any member of the target group. Moreover, as already mentioned, not all speakers are alike. This is not only because of group affiliation. Thus, in the

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12 The identity of the audience involved may be relevant for a variety of reasons, including assessing the harm produced by hate speech, and devising effective legal means to combat hate speech. For example, demeaning racist propaganda aimed at a non-target audience may be a necessary step in the creation of a political environment wherein policies of genocide might plausibly be implemented. See generally GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954). Thus, the German people might never have countenanced the Nazi policy of extermination of the Jews, had they not been desensitized through years of vicious anti-Semitic propaganda. See FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 87 (1981). Consistent with this, hate speech directed at a non-target audience might well be much more dangerous than if exclusively addressed to a target-group audience.

From the standpoint of devising workable legal responses, the differences between different speakers and different target group audiences may also be very important. For example, in the United States where hate groups like the Neo-Nazis and the Ku Klux Klan are relatively marginalized and lack major financial means, allowing private tort suits by affected members of the relevant target groups may lead to expensive verdicts with crippling effects on the hate group’s ability to function. See Klansmen Sued over Shooting at S.C. Nightclub, THE ATLANTA J. CONST., Nov. 1, 1998, at 6A (reporting crippling effect on Ku Klux Klan of a $37.8 million verdict over a church fire).
context of dominant majority group hate speech against a vulnerable and discriminated against minority, the impact of the hate speech in question is likely to differ significantly depending on whether it is uttered by a high government official or an important opposition leader or whether it is propaganda by a marginalized outsider group with no credibility. Furthermore, even the same speaker may have to be treated differently, or at least may have a different impact which ought to be considered legally relevant, depending on whom is the target of his or her hate message. Assuming, for the sake of argument, that black hate speech against whites in the United States is not the equivalent of white hate speech against blacks, what about black anti-Semitism? Ought it be considered as yet another instance of black (albeit inappropriate) response to white oppression? Or as an assault against a vulnerable minority? In other words, is black anti-Semitism but one aspect of a comprehensible resentment harbored by blacks against whites? Or is it but a means for blacks to carve out a common ground with white non-Jews by casting the Jews as the common enemy? And does it matter, if the dangers of anti-Semitism prove greater than those of undifferentiated anti-white hatred?

The what or message uttered in the context of hate speech also matters, and may or may not, depending on its form and content, call for sanction or suppression. Obvious hate speech such as that involving crude racist insults or invectives can be characterized as “hate speech in form.” In contrast, utterances such as Holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt, may be referred as “hate speech in substance.” At first glance, it may seem easy to justify banning hate speech in form but not hate speech in substance. Indeed, in the context of the latter, there appear to be potentially daunting line-drawing problems, as the boundary between genuine scholarly, scientific or political debate and the veiled promotion of racial hatred may not always be easy to draw. Moreover, even

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13 For example, Neo-Nazis in the United States are so marginalized and discredited that virtually no one believes that they pose any realistic danger. In contrast, a statement (that is better qualified as anti-Semitic rather than as an instance of hate speech) to the effect that the Jews have too much influence in the United States because they control the media—which is in part true—and the banks—which is patently false—uttered by the country’s highest military official a few years back caused quite an uproar and led to his resignation. See Editorial, Counting the Jews, NATION, Oct. 3, 1988, at 257.

14 Because of prevailing social and economic circumstances, it has often been the case that the whites with whom black ghetto dwellers have the most—often unpleasant—contacts, namely shopkeepers and landlords, happen to be Jews. See Vince Beiser, Surviving The Rage in Harlem, JERUSALEM REP., Feb. 8, 1996, at 30.
hate speech in form may not be used in a demeaning way warranting suppression.\(^\text{15}\)

Finally, \textit{where} and \textit{under what circumstances} hate speech is uttered also makes a difference in terms of whether or not it should be prohibited. As already mentioned, “where” may make a difference depending on the country, society or culture involved, which may justify flatly prohibiting all Nazi propaganda in Germany but not in the United States. “Where” may also matter within the same country or society. Thus, hate speech in an intra-communal setting may in some cases be less dangerous than if uttered in an inter-communal setting. Without minimizing the dangers of hate speech, it seems plausible to argue, for example, that hate speech directed against Germans at a Jewish community center comprising many Holocaust survivors, or a virulent anti-white speech at an all black social club in the United States, should not be subjected to the same sanctions as the very same utterance in an inter-communal setting, such as an open political rally in a town’s central square.\(^\text{16}\)

Circumstances also make a difference. For example, even if black hate speech against whites in the United States is deemed as pernicious as white hate speech against blacks, legal consequences arguably ought to differ depending on the circumstances. Thus, for example, black hate speech ought not be penalized—or at least not as much as otherwise—if it occurs in the course of a spontaneous reaction to a police shooting of an innocent black victim in a locality with widespread perceptions of racial bias within the police department.

More generally, which of the above mentioned differences ought to figure in the constitutional treatment of hate speech depends on the values sought to be promoted, on the perceived harms involved, and on the importance attributed to these harms. As already noted, the United States’ approach to these issues differs markedly from those of other Western democracies. Before embarking on a comparison of these contrasting approaches however, it is necessary to specify two important points concerning the scope of the present inquiry: 1) there will be

\(^{15}\) For example, in the United States the word “nigger” is an insulting and demeaning word that is used to refer to a person who is black. When uttered by a white person to refer to a black person, it undoubtedly fits the label “hate speech in form.” However, as used among blacks, it often serves as an endearing term connoting at once intra-communal solidarity and implicit condemnation of white racism.

\(^{16}\) What accounts for their difference is that the oppressed are in a different position than the oppressors. Reaction by the oppressed even if tinged with hatred should therefore arguably be somewhat more tolerated than hate messages by members of traditionally oppressor groups.
no discussion of the advantages or disadvantages of various approaches to the regulation of hate speech, such as imposition of criminal versus civil liability; and 2) since all the countries which will be discussed below including the United States deny protection to hate speech that incites violence—or, to put it in terms of the relevant American jurisprudence, that poses "a clear and present danger" of violence—what follows will not focus on such speech. Instead, it will be on hate speech that incites racial hatred or hostility but that falls short of incitement to violence. This last limitation is important for two reasons. First, prohibiting hate speech that constitutes a clear incitement to immediate violence hardly seems a difficult decision. Second, criticism of the United States for tolerating hate speech does not always seem to take into account the difference between incitement to violence and incitement to discrimination or hatred. But, unless this difference is kept in mind, the discussion is likely to become confusing. Indeed, the key question is not whether speech likely to lead to immediate violence ought to be protected, but rather whether hate speech not likely to lead to such immediate violence, but capable of producing more subtle and uncertain evils, albeit perhaps equally pernicious, ought to be suppressed or fought with more speech.

II. HATE SPEECH AND THE JURISPRUDENCE OF FREE SPEECH IN THE UNITED STATES

Freedom of speech is not only the most cherished American constitutional right, but also one of America's foremost cultural symbols. Moreover, the prominence of free speech in the United States is due to many different factors, including a strong preference for liberty over equality, commitment to individualism, and a natural rights tradition derived from Locke which champions freedom from the state—or negative freedom—over freedom through the state—or positive freedom. In essence, free speech rights in the United States are conceived as belonging to the individual against the state, and they are enshrined in the First Amendment to the Constitution as a prohibition against government interference, rather than as the imposition of a

19 For a thorough discussion of the distinction between positive and negative liberty, see ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118-72 (1969).
positive duty on government to guarantee the receipt and transmission of ideas among its citizens.\textsuperscript{20}

Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies.\textsuperscript{21} Indeed, Americans have a deep seated belief in free speech as a virtually unlimited good and a strong fear that an active government in the area of speech will much more likely result in harm than in good. In spite of this, however, there have been significant discrepancies between theory and practice throughout the twentieth century, with the consequence that American protection of speech has been less extensive than official rhetoric or popular belief would lead one to believe. For example, although political speech has been widely recognized as the most worthy of protection,\textsuperscript{22} for much of the twentieth century, laws aimed at suppressing or criminalizing socialist and communist views were routinely upheld as constitutional.\textsuperscript{23} With respect to communist views, therefore, American protection of political speech has been more limited than that afforded by most other Western democracies.

American theory and practice relating to free speech is ultimately complex and not always consistent. Accordingly, to better understand the American approach to hate speech—which has itself changed over time\textsuperscript{24}—it must be briefly placed in its proper historical and theoretical context.

In the broadest terms, one can distinguish four different historical stages in which the perceived principal function of free speech saw significant changes. On the other hand, there have also been four principal philosophical justifications of free speech, which have informed or explained the relevant constitutional jurisprudence. Moreover, the philosophical justifications do not necessarily correspond to the historical stages, but rather intertwine and overlap with them. Nor do sharp boundaries separate the four historical stages which run into each other and in

\textsuperscript{20} The First Amendment provides, in relevant part, that “Congress shall make no law... abridging the freedom of speech or of the press...” U.S. Const. amend. I.

\textsuperscript{21} See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (involving a flag burning at the 1984 Republican National Convention in Dallas, Texas); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (concerning a crude parody of a church leader); New York Times Co. v. United States, 403 U.S. 713 (1971) (involving the publication of classified diplomatic information susceptible of adversely affecting sensitive peace negotiations). In each case, the Supreme Court held that the expression involved was constitutionally protected.

\textsuperscript{22} See, e.g., Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948).


\textsuperscript{24} See infra notes 43-56 and accompanying text.
which free speech fulfills various different functions. The principal marking point between these various stages is a shift in the *dominant* function of free speech. All this makes for a complex construct with a large number of possible permutations. Accordingly, only the broadest outlines of the historical and theoretical context of American free speech jurisprudence will be considered in what follows.

Of the four historical stages of free speech, the first three have had definite—if often only implicit—influences on the Supreme Court’s free speech jurisprudence. In contrast, the fourth stage, which is still in its infancy, thus far has had virtually no effect on the judicial approach to free speech issues, though it has already made a clear imprint on certain legislators and scholars. The first of these historical stages dates back to the 1776 War of Independence against Britain, and establishes protection of the people against the government as the principal purpose of free speech. Once democracy had become firmly entrenched in the United States, however, the principal threat to free speech came not from the government but from the “tyranny of the majority.” Accordingly, in stage two, free speech was meant above all to protect proponents of unpopular views against the wrath of the majority. Stage three, which roughly covers the period between the mid-1950s to the 1980s, corresponds to a period in the United States in which many believed that there had been an end to ideology, resulting in a widespread consensus on essential values. Stage three is thus marked by pervasive conformity, and the principal function of free speech shifts from lifting restraints on speakers to insuring that listeners remain open-minded. Finally, beginning in the 1980s with the rapid expansion of feminist theory, critical race theory and other alternative discourses—all of which attacked mainstream and official speech as inherently oppressive, white male dominated discourse—there emerged a strong belief in the pluralization and fragmentation of discourse. Consistent with that belief, the principal role of free speech in stage four becomes the protection of oppressed and marginalized discourses and their

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26 See BOLLINGER, *supra* note 18, at 144.
27 Id.
29 See BOLLINGER, *supra* note 18, at 143-44.
30 Id.
proponents against the hegemonic tendencies of the discourses of the powerful. 31

Of these four stages, stage three affords the greatest justification for toleration of hate speech, 32 while stage four provides the strongest case for its suppression—at least to the extent that it targets racial or religious minorities. Stages one and two do not provide clear cut answers as the perceived evils of hate speech are likely to fluctuate depending on the circumstances. Assuming in stage one that hate speech is not promoted by government, the magnitude of the harms associated with it would depend on the degree of sympathy or revulsion which it produces in official circles. In stage two, on the other hand, even if those who engage in hate speech constitute but a very small minority of the population, the danger posed by hate speech would depend on whether political majorities tend to agree with that speech’s underlying message, or whether they are seriously disturbed by it and firmly committed to combating the views it seeks to convey.

Assessment of how hate speech might fare under the four different historical stages is made much more difficult if the four main philosophical justifications for free speech in the United States are taken into proper account. These four justifications can be referred to respectively as: the justification from democracy; the justification from social contract; the justification from the pursuit of the truth; and the justification from individual autonomy. 33 As we shall see, each of these justifications ascribes a different scope of legitimacy to free speech. Moreover, even different versions of the same justification lead to shifts in the boundaries between speech that requires protection and speech that may be constitutionally restricted, and such shifts are particularly important in the context of hate speech.

The justification from democracy is premised on the conviction that freedom of speech serves an indispensable function in the process of democratic self-government. 34 Without the freedom to convey and receive ideas, citizens cannot successfully carry out the task of democratic self-government. Accordingly, political speech needs to be protected, but not necessary all

31 See, e.g., MATSUDA ET AL., supra note 25; MACKINNON, supra note 25.
32 For an extended argument in favor of such toleration from a stage three perspective, see BOLLINGER, supra note 18.
33 For an extensive discussion of philosophical justifications of free speech that both overlaps with, and differs from, the present discussion, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).
34 The principal exponent of this view was Alexander Meiklejohn. See MEIKLEJOHN, supra note 22.
political speech.\textsuperscript{35} If the paramount objective is the preservation and promotion of democracy, then anti-democratic speech in general, and hate and political extremist speech in particular, would in all likelihood serve no useful purpose, and would therefore not warrant protection.\textsuperscript{36}

The justification from social contract theory is in many ways similar to that from democracy, but the two do not necessarily call for protection of the same speech. Unlike the other three justifications, that from social contract theory is at bottom procedural in nature. Under this justification, fundamental political institutions must be justifiable in terms of an actual or hypothetical agreement among all members of the relevant society,\textsuperscript{37} and significant changes in those institutions must be made only through such agreements. Just as with justification from democracy, in justification from social contract there is a need for free exchange and discussion of ideas. Unlike the justification from democracy, however, social contract cannot exclude \textit{ex ante} any views which, though incompatible with democracy, might be relevant to a social contractor's decision to embrace the polity's fundamental institutions or to agree to any particular form of political organization. Accordingly, the justification from social contract seems to require some tolerance of hate speech, if not in form then at least in substance.

The justification from the pursuit of the truth originates in the utilitarian philosophy of John Stuart Mill. According to Mill, the discovery of truth is an incremental empirical process that relies on trial and error and that requires uninhibited discussion.\textsuperscript{38} Mill's justification for very broad freedom of expression was imported into American constitutional jurisprudence by Justice Oliver Wendell Holmes, and became known as the justification based on the free marketplace of ideas.\textsuperscript{39} This justification, which has been dominant in the United States ever since,\textsuperscript{40} is premised on the firm

\textsuperscript{35} Meiklejohn himself had a broad view of political speech, and advocated an extensive protection of it.

\textsuperscript{36} It is of course possible to maintain that toleration of extremist anti-democratic speech would tend to invigorate the proponents of democracy and hence ultimately strengthen rather than weaken democracy. Be that as it may, toleration of anti-democratic views is not logically required for purposes of advancing self-governing democracy. For example, advocacy of violent overthrow of democratically elected government and establishment of a dictatorship need not be protected to ensure vigorous debate on all plausible alternatives consistent with democracy.

\textsuperscript{37} See, e.g., \textsc{John Rawls}, \textsc{A Theory of Justice} 11-12 (1971).

\textsuperscript{38} See \textsc{John Stuart Mill}, \textsc{On Liberty} (1859), reprinted in \textsc{On Liberty and Other Essays} I (John Gray ed., 1991).

\textsuperscript{39} See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\textsuperscript{40} See \textsc{Schauer}, \textit{supra} note 33, at 15-16.
belief that truth is more likely to prevail through open discussion (even if such discussion temporarily unwittingly promotes falsehoods) than through any other means bent on eradicating falsehoods outright.

Mill's strong endorsement of free speech was rooted in his optimistic belief in social progress. According to his view, truth would always ultimately best falsehood so long as discussion remained possible, and hence even potentially harmful speech should be tolerated as its potential evils could best be minimized through open debate. Accordingly, Mill advocated protection of all speech so long as it falls short of incitement to violence.

Although Holmes's justification of free expression is very similar to Mill's, his reasons for embracing the free marketplace of ideas differ. Unlike Mill, Holmes was driven by skepticism and pessimism and expressed grave doubts about the possibility of truth. Because of this, Holmes justified his free marketplace approach on pragmatic grounds. Since most strongly held views eventually prove false, any limitation on speech is most likely grounded on false ideas. Accordingly, Holmes was convinced that a free marketplace of ideas was likely to reduce harm in two distinct ways: it would lower the possibility that expression would be needlessly suppressed based on falsehoods; and it would encourage most people who tend stubbornly to hold on to harmful or worthless ideas to develop a healthy measure of self-doubt.41

Like Mill, Holmes did not endorse unlimited freedom of speech. For Holmes, speech should be protected unless it poses a “clear and present danger” to people, such as falsely shouting “fire” in a crowded theater and thereby causing panic.42 Both Mill’s and Holmes’s justification from the pursuit of truth justify protection of hate speech that does not amount to incitement to violence. Indeed speech amounting to an “incitement to violence” is but one instance of speech that poses a “clear and present danger.” In the end, whether speech incites to violence or creates another type of clear and present danger, it does not deserve protection—under the justification from the pursuit of truth—because it is much more likely to lead to harmful action than to more speech, and hence it undermines the functioning of the marketplace of ideas.

In the end, Mill and Holmes represent two sides of the same coin. Mill overestimates the potential of rational discussion while Holmes underestimates the potential for serious harm of certain types of speech that fall short of the clear and present danger test.

41 See Abrams, 250 U.S. at 630.
The justification from the pursuit of truth is at bottom pragmatic. As we shall see below, however, because both the Millian and Holmesian pragmatic reasons for the toleration of hate speech are based on dubious factual claims, they may in the end undermine rather than bolster any pragmatic justification of tolerance of hate speech that falls short of incitement to violence.⁴³

Unlike the three preceding justifications, which are collective in nature, the fourth justification for free speech, that from autonomy, is primarily individual-regarding. Indeed, democracy, social peace and harmony through the social contract, and pursuit of the truth, are collective goods designed to benefit society as a whole. In contrast, individual autonomy and well-being through self-expression are presumably always of benefit to the individual concerned, without in many cases necessarily producing any further societal good.

The justification from autonomy is based on the conviction that individual autonomy and respect require protection of virtually unconstrained self-expression.⁴⁴ Accordingly, all kinds of utterances arguably linked to an individual’s felt need for self-expression ought to be afforded constitutional protection. And consistent with this, the justification from autonomy clearly affords the broadest scope of protection for all types of speech.

As originally conceived, the justification from autonomy seemed exclusively concerned with the self-expression needs of speakers. Since hate speech could plausibly contribute to the fulfillment of the self-expression needs of its proponents, it would definitely seem to qualify for protection under the justification from autonomy.

Under a less individualistic—or at least less atomistic—conception of autonomy and self-respect, however, focusing exclusively on the standpoint of the speaker would seem insufficient. Indeed, if autonomy and self-respect are considered from the standpoint of listeners, then hate speech may wellloom as prone to undermining the autonomy and self-respect of those whom it targets. This last observation becomes that much more urgent under a stage four conception of the nature and scope of legitimate regulation of speech. Indeed, if the main threat of unconstrained speech is the hegemony of dominant discourses at

⁴³ For an extended critique of the use of pragmatism to justify free speech protection of hate speech that does not pose a clear and present danger of violence, see MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 150-96 (1998).

the expense of the discourses of oppressed minorities, then self-expression of the powerful threatens the autonomy of those whose voices are being drowned, and hate speech against the latter can only exacerbate their humiliation and the denial of their autonomy.

As these last observations indicate, the possible intersections between the four historical stages and the four philosophical justifications are multiple and complex. Current American constitutional jurisprudence concerning hate speech, however, relies by and large on the justification from the pursuit of truth and tends to espouse implicitly a stage three—or a combination of stage two and stage three—vision on the proper role of speech.

Judicial treatment of hate speech in the United States is of relatively recent vintage. Indeed, approximately fifty years ago, in *Beauharnais v. Illinois,*45 the Supreme Court upheld a conviction for hate speech emphasizing that such speech amounted to group defamation, and reasoning that such defamation was in all relevant respects analogous to individual defamation, which had traditionally been excluded from free speech protection. Beauharnais, a white supremacist, had distributed a leaflet accusing blacks, among other things, of rape, robbery and other violent crimes. Although Beauharnais had urged whites to unite and protect themselves against the evils he attributed to blacks, he had not been found to have posed a “clear and present danger” of violence.

*Beauharnais* has never been explicitly repudiated, but it has been thoroughly undermined by subsequent decisions. Already, the dissenting opinions in *Beauharnais* attacked the Court’s majority rationale, by stressing that both the libel and the “fighting words.”46 exceptions to free speech involved utterances addressed to individuals, and were hence unlikely to have any significant impact on public debate. In contrast, group libel was a public, not private, matter and its prohibition would inhibit public debate.

The current constitutional standard, which draws the line at incitement to violence, was established in the 1969 *Brandenburg v. Ohio*47 decision. *Brandenburg* involved a leader and several members of the Ku Klux Klan who in a rally staged for television (in front of only a few reporters) made several derogatory remarks mainly against blacks, but also some against Jews. In addition,

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45 343 U.S. 250 (1952).
46 In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the Supreme Court held that insults addressed to an individual that were so offensive as to readily prompt a violent reaction did not fall within the ambit of constitutionally protected speech.
while not threatening any imminent or direct violence, the
speakers suggested that blacks should return to Africa and Jews to
Israel, and announced that they would petition the government to
act, but that if it refused they would have no other recourse than to
take matters in their own hands. Selected portions of this rally
were later broadcast on local and national television.

The Supreme Court in a unanimous decision set aside
Brandenburg's criminal conviction concluding that the Klan may
have advocated violence, but that it had not incited it.
Significantly, in drawing the line between incitement and
advocacy, the Court applied to hate speech a standard it had
recently established to deal with communist speech involving
advocacy of forcible overthrow of the government. In so doing,
the Court's decision raises the question of whether hate speech
ought to be equated with (politically) extremist speech. While the
intricacies of this issue remain beyond the scope of this Article,
two brief observations seem in order. First, extremist speech
based on a political ideology like communism is above all political
speech and does not necessarily involve personal hatred. Second,
even if extremist speech involved such hatred—e.g., if communists
seek to fuel passions against those whom they call "capitalist
pigs"—such hatred cannot be simply equated with virulent anti-
Semitism or racism.

If one case has come to symbolize the contemporary political
and constitutional response to hate speech in the United States, it
is the Skokie case in the late 1970s. This case arose out of a
proposed march by Neo-Nazis in full SS uniform with swastikas
through Skokie, a suburb of Chicago with a large Jewish
population, including thousands of Holocaust survivors. The local
municipal authorities took measures—including enacting new
legislation—designed to prevent the march, but both state and
federal courts eventually invalidated the measures as violative of
the Neo-Nazis' free speech rights.

The Neo-Nazis made it clear that their choice of Skokie for
the march was intended to upset Jews, by confronting them with
their message. The constitutional battle focused on whether the
proposed march in Skokie would amount to an "incitement to
violence." Based on the testimony of Holocaust survivors residing
in Skokie, who asserted that exposure to the swastika might
prove them to violence, a lower state court determined that such

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48 See Yates v. United States, 354 U.S. 298 (1957) (holding conviction for mere
advocacy unconstitutional).
49 See Smith v. Collin, 436 U.S. 953 (1978); Nat'l Socialist Party of Am. v. Vill. of
Skokie, 432 U.S. 43 (1977);
That decision was reversed on appeal, on the ground that the lower court had wrongly concluded that the proposed march had met the “incitement to violence” requirement. While acknowledging the intensity of the likely feelings of Holocaust survivors, the court held that they were not sufficient to prohibit the proposed march. The court did not specify what standard would have to be met to justify banning display of the swastika. What if a Jew who is not a Holocaust survivor had testified that a Neo-Nazi march with a Swastika would move him to violence? Or else, what if a gentile had thus testified?

These uncertainties illustrate some of the difficulties associated with the “incitement to violence” standard, even if one assumes that it is the right standard. Be that as it may, the Skokie controversy ultimately fizzled, for after their legal victories, the Neo-Nazis decided not to march in Skokie. Instead, they marched in Chicago far from any Jewish neighborhood. Because of their very marginality, and because they had no sway over the larger non-target audience in the United States, the actual march by the Neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under those circumstances, allowing them to express their hate message probably contributed more to discrediting them than a judicial prohibition against their march.

Because of contextual factors prevalent in the United States during the late 1970s, the result in the Skokie case may appear to be pragmatically justified, and to fit within a stage three conception of free speech. Indeed, in as much as the Neo-Nazi message had no appeal, and reminded its listeners of past horrors as well as of the fact that the United States had to go to war against Hitler’s Germany, it could conceivably be analogized to a vaccine against total complacency. Moreover, by the very falsehood of its ring, utterance of the Neo-Nazi message could well be interpreted as reinforcing the belief in a need for virtually unlimited free speech associated with the justification from the pursuit of the truth.

51 Id. at 24.
52 See id.
53 See Smith, 439 U.S. at 916 (Blackmun, J., dissenting).
54 For an extended argument in support of the judicial handling of the Skokie case within the scope of a stage three conception, see BOLLINGER, supra note 18.
55 It is significant, consistent with these observations, that Jews were on both sides of the Skokie controversy, as civil rights organizations defended the Neo-Nazis’ right to speak. For a further analysis of this fact, see Michel Rosenfeld, Extremist Speech and the
Even if the Skokie case was rightly decided, the constitutional jurisprudence which it helped to shape has proved quite troubling when applied under less favorable circumstances. This conclusion becomes manifest from a consideration of the case of *R.A.V. v. City of St. Paul*, involving the burning of a cross inside the fenced yard of a black family by young white extremists. The latter were convicted under a local criminal ordinance which provided in relevant part that:

> Whoever places on public or private property a symbol, object, ... but not limited to, a burning cross or Nazi swastika, which one knows ... arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct...

In a unanimous decision, the U.S. Supreme Court reversed the conviction, holding the above ordinance unconstitutional for two principal reasons: First, it targeted speech that would not amount to an incitement to violence; and second, even granting that a burning cross qualified as “fighting words,” thus meeting the incitement standard, by criminalizing some incitements but not others, the ordinance was based on impermissible viewpoint discrimination. Indeed, while the ordinance criminalized expression likely to incite violence on the basis of race or religion, it did not criminalize similar expression equally likely to incite violence on other bases, such as homosexuality.

Because of the pervasive nature of racism and the long history of oppression and violence against blacks in the United States, and given the frightening associations evoked by burning crosses, the situation in *R.A.V.* cannot be equated with that involved in the Skokie case. Of course, swastikas tend to inspire as much fear and anger in Jews as burning crosses do in blacks. The major difference between the Skokie case and *R.A.V.*, however, has to do not with the perniciousness of the respective symbols involved, but with the different factual and emotional impact of these symbols on the target and non-target audiences before whom they were meant to be displayed.

Significantly, the Holocaust survivors who testified that the proposed Neo-Nazi march in Skokie would lead them to violence emphasized that their reaction would be triggered by memories of the past. Moreover, though there was some anti-Semitism in the

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57 The burning of a cross, long a practice of white supremacists, such as those belonging to the Ku Klux Klan, has been a symbol of virulent racism much like the display of the swastika has been associated with virulent anti-Semitism.

United States in the 1970s, the small fringe Neo-Nazis were so discredited that it seemed most unlikely that they would in any way, directly or indirectly, advance the cause of anti-Semitism. In contrast, cross burning produced fears not only concerning the past but also the present and the future, and not based on events that had taken place across an ocean, but on events that had marked the sad history of race relations in the United States from the founding of the republic. Indeed, the cross burning in \textit{R.A.V.} occurred in a racially mixed neighborhood, in an era in which several homes of black persons who had moved into white neighborhoods had been burned, in efforts to dissuade members of a growing black middle class from moving into white neighborhoods.

In sum, though both the proposed march in \textit{Skokie} and the cross burning in \textit{R.A.V.} were meant to incite hatred on the basis of religion and race respectively, their effects were quite different. \textit{Skokie} mainly produced contempt for the marchers and a reminder that there was little danger of an embrace of Nazism in the United States. \textit{R.A.V.}, on the other hand, played on pervasive, and to a significant degree justified, fears concerning race relations in America. Undoubtedly, cross burning itself is rejected as repugnant by the vast majority of Americans. The underlying racism associated with it, and the message that blacks should remain in their own segregated neighborhoods, however, unfortunately still have adherents among a non-negligible portion of whites in America.

The ultimate difference between the impact of the hate speech in \textit{Skokie} and that in \textit{R.A.V.} relates to the emotional reactions of the respective target and non-target audiences involved. In \textit{Skokie}, the vast majority of Jews felt no genuine present or future threat whereas the non-target gentile audience felt mainly contempt and hostility towards the Nazi hate message. In \textit{R.A.V.}, however, the target audience definitely experienced anger, fear and concern while the non-target audience was split along a spectrum spanning from revulsion to mixed emotions to...

59 This last observation may no longer hold true in view of certain more recent events, which have increased the profile of white supremacist extremists. For example, in a recent incident, several children were shot at a Jewish day-care center in Los Angeles. See Terry McDermott, \textit{Panic Pierses Illusion of Safety,} \textit{L.A. TIMES,} Aug. 11, 1999, at A1. In Chicago, a white supremacist went on a shooting spree which included the firing of many shots that did not cause any injuries near a synagogue. See \textit{Suspect In Racial Shootings Had a Troubled Past, CHRON. OF HIGHER EDUC.,} July 16, 1999, at A8. During that same spree, however, that individual killed both a Black and Asian person. See id.

III. THE TREATMENT OF HATE SPEECH UNDER INTERNATIONAL HUMAN RIGHTS NORMS AND IN THE CONSTITUTIONAL JURISPRUDENCE OF OTHER WESTERN DEMOCRACIES

If free speech in the United States is shaped above all by individualism and libertarianism, collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants or in the constitutional jurisprudence of other Western democracies. Thus, for example, Canadian constitutional jurisprudence is more concerned with multiculturalism and group-regarding equality. For its part, the German Constitution sets the inviolability of human dignity as its paramount value, and specifically limits freedom of expression to the extent necessary to protect the young and the right to personal honor.

These differences have had a profound impact on the treatment of hate speech. In order to better appreciate this, I shall briefly focus on salient developments in three countries and under certain international covenants. The three countries in question are Canada, the United Kingdom and Germany.

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61 As this article was going to press, the U.S. Supreme Court decided Virginia v. Black, 123 S. Ct. 1536, 538 U.S. ___ (2003), in which it held that criminalizing cross burning with an intent to intimidate was constitutional, but that the Virginia statute before it was unconstitutional because it treated cross burning as prima facie evidence of intent to intimidate. Writing for the Court, Justice O'Connor noted that throughout the history of the Ku Klux Klan, "cross burnings have been used to communicate both threats of violence and messages of shared ideology." Id. at 1545. Because cross burnings have frequently been followed by beatings, lynchings, shootings and killings of African-Americans, they either amount to incitements to violence or they create a reasonable fear in those whom they target of becoming victims of impending violence. On the other hand, when cross burnings are carried out at meetings exclusively attended by members of Klan, the most likely intent is communication of group solidarity among fellow believers in the ideology of white supremacy. Accordingly, the Court's decision in Black is consistent with R.A.V and with the "incitement to violence" standard applied in hate speech cases.


A. Canada

It is particularly interesting to start with the contrast between the United States and Canada, two neighboring countries which were once British colonies and which are now advanced industrialized democracies with large immigrant populations with roots in a vast array of countries and cultures. Moreover, while Canada has produced a constitutional jurisprudence that is clearly distinct from that of the United States, the Canadian Supreme Court has displayed great familiarity with American jurisprudence.65

Although both the United States and Canada are multiethnic and multicultural polities, the United States has embraced an assimilationalist ideal symbolized by the metaphor of the “melting pot” while Canada has placed greater emphasis on cultural diversity and has promoted the ideal of an “ethnic mosaic.”66 Consistent with this difference, the Canadian Supreme Court has explicitly refused to follow the American approach to hate speech. In a closely divided decision, the Canadian Court upheld the criminal conviction of a high school teacher who had communicated anti-Semitic propaganda to his pupils in the leading case of Regina v. Keegstra.67

Keegstra told his pupils that Jews were “treacherous,” “subversive,” “sadistic,” “money loving,” “power hungry” and “child killers.” He went on to say that the Jews “created the Holocaust to gain sympathy.” He concluded that Jews were inherently evil and expected his students to reproduce his teachings on their exams in order to avoid bad grades.68

The criminal statute under which Keegstra had been convicted prohibited the willful promotion of hatred against a group identifiable on the basis of color, race, religion or ethnic origin.69 The statute in question made no reference to incitement to violence, nor was there any evidence that Keegstra had any intent to lead his pupils to violence.

In examining the constitutionality of Keegstra’s conviction, the Canadian Supreme Court referred to the following concerns as

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65 One example is the thorough discussion of American decisions and rejection of the American approach in the majority opinion in Canada’s leading hate speech case, Regina v. Keegstra., [1990] 3 S.C.R. 697.
68 See id. at 714.
69 See id. at 713.
providing support for freedom of expression under the Canadian Charter:

(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.70

Thus, the Canadian protection of freedom of expression, like the American, relies on the justifications from democracy, from the pursuit of truth and from autonomy. The Canadian conception of autonomy, however, is less individualistic than its American counterpart, as it seemingly places equal emphasis on the autonomy of listeners and speakers.

In spite of these affinities, the Canadian Supreme Court refused to follow the American lead and draw the line at incitement to violence. Stressing the Canadian Constitution’s commitment to multicultural diversity, group identity, human dignity and equality,71 the Court adopted a nuanced approach designed to harmonize these values with those embedded in freedom of expression. And based on this approach, the Court concluded that hate propaganda such as that promoted by Keegstra did not warrant protection as it did more to undermine mutual respect among diverse racial, religious and cultural groups in Canada than to promote any genuine expression needs or values.

In reaching its conclusion, the Canadian Court considered the likely impact of hate propaganda on both the target-group and on non-target group audiences. Members of the target group are likely to be degraded and humiliated, to experience injuries to their sense of self-worth and acceptance in the larger society, and may as a consequence avoid contact with members of other groups within the polity.72 Those who are not members of the target group, or society at large, on the other hand, may become gradually de-sensitized and may in the long run become accepting of messages of racial or religious inferiority.73

Not only does the Canadian approach to hate speech focus on gradual long-term effects likely to pose serious threats to social cohesion rather than merely on immediate threats to violence, but

70 Id. at 728.
71 See id. at 736.
72 See id. at 746.
73 See id. at 747.
it also departs from its American counterpart in its assessment of the likely effects of speech. Contrary to the American assumption that truth will ultimately prevail, or that speech alone may not lead to truth but is unlikely to produce serious harm, the Canadian Supreme Court is mindful that hate propaganda can lead to great harm by bypassing reason and playing on the emotions. In support of this, the Court cited approvingly the following observations contained in a study conducted by a committee of the Canadian Parliament:

The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.74

In short, the Canadian treatment of hate speech differs from its American counterpart in two principal respects: First, it is grounded on somewhat different normative priorities; and second, the two countries differ in their practical assessments of the consequences of tolerating hate speech. Under the American view, there seems to be a greater likelihood of harm from suppression of hate speech that falls short of incitement to violence than from its toleration. From a Canadian perspective, on the other hand, dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.

B. The United Kingdom

Unlike the United States and Canada, the United Kingdom does not have a written constitution. Nevertheless, it recognizes a right to freedom of expression through its adherence to international covenants, such as the European Convention on Human Rights, and through commitment to constitutional values inherent in its rule of law tradition.75 Moreover, the United

74 Id.
75 See European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10, 213 U.N.T.S. 221; Regina v. Sec'y of State for the Home Dep't, ex parte Brind, 1 A.C. 696 (1991) (holding that freedom of expression is considered a basic right under both written and unwritten constitutions). Furthermore, through adoption of the Human Rights Act of 1998, which became effective in October 2000, the United Kingdom has incorporated ECHR Article 10 into domestic law, thus making it directly
Kingdom has criminalized hate speech going back as far as the seventeenth century. The focus of British regulation of free speech has shifted over the years, starting with concern with reinforcing the security of the government, continuing with preoccupation with incitement to racial hatred among non-target audiences, and culminating with the aim of protecting targets against racially motivated harassment. As we shall see, the results of British regulation have been mixed, with significant success against Fascists and Nazis, but with much less success in attempts to defuse racial animosity between whites and non-whites.

The seventeenth century offense of seditious libel punished the utterance or publication of statements with “an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty... or to promote feelings of ill-will and hostility between different classes of... [her] subjects.” To the extent that seditious libel allows for punishment of political criticism of the government, it contravenes a core function of modern freedom of expression rights. Although seditious libel was primarily used to punish those perceived to pose a threat to the monarchy, occasionally, it was used in the context of what today is called “hate speech.” Thus, in Regina v. Osborne the publishers of a pamphlet that asserted that certain Jews had killed a woman and her child because the latter’s father was a Christian were convicted of seditious libel. As a consequence of distribution of the pamphlet some Jews were beaten and threatened with death. As this case involved direct incitement to violence and a clear threat to the maintenance of public order, it may be best viewed as vindicating government dominance and control rather than as protecting the Jews from group defamation.

Because seditious libel can be used to frustrate criticism of government, it can pose a threat to the kind of vigorous debate that is indispensable in a working democracy. Significantly, as used in the early twentieth century, seditious libel became rather ineffective as convictions could only be obtained upon proof of direct incitement to violence or breach of public order. In 1936, Parliament adopted Section 5 of the Public Order Act.

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76 ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN GREAT BRITAIN 345 (1972).
77 Id.
78 2 Swanst. 503n (1732).
79 See LESTER & BINDMAN, supra note 76, at 345.
80 Id. at 347.
81 Public Order Act, 1936, 1 GEO. 6, c. 6, § 5 (Eng.).
legislation, which proved useful in combating the rise of British Fascism prior to and during World War II, relaxed the seditious libel standards in two critical respects: first it allowed for punishment of speech “likely” to lead to violence even if it did not actually result in violence; and, second it allowed for punishment of mere intent to provoke violence.\textsuperscript{82}

After World War II, the United Kingdom enacted further laws against hate propaganda, consistent with its obligations under international covenants.\textsuperscript{83} Thus, in 1965, the British Parliament enacted Section 6 of the Race Relations Act (RRA 1965) which made it a crime to utter in public or to publish words “which are threatening, abusive or insulting” and which are intended to incite hatred on the basis of race, color or national origin.\textsuperscript{84}

The RRA 1965 focuses on incitement to hatred rather than on incitement to violence, but it reintroduces proof of intent as a prerequisite to conviction. This makes prosecution more difficult, as evinced by the acquittal in the 1968 Southern News case.\textsuperscript{85} The case involved a publication of the Racial Preservation Society, which advocated the “return of people of other races from this overcrowded island to their own countries.” At trial the publishers asserted that their paper addressed important social issues and that it did not attempt to incite hatred. Because of the prosecution’s failure to establish the requisite intent, the net result of Southern News was the dissemination of its racist views in the mainstream press, and a judicial determination that its message was a legally protected expression of a political position rather than illegal promotion of hate speech.

The problem posed by Southern News was remedied by removal of the intent requirement in the Race Relations Act of 1976 (RRA 1976).\textsuperscript{86} Moreover, the RRA 1965 did lead to a series of convictions, but a number of these were obtained against leaders of the Black Liberation Movement in the late 1960s, raising disturbing questions if not about the law itself, at least about its enforcement. For example, in Regina v. Malik,\textsuperscript{87} the black defendant was convicted and sentenced to a year in prison.

\begin{footnotes}
\item[83] Id. at 733.
\item[84] Race Relations Act, 1965, c. 73, § 6 (1) (Eng.).
\item[85] This is an unreported case discussed in the \textit{London Times}. See Race Act not a Curb, TIMES (London), Mar. 28, 1968, at 2.
\end{footnotes}
for having asserted that whites are "vicious and nasty people" and for stating, inter alia,

I saw in this country in 1952 white savages kicking black women. If you ever see a white man lay hands on a black woman, kill him immediately. If you love our brothers and sisters you will be willing to die for them.\(^8\)

The defendant admitted that his speech was offensive to whites but argued that he had a right to respond to the evils that whites had perpetrated against blacks.\(^9\) In another case, four blacks were convicted of incitement to racial hatred for a speech made at Hyde Park's Speakers' Corner in which they called on black nurses to give the wrong injection to white people.\(^10\) The court was unswayed by the defendants' claim that they were expressing their frustrations as blacks who had to endure white racism.\(^11\)

The laws discussed thus far have focused on threats to the public and on promotion of hatred through persuasion of non-target audiences. In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997 it enacted the Protection from Harassment Act.\(^12\) These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the United Kingdom. In the end, the problem may have to do less with the particular legal regime involved, than with the social and political context in which that regime is embedded. As already mentioned, British legislation has been much more successful in combating fascism and Nazism than in dealing with hatred between whites and non-whites. Perhaps the reason for that difference is that a much greater consensus has prevailed in Britain concerning fascism than concerning the absorption and accommodation of the large, relatively recent influx of racial minorities.

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\(^9\) Although the above cited passage urges violence if certain conditions are met, it clearly falls short of an "incitement" to violence. Actually, to the extent that it advocates violence to combat violence, it arguably preaches self-defense rather than mere aggression.
\(^10\) See *Sentences Today on Four Coloured Men*, *TIMES* (London), Nov. 29, 1967, at 3.
\(^11\) *Id.*
\(^12\) See Public Order Act, 1986, c. 64, §§ 5-6 (Eng.); Protection From Harassment Act, 1997, c. 40, § 7 (Eng.).
C. Germany

The contemporary German approach to hate speech is the product of two principal influences: the German Constitution’s conception of freedom of expression as properly circumscribed by fundamental values such as human dignity and by constitutional interests such as honor and personality; and the Third Reich’s historical record against the Jews, especially its virulent hate propaganda and discrimination which culminated in the Holocaust.

Unlike the United States, and much like Canada, Germany treats freedom of expression as one constitutional right among many, rather than as paramount or even as first among equals. Whereas under the Canadian Constitution, freedom of expression is limited by constitutionally mandated vindications of equality and multiculturalism, under the German Basic Law, freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.

The contrast between the German approach and other approaches to freedom of speech, such as the American or the Canadian, is well captured in the following summary assessment of the German Constitutional Court’s treatment of free speech claims:

First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion—as opposed to fact—constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing.

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93 See discussion supra notes 64, 65.

94 The values underlying the Basic Law’s approach of freedom of expression were discussed by the German Constitutional Court in the landmark Lütíh case, BVerfGE 7, 198 (1958) (stating that the Basic Law “establishes an objective order of values … which centers upon dignity of the human personality developing freely within the social community …”) (translated in DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 363 (2d. ed. 1997)).

95 KOMMERS, supra note 94, at 424.
In broad terms, freedom of speech, like other constitutional rights in Germany, is in part a negative right—i.e., a right against government—and, in part a positive right—i.e., a right to government sponsorship and encouragement of free speech. In contrast to the Anglo-American approach, which in its Lockean tradition regards fundamental rights as inalienable and as preceding and transcending civil society, the German tradition regards fundamental rights as depending on the (constitutional) state for their establishment and support. Consistent with this, the more free speech rights are conceived and treated as positive rights, the easier it becomes to pin on the state responsibility for hate speech which it may find repugnant, but which it does not prohibit or punish. Furthermore, the German constitutional system is immersed in a normative framework that is more Kantian than Lockean, thus requiring a balancing of rights and duties not only on the side of the state but also on that of the citizenry.

As in the United States, in Germany freedom of speech is legitimated from the respective standpoints of the justification from democracy, from the pursuit of truth and from autonomy. These justifications are conceived quite differently in Germany than in the United States, however, with the consequence that the nature and scope of free speech rights in Germany stand in sharp contrast to their American counterparts. Indeed, because of its constitutional commitment to "militant democracy," the German justification from democracy does not encompass extremist antidemocratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets. The German justification from the pursuit of truth, on the other hand, does not embrace its American counterpart's Millean presuppositions. This emerges clearly from the German Constitutional Court's firm conviction that established falsehoods can be safely denied protection without hindrance to the pursuit of truth. Finally, the German justification from autonomy is not centered on the autonomy of the speakers, as its American counterpart has proven to date. Instead, the German justification implies the need to strike a balance between rights and duties, between the individual and the community, and between the self-expression needs of

96 Id. at 386.
97 See id. at 298, 305.
speakers and the self-respect and dignity of listeners.

The contemporary German constitutional system is grounded in an order of objective values, including respect for human dignity and perpetual commitment to militant democracy.\(^{100}\) As such, it excludes certain creeds and thus paves the way for content-based restrictions on freedom of speech which would be unacceptable under American free speech jurisprudence.\(^{101}\) Undoubtedly, the German Basic Law’s adoption of certain values and the consequent legitimacy of content-based speech regulation originated in the deliberate commitment to repudiate the country’s Nazi past, and to prevent at all costs any possible resurgence of it in the future. Within this context, concern with protection of the Jewish community and with prevention of any rekindling of virulent anti-Semitism within the general population has left a definite imprint not only on the constitutional treatment of hate speech, but also on the evolution of free speech doctrine more generally.

Evidence of this can be found in the Constitutional Court’s landmark decision in the 1958 Lüth Case.\(^{102}\) Lüth involved an appeal to boycott a post-war movie by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. Lüth, who had advocated the boycott and who was an active member of a group seeking to heal the wounds between Christians and Jews, was enjoined by a Hamburg court from continuing his advocacy of a boycott. He filed a complaint with the Constitutional Court claiming a denial of his free speech rights.

The Constitutional Court upheld Lüth’s claim and voided the injunction against him, noting that he was motivated by apprehension that the reemergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, “to mean that nothing had changed in German cultural life since the National Socialist period...”\(^{103}\) The Court went on to note that Lüth’s concerns were very important for Germans as “[n]othing has damaged the German reputation as much as the cruel Nazi persecution of the Jews. A

\(^{100}\) Neither Article 1 of the Basic Law which enshrines human dignity nor Article 21 which establishes militant democracy are subject to amendment and are thus made permanent fixtures of the German constitutional order.


\(^{102}\) BverfGE 7, 198 (1958).

\(^{103}\) KOMMERS, supra note 94, at 367.
crucial interest exists, therefore, in assuring the world that the German people have abandoned this attitude. . . ." Accordingly, in balancing Lüth's free speech interests against the film director's professional and economic interests, the Court concluded that "[w]here the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield." Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead. Although the precise legal standards applicable to the regulation of hate speech have evolved over the years, hate speech against groups, and anti-Semitic propaganda in particular, have been routinely curbed by the German courts. For example, spreading pamphlets charging "the Jews" with numerous crimes and conspiracies, and even putting a sticker only saying "Jew" on the election posters of a candidate running for office were deemed properly punishable by the courts.

Under current law, criminal liability can be imposed for incitement to hatred, or for attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin. Some of these provisions require showing a threat to public peace, while others do not. But even when such a showing is necessary, it imposes a standard that is easily met, in sharp contrast to the American requirement of proof of an incitement to violence.

Perhaps the most notorious and controversial offshoot of Germany's attempts to combat hate speech relate to the prohibitions against denying the Holocaust, or to use a literal translation of the German expression, to engage in the "Auschwitz lie." Attempts to combat Holocaust denials raise difficult questions not only concerning the proper boundaries between fact and opinion, but also concerning the limits of academic freedom.

These issues came before the Constitutional Court in the

104 Id.
105 Id.
106 See Kübler, supra note 7, at 340.
107 For an account of the most important changes, see id. at 340-47.
108 See id. at 343-44.
109 See id. at 344.
110 Id. at 345.
111 See id. at 344, n.32.
112 Id. at 344-46.
Holocaust Denial Case in 1994. This case arose as a consequence of an invitation to speak at a public meeting issued by a far right political party to David Irving, a revisionist British historian who has argued that the mass extermination of Jews during the Third Reich never took place. The government conditioned permission for the meeting on assurance that Holocaust denial would not occur, stating that such denial would amount to "denigration of the memory of the dead, criminal agitation, and, most important, criminal insult, all of which are prohibited by the Criminal Code." Thereupon, the far right party brought a complaint alleging an infringement of its freedom of expression rights.

Relying on the distinction between fact and opinion and emphasizing that demonstrably false facts have no genuine role in opinion formation, the Constitutional Court upheld the lower court's rejection of the complaint. In so doing, the Court cited the following passage from the lower court's opinion:

The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-à-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny that these events denies vis-à-vis each individual the personal worth of [Jewish persons]. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.

In short, given the special circumstances involved, Holocaust denial is seen as robbing the Jews in Germany of their individual and collective identity and dignity, and as threatening to undermine the rest of the population's duty to maintain a social and political environment in which Jews and the Jewish community can feel themselves to be an integral part.

Holocaust denial in relation to the Jews in Germany presents a very special case. But what about the fact/opinion distinction in
other contexts? Or hate speech and insults against other individuals or groups?

The Constitutional Court rendered a controversial decision bearing on the fact/opinion distinction in the Historical Fabrication Case.\(^\text{116}\) That case involved a book claiming that Germany was not to be blamed for the outbreak of World War II, as that war was thrust upon it by its enemies. The Court held that the book’s claim amounted to an “opinion”—albeit a clearly unwarranted one—and was thus within the realm of protected speech.\(^\text{117}\) While who is to blame for the outbreak of the war is clearly more a matter of opinion than whether or not the Holocaust took place, the line between fact and opinion is by no means as neat as the Constitutional Court’s jurisprudence suggests. For example, is admission of the Holocaust coupled with the claim that the Jews brought it on themselves a protected opinion or such a gross distortion of the facts as to warrant equating the “opinion” involved with assertion of patently false facts?

Insults linked to false statements targeting groups other than Jews was at the core of the Constitutional Court’s decision in the Tucholsky I Case,\(^\text{118}\) which dealt with display of a bumper sticker on a car with the slogan “soldiers are murderers.” The bumper sticker in question had been displayed by a social science teacher who was a pacifist and who objected to Germany’s military role in the 1991 Gulf War. Moreover, the above slogan had a long pedigree in German history as it was the creation of the writer Kurt Tucholsky, an Anti-Nazi pacifist of the 1930s who was stripped of his German citizenship in 1933.

The lower court interpreting the slogan literally found it to be a defamatory incitement to hatred which assaulted the human dignity of all soldiers. By asserting that all soldiers are murderers, the slogan cast them as unworthy members of the community. Based on this analysis, the social science teacher was fined for violating the criminal code’s prohibition against incitement to hatred against an identifiable group within society.

The Constitutional Court, construing the slogan as an expression of opinion, held it to be constitutionally protected speech. In so doing, the Court asserted that the slogan should not be construed literally. Emphasizing that the slogan had been displayed next to a photograph from the Spanish Civil War showing a dying soldier who had been hit by a bullet accompanied by an inscription of the word “why?”; the Court interpreted the

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\(^{116}\) 90 BVerfGE 1 (1994).

\(^{117}\) See KOMMERS, supra note 94, at 387.

\(^{118}\) 21 EuGRZ 463-65 (1994).
message of the slogan as casting soldiers as much as victims as it had as killers. Accordingly, the slogan could be interpreted as an appeal to reject militarism, by asking why society forces soldiers—who are members of society as everyone else—to become potential murderers and to expose them to becoming victims of murder.

The Constitutional Court's decision provoked an angry reaction among politicians, journalists and scholars. The Court revisited the issue as it reviewed other criminal convictions in cases involving statements claiming that "soldiers are murderers" or "soldiers are potential murderers," in its 1995 Tucholsky II Case. Noting that the attacks involved were not against any particular soldier but against soldiers as agents of the government, the Court reiterated that the statements involved amounted to constitutionally protected expressions of opinion rather than to the spreading of false facts. The Court recognized that public institutions deserve protection from attacks that may undermine their social acceptance. Nonetheless, the Court concluded that the right to express political opinions critical or even insulting to political institutions, rather than to any segment of the population, outweighed the affected institutions' need for protection.

These two decisions illustrate some of the difficulties involved in drawing cogent lines between fact and opinion, and between acceptable—and in a democracy indispensable—political criticism and inflammatory excesses threatening the continued viability of public institutions. This notwithstanding, in Germany the prohibitions against hate speech are firmly grounded. The only open questions concern their constitutional boundaries in cases that do not involve anti-Semitism or the Holocaust.

### D. International Covenants

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II, such as the 1948 U.N. Universal Declaration of Human Rights, the 1966 United Nations Covenant on Civil and Political Rights (CCPR), and the 1950

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119 See KOMMERS, supra note 94, at 392-93.
120 Id. at 393.
European Convention on Human Rights (ECHR). These covenants, however, do not extend protection to all speech, and some such as the CCPR specially condemn hate speech. A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by Article 4 of the 1965 International Convention on the Elimination of All forms of Racial Discrimination (CERD) Article 4 provides in relevant part, that:

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form . . .

[State Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination . . . and also the provision of any assistance to racist activities, including the financing thereof . . .

Shall declare illegal and prohibit organizations . . . and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law . . .

The United States attached a reservation to its ratification of CERD, since compliance with Article 4 would obviously contravene current American free speech jurisprudence.

International bodies charged with judicial review of hate speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their United States counterpart. For example, in Faurisson v. France, the U.N. Human Rights Committee upheld the conviction of Faurisson under France's "Gayssot Act" which makes it an offence to contest the existence of proven crimes against humanity. Faurisson, a French university professor, had promoted the view that the gas chambers at Auschwitz and other Nazi camps had not been used for the purposes of extermination, and claimed that all the people in France knew that "the myth of the gas chambers is a dishonest fabrication."

The Human Rights Committee decided that Faurisson's
conviction for having violated the rights and reputation of others was consistent with the free speech protection afforded by Article 19 of CCPR. Since Faurisson’s statements were prone to foster anti-Semitism, their restriction served the legitimate purpose of furthering the Jewish community’s right “to live free from fear of an atmosphere of anti-[S]emitism.”

Notwithstanding its support for Faurisson’s conviction, the Human Rights Committee noted that the “Gayssot Act” was overly broad in as much as it prohibited publication of bona fide historical research which would tend to contradict some of the conclusions arrived at the Nuremberg trials. Thus, whereas suppression of demonstrably false facts likely to kindle hatred is consistent with United Nations standards, suppression of plausible factual claims or of opinions based on such facts would not be justified even if it happened to lead to increased anti-Semitism.

The European Court of Human Rights has also upheld convictions for hate speech as consistent with the free speech guarantees provided by Article 10 of the ECHR. An interesting case in point is *Jersild v. Denmark*. The Danish courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, calling them among other things, “niggers” and “animals,” and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary that he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR standards, but which by a twelve to seven vote held that the journalist’s conviction violated the standards in question.

The convictions of the youths for having treated a segment of the population as being less than human were consistent with the limitations on free speech for “the protection of the reputation or rights of others” imposed by Article 10 of the ECHR. The conviction of the journalist for aiding and abetting the youths had been premised on the finding that the broadcast had given wide publicity to views that would otherwise have reached but a very small audience, thus exacerbating the harm against the targets of the hate message. The European Court’s majority stressed that the journalist had not endorsed the message of his racist interviewees; and had tried to expose them and their message in terms of their social milieu, their frustrations, their propensity to

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violence and their criminal records as posing important questions of public concern; concluding that conviction had been disproportionate in relation to the permissible aim of protecting the rights and reputations of the target group because the journalists had no intent of promoting hatred, the legitimacy of his conviction turned on a balancing of his expression rights in reporting facts and conveying opinions about them and the harms imposed by the hate message on its targets. Both the majority and the dissenters on the European Court agreed that balancing was the proper approach. They disagreed, however, concerning how much weight should be borne by the competing interests involved. From the standpoint of the dissenters, the majority placed too much weight on the journalist’s expression rights and too little on the protection of the dignity of the victims of hatred. The dissenters emphasized the fact that the journalist had edited down the interviews to the point of principally highlighting the racial slurs, and that he had at no point in the documentary expressed disapproval or condemnation of the statements uttered by his interviewees.

In the end, the disagreements between the majority and the dissent in Jersild center on the proper interpretation to be given to the general tenor of the documentary and to the attitude displayed in it by the journalist through his interviews and reports. Accordingly, just as it became plain in the context of hate speech regulation in Germany, prohibitions against crude insults and patently false statements of fact generally seem legally manageable. On the other hand, issues depending on opinions or on drawing the often elusive line between fact and opinion, present much more troubling questions. With this in mind and in light of the different approaches to hate speech outlined above, it is now time to explore how best to deal with hate speech in the context of contemporary constitutional concerns.

IV. CONFRONTING THE CHALLENGES OF HATE SPEECH IN CONTEMPORARY CONSTITUTIONAL DEMOCRACIES: OBSERVATIONS AND PROPOSALS

The preceding analysis reveals that protection of hate speech as well as its prohibition raise serious and difficult problems. Not all hate speech is alike, and its consequences may vary from one setting to another. Furthermore, to the extent that hate speech produces harms that are not immediate, these may be uncertain and hard to measure. The impact of hate speech also seems to
depend to a significant extent on the medium of its communication. Thus, an oral communication to a relatively small audience at Speakers’ Corner in London’s Hyde Park should not be automatically lumped together with a posting on the Internet available worldwide on the web.

The two contrasting approaches to hate speech adopted by the United States and by other Western democracies each has certain advantages and drawbacks. The main advantage of the American approach is that it makes for relatively clear cut boundaries between permissible and impermissible speech. And, at least in cases in which hate speech poses little threat to its targets and its message is repudiated by an overwhelming majority of its non-target audience, as in the Skokie case, tolerance may be preferable. Indeed in that case, the dangers stemming from suppression and possible spread underground of hate speech would seem to outweigh the harm from unconstrained communication.

The chief disadvantage of the American approach is that it is not attuned to potentially serious harms that may unfold gradually over time or have their greatest immediate impact in remote places. In addition, the American approach tends to remain blind to the considerable potential harm that hate speech can cause to the equality and dignity concerns of its victims or the attitudes and beliefs of non-target audiences. The latter groups may reject the explicit appeal to hate but nonetheless be influenced by the more diffuse implicit message lurking beneath the surface of that appeal.129

The principal advantage to the approach to hate speech prevalent outside the United States is that it makes for unequivocal condemnation of it as morally repugnant, and at least in some cases, such as in the United Kingdom’s efforts against the spread of fascist hate propaganda discussed above, it can play an important role in the struggle against extremist anti-democratic political movements. Furthermore, as exemplified by contemporary Germany’s steadfast and continuous pursuit against anti-Semitic hate propaganda, vigorous prohibition and enforcement can bolster the security, dignity, autonomy and well being of the target community while at the same time reminding non-target groups and society at large that the hate message at

129 This may have occurred for many whites in connection with the R.A.V. case. See discussion supra note 101. These whites most likely found the cross burning repugnant, but nonetheless did not want to live in a racially mixed neighborhood. They may even have hidden that belief from themselves by rationalizing that it is better to have a racially segregated neighborhood to avoid the kind of ugly violence exemplified by cross burning.
stake is not only repugnant and unacceptable, but that it will not be tolerated, and that those who are bent on spreading it will be punished.

The principal disadvantages to the approach to hate speech under consideration, on the other hand, are: that it inevitably has to confront difficult line drawing problems, such as that between fact and opinion in the context of the German scheme of regulation; that when prosecution of perpetrators of hate speech fails, such as in the British Southern News case discussed above,\(^{130}\) regulation may unwittingly do more to legitimate and to disseminate the hate propaganda at issue than a complete absence of regulation would have;\(^{131}\) that prosecutions may be too selective or too indiscriminate owing to (often unconscious) biases prevalent among law enforcement officials, as appears to have been the case in the prosecutions of certain black activists under the British Race Relations Act;\(^{132}\) and, that since not all that may appear to be hate speech actually is hate speech—such as the documentary report involved in Jersild\(^ {133}\) or a play in which a racist character engages in hate speech, but the dramatist intends to convey an anti-hate message—regulation of that speech may unwisely bestow powers of censorship over legitimate political, literary and artistic expression to government officials and judges.

In the last analysis, none of the existing approaches to hate speech are ideal, but on balance the American seems less satisfactory than its alternatives. Above all, the American approach seems significantly flawed in some of its assumptions, in its impact and in the message it conveys concerning the evils surrounding hate speech. In terms of assumptions, the American approach either underestimates the potential for harm of hate speech that is short of incitement to violence, or it overestimates the potential of rational deliberation as a means to neutralize calls to hate. In terms of impact, given its long history of racial tensions, it is surprising that the United States does not exhibit greater concern for the injuries to security, dignity, autonomy and well being which officially tolerated hate speech causes to its black minority. Likewise, America’s hate speech approach seems to unduly discount the pernicious impact that racist hate speech may

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\(^{130}\) See supra note 85.

\(^{131}\) This disadvantage should not be overestimated, however. Indeed, if most prosecutions against a certain type of hate succeed and only a few fail, then conceivably prohibition may on the whole be preferable to freedom spread through lack of regulation.


have on lingering or dormant racist sentiments still harbored by a non-negligible segment of the white population. Furthermore, even if we discount the domestic impact of hate speech, given the worldwide spread of locally produced hate speech, such as in the case of American manufactured Neo-Nazi propaganda disseminated through the worldwide web, a strong argument can be made that American courts should factor in the obvious and serious foreign impact of certain domestic hate speech in determining whether such speech should be entitled to constitutional protection. Finally, in terms of the message conveyed by refusing to curb most hate speech, the American approach looms as a double-edged sword. On the one hand, tolerance of hate speech in a country in which democracy has been solidly entrenched since independence over two hundred years ago conveys a message of confidence against both the message and the prospects of those who endeavor to spread hate. On the other hand, tolerance of hate speech in a country with serious and enduring race relations problems may reinforce racism and hamper full integration of the victims of racism within the broader community.

The argument in favor of opting for greater regulation of hate speech than that provided in the United States rests on several important considerations, some related to the place and function of free speech in contemporary constitutional democracies, and others to the dangers and problems surrounding hate speech. Typically, contemporary constitutional democracies are increasingly diverse, multiracial, multicultural, multireligious and multilingual. Because of this and because of increased migration, a commitment to pluralism and to respect of diversity seem inextricably linked to vindication of the most fundamental individual and collective rights. Increased diversity is prone to making social cohesion more precarious, thus, if anything, exacerbating the potential evils of hate speech. Contemporary democratic states, on the other hand, are less prone to curtailing

134 In this connection, it is significant that following a steep rise in racist incidents involving hate speech on university campuses throughout the United States, several universities, including the University of Michigan and Stanford University adopted regulations against hate speech. These were, however, struck down as unconstitutional by lower courts because they restricted speech falling short of the incitement to violence standard. See Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); Corry v. Stanford, No. 74039 (Cal. Super. Ct. Santa Clara Co. Feb., 27, 1995) (applying constitutional standard incorporated in state law and made applicable to private universities).

135 This is the view defended in BOLLINGER, supra note 18.

136 For a discussion of the uses of tolerance of hate speech to promote existing racism, see Rosenfeld, supra note 55, at 1457, 1487.
free speech rights than their predecessors either because of deeper implantation of the democratic ethos or because respect of supranational norms has become inextricably linked to continued membership in supranational alliances that further vital national interests.

In these circumstances, contemporary democracies are more likely to find themselves in a situation like stage four in the context of the American experience with free speech rather than in one that more closely approximates a stage one experience. In other words, to drown out minority discourse seems a much greater threat than government prompted censorship in contemporary constitutional democracies that are pluralistic. Actually, viewed more closely, contemporary pluralistic democracies tend to be in a situation that combines the main features of stage two and stage four. Thus, the main threats to full fledged freedom of expression would seem to come primarily from the “tyranny of the majority” as reflected both within the government and without, and from the dominance of majority discourses at the expense of minority ones.

If it is true that majority conformity and the dominance of its discourse pose the greatest threat to uninhibited self-expression and unconstrained political debate in a contemporary pluralist polity, then significant regulation of hate speech seems justified. This is not only because hate speech obviously inhibits the self-expression and opportunity of inclusion of its victims, but also, less obviously, because hate speech tends to bear closer links to majority views than might initially appear. Indeed, in a multicultural society, while crude insults uttered by a member of the majority directed against a minority may be unequivocally rejected by almost all other members of the majority culture, the concerns that led to the hate message may be widely shared by the majority culture who regard of other cultures as threats to their way of life. In those circumstances, hate speech might best be characterized as a pathological extension of majority feelings or beliefs.

So long as the pluralist contemporary state is committed to maintaining diversity, it cannot simply embrace a value neutral mindset, and consequently it cannot legitimately avoid engaging in some minimum of viewpoint discrimination. This is made clear by the German example, and although the German experience has been unique, it is hard to imagine that any pluralist constitutional democracy would not be committed to a similar position, albeit to a lesser degree. Accordingly, without adopting German free

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137 See supra notes 22-29 and accompanying text.
138 This includes even the United States, which for all its professed commitment to a
speech jurisprudence, at a minimum contemporary pluralist democracy ought to institutionalize viewpoint discrimination against the crudest and most offensive expressions of racism, religious bigotry and virulent bias on the basis of ethnic or national origin.

Rejection of a content-neutral approach to speech does not contravene the four philosophical justifications of free speech discussed above, but it does somewhat alter the nature and scope of speech protected under some of them. In terms of the justification from democracy, whereas tolerating hate speech is not inherently at odds with maintaining a free speech regime compatible with the flow of ideas required to sustain a well functioning democracy, it is inconsistent with the smooth functioning of a democracy marked by an unswerving commitment to pluralism. Accordingly, either the justification from democracy is regarded as constrained by the need to sustain pluralism, or conceived as linked to a particular kind of democracy grounded on pluralism. In either case, in a polity committed to pluralism, hate speech could not conceivably contribute in any legitimate way to democracy.

A similar argument can be advanced in relation to the justification from social contract. Either commitment to pluralism is not subject to alteration through agreement, or it is assumed that preservation of basic individual and collective dignity is in the self-interest of every contractor, and thus not prone to being bargained away in the course of agreeing to any viable pact. Consequently, hate speech could be safely banned without affecting the integrity of the social contract justification.

In view of the earlier discussion of the justification from autonomy, it is obvious that it goes hand in hand with a ban against hate speech so long as the autonomy of speakers and listeners is given equal weight. In other words, if autonomy is taken as requiring dignity and reciprocity, then it demands banning hate speech as an affront against the basic rights of its targets.

free speech jurisprudence anchored on viewpoint neutrality, has in certain cases upheld restrictions on speech that seem based on viewpoint bias. See, e.g., Dennis v. United States, 341 U.S. 494, 544-45 (1951) (Frankfurter, J., concurring) (characterizing clearly political speech of members of the Communist Party advocating—but not inciting to violence or creating any imminent present danger of—the violent overthrow of the government as speech that ranks “low” “on any scale of values which we have hitherto recognized”). This confuses the category of speech involved, namely political speech, which has traditionally been ranked as the highest, and the content of the speech, which had been indeed rejected as repugnant by the vast majority of Americans.

139 See supra note 43 and accompanying text.
Unlike the above justifications, the pursuit of truth does not depend on whether or not one embraces pluralism. Nevertheless, if one rejects the presumptions made by Mill and Holmes, the banning of hate speech can be amply reconciled with commitment to the pursuit of truth. The justification for rejecting the Millean and Holmesian presumptions has been persuasively made by the Canadian Supreme Court in the Keegstra case discussed above.\(^{140}\) Moreover, banning definitively proven falsehoods, such as unequivocal denial of the Holocaust, cannot conceivably hinder pursuit of the truth.

Opinion based hate speech may not be as convincingly dismissed, but it is difficult to see how hate speech in form could contribute to furthering the truth. The same cannot automatically be said about the broader message lurking beneath hate-based opinion. Thus a racist belief or opinion may be based on fears or concerns which may not themselves be worthless from the standpoint of pursuit of the truth. For example, sentiments against recent immigrants belonging to different races or cultures may stem from fears of challenges against one’s economic security and cultural values. Whether and to what degree such fears may be warranted are certainly questions which ought to be freely discussed from the standpoint of pursuit of the truth. Consistent with this, special caution should be exercised when dealing with what appears to be hate speech in substance, but is not hate speech in form.

From a theoretical standpoint, it is quite possible to draw a bright line between fears and concerns and racist animus. Arguing that immigration from a former colony should be curtailed because it will result in a loss of jobs among the natives and result in undesired changes in the local culture is certainly distinguishable from the hate message that the immigrants in question are “animals” who should be shipped back to their country of origin,\(^{141}\) even if one recognizes that the former message is implicitly incorporated into the latter. Because of the ambiguity and openness to several inconsistent interpretations of some messages which may plausibly amount to hate speech in substance, the above mentioned line may not always be easy to draw in practice. As we shall examine below, that standing alone does not afford a good reason for tolerating all opinion-based hate speech. In short, whether couched as hate speech in form or as hate speech in

\(^{140}\) See supra Part III.A and accompanying notes for a discussion of the Keegstra case.

substance, expressions of racial animus do not advance the search for the truth and thus do not call for protection from the standpoint of the justification from pursuit of the truth.\textsuperscript{142}

Although consistent with the four philosophical justifications of freedom of speech, to become fully acceptable from a practical standpoint, regulation of hate speech must cope satisfactorily with the vexing problems identified in our review of current regulation outside the United States. The principal problems encountered involve line drawing, bias, difficulties in interpretation leading to suppression of speech deserving of protection and/or to toleration of certain hate messages, and facilitation of government or majority driven censorship.

Most of these problems are raised in the prevalent American criticism against regulation based on the so called “slippery slope” argument.\textsuperscript{143} Pursuant to this argument, since it is impossible to draw neat lines imposing verifiable constraints on judges and legislators, once the door to regulation is open ever so slightly it is bound gradually to open wider, eventually allowing for censorship of all kinds of legitimate yet unpopular speech. Accordingly, failure to confront the “slippery slope” problem may lead to dangerous erosion of free speech.

Unless one adopts a Holmesian view of speech,\textsuperscript{144} the “slippery slope” argument is largely unpersuasive, and this seems particularly true in the context of hate speech. Indeed, in many cases, such as those involving Holocaust denial, cross burning, displaying swastikas, and calling immigrants “animals,” there do not appear to be any line drawing problems. These cases involve clearly recognizable expressions of hate which constitute patent assaults against the dignity of those whom they target, and which fly in the face of even a cursory commitment to pluralism. On the other hand, there are cases of statements, which some groups may find objectionable or offensive, but which raise genuine factual or value based issues, and which ought therefore be granted protection. For example, strong criticism of the Pope for his opposition to contraception and to homosexual relationships as being “indifferent to human suffering caused by overpopulation and an enemy of human dignity for all” may be highly offensive to Catholics, but even in a country where Catholics are a religious minority should clearly not be officially censored, punished or

\textsuperscript{142} In this connection, it is important to distinguish between expression of racial animus and reporting such animus. Conveying information concerning whether one is a racist, as opposed to uttering racial epithets, can of course contribute to discovery of the truth.

\textsuperscript{143} See Frederick Schauer, Slippery Slopes, 99 HARV. L. REV. 361 (1985).

\textsuperscript{144} See supra notes 39-42 and accompanying text.
characterized as hate speech.

There is of course a gray area between these two fairly clear cut areas, in which there are difficult line drawing problems, as exemplified by the German controversy over the claim that "soldiers are murderers." Line drawing problems, however, are quite common in law as they tend to arise whenever a scheme of regulation attempts to draw a balance among competing objectives. Such line drawing problems may well be exacerbated when a fundamental right like free speech is involved, but that justifies, at most, deregulating the entire gray area, not toleration of all hate speech falling short of incitement to violence.

In the last analysis, the best way to deal with the problems likely to arise in connection with regulation of hate speech is to approach them consistent with a set of fundamental normative principles, and in light of key contextual variables. In other words, the standards of constitutionally permissible regulation of hate speech should conform to fundamental principles that transcend geographical, cultural and historical differences, and at the same time remain sufficiently open to accommodate highly relevant historical and cultural variables. The fixed principles involved are openness to pluralism and respect for the most elementary degree of autonomy, equality, dignity and reciprocity. The variables, on the other hand, include the particular history and nature of discrimination, status as minority or majority group, customs, common linguistic practices, and the relative power or powerlessness of speakers and their targets within the society involved.

To minimize difficulties and to reduce the possibility of bias, regulation of hate speech should focus on efforts to reconcile the fixed principles and the relevant variables. This focus should determine, among other things, how far within the gray area regulation should extend. Thus, for example, given their different historical experiences with anti-Semitism, it seems reasonable that

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145 See supra notes 119-20 and accompanying text.
146 That does not necessarily mean that these are universal, only that they ought to be common to contemporary pluralist constitutional democracies. For a more extended discussion of the question of universalism of human rights, see Michel Rosenfeld, Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities, 30 COLUM. HUM. RTS. L. REV. 249 (1999).
147 This standard establishes a bare minimum which seems adequate in the context of speech regulation, but not in that of government policy. For example, this standard would allow for criticism of a particular religion on the grounds it is too restrictive, an enemy of progress, or indifferent to the rights of women. While these statements may offend believers, it cannot be fairly said that they deprive them of the most elementary degree of dignity. However, a government policy attacking such religion, or making it difficult for its adherents to freely practice it would require meeting a much higher standard.
Germany should go further than the United States in prohibiting anti-Semitic speech that falls within the gray area. Although American and German Jews are entitled to the same degree of dignity and inclusion within their respective societies, greater restrictions on anti-Semitism are required in Germany than in the United States in order to achieve comparable results.

Recourse to the above mentioned approach is also likely to minimize bias in the regulation of hate speech. One way in which this can be achieved is by taking into account historically significant differences between the proponents and intended targets of hate messages. Thus, racist speech by a member of a historically dominant race against members of an oppressed race are likely to have a more severe impact than racist speech by the racially oppressed against their oppressors. Even if this does not justify selective regulation of hate speech, it does call for greater leniency when the racially oppressed is at fault, and for taking into account as a mitigating factor the fact—found in some of the British cases discussed above—\(^\text{148}\)—that the racist speech of a member of an oppressed racial group was in response to the racism perpetrated by members of the oppressor race. Furthermore, if these contextual variables are properly accounted for, it becomes less likely that majority biases will dominate prosecutorial or judicial decisions.

CONCLUSION

Hate speech raises difficult questions that test the limits of free speech. Although none of the constitutional regimes examined in these pages leaves hate speech unregulated, there are vast differences between the minimal regulation practiced in the United States and the much more extensive regulation typical of other countries and of international covenants. Both approaches are imperfect, but in a world that has witnessed the Holocaust, various other genocides and ethnic cleansing, all of which were surrounded by abundant hate speech, the American way seems definitely less appealing than its alternatives. As hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously and culturally diverse, the need for regulation becomes ever more urgent. In view of these important changes the state can no longer justify commitment to neutrality, but must embrace pluralism,

\(^\text{148}\) See discussion supra Part III.B and accompanying notes.
guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect. Commitment to these values requires states to conduct an active struggle against hate speech, while at the same time avoiding the pitfalls bound to be encountered in the pursuit of that struggle. It would of course be preferable if hate could be defeated by reason. But since unfortunately that has failed all too often, there seems no alternative but to combat hate speech through regulation in order to secure a minimum of civility in the public arena.