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# The Empirical Shortcomings of First Amendment Jurisprudence: An Historical Perspective on the Power of Hate Speech

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# THE EMPIRICAL SHORTCOMINGS OF FIRST AMENDMENT JURISPRUDENCE: A HISTORICAL PERSPECTIVE ON THE POWER OF HATE SPEECH

Alexander Tsesis\*

## I. INTRODUCTION

Speech plays a pivotal role in the communication of ideas, beliefs, doctrines, and schemes of action.<sup>1</sup> Verbal and symbolic messages are instrumental in the transmission of social mores and dogmas.<sup>2</sup> Those tenets then influence persons to act on the expressed views.

The First Amendment protects the freedom of speech and is critical to the improvement of American society. However, freedom of speech has not always led to the advancement of all United States citizens. At times, individuals successfully used free speech to advocate limiting the social opportunities of non-privileged classes.

In its original form, the United States Constitution protected a racist institution.<sup>3</sup> The same Constitution that protected speech through the First Amendment also institutionalized slavery.<sup>4</sup> The drafters of the Constitution did not

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1. See David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 462 (1987).

2. See *id.*

3. See U.S. CONST. art. I, § 2, cl. 3; art. I, § 9, cl. 1, *amended* by U.S. CONST. amends. XIII, XIV, and XV.

4. See Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82

incorporate any protections for the speech of the slaves.<sup>5</sup> Rather, they envisioned the First Amendment as a constraint against the censorship of “political, scientific, and artistic discourse that they and their class enjoyed.”<sup>6</sup> Even after the passage of the Thirteenth Amendment and the demise of slavery, speech continues to play a role in spreading racially intolerant views.

In the twentieth century, United States jurisprudence has supported freedom of expression over the restriction of hate speech.<sup>7</sup> According to Supreme Court precedent, the government may only sanction speakers who intend to cause “imminent lawless action” and those who are likely to produce such action.<sup>8</sup> On the other hand, the Court has deemed unconstitutional laws restricting abstract utterances that are not clearly and currently dangerous.<sup>9</sup>

The Supreme Court has found few exceptions to the constitutional prohibition against legislative restrictions limiting hate speech.<sup>10</sup> In assuring persons the freedom to verbally express their views, the Court has focused on protecting the speakers’ liberties, while neglecting considerations about the negative impact of hate speech<sup>11</sup> on members of historically oppressed racial and ethnic groups (“outgroups”). Recent events, such as the Littleton, Colorado shooting spree<sup>12</sup> and the Benjamin Smith shooting rampage in the Midwest,<sup>13</sup> call

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CAL. L. REV. 871, 881–82 (1994).

5. *See id.*

6. *Id.*

7. *See* Kretzmer, *supra* note 1, at 449.

8. *See* Joseph Grinstein, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1365 (1996).

9. *See id.*

10. *See* Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 78 (1984).

11. Such expressions are also referred to as “biased speech.” These two terms refer to oratory that is intended to incite persecution against people because of their race, color, religion, ethnic group, or nationality. This definition does not include verbal attacks against individuals who incidentally happen to be members of an outgroup. However, it does include speech that is specifically intended to oppress outgroups or lead to their destruction. *See* Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997). For example, taunting a person who happens to be black is only hate speech if that person is targeted expressly because of his race. *See id.*

12. *See infra* text accompanying notes 224–27.

13. *See infra* text accompanying notes 217–23.

for a reevaluation of contemporary free speech doctrine. Criminal legislation prohibiting the use of racially and ethnically derogatory expressions intended to incite violence against outgroups might have deterred such tragedies.

This article evaluates the extent to which hate speech is a catalyst for discrimination, persecution, and other forms of oppression. Furthermore, it analyzes whether hate speech facilitates persecution of insular minorities. If hate speech breeds prejudice and limits an identifiable outgroup's ability to participate in the democratic process,<sup>14</sup> then laws that prohibit certain forms of biased expressions should be enacted. At issue are not abstract sayings, but expressions calculated to indoctrinate listeners with a set of beliefs justifying and advocating the use of force and persecution against outgroups. Restrictions should be enacted against hate speech that is intended to elicit persecution or oppression when such results are significantly probable.

This article suggests that hate speech is not only dangerous when it poses an immediate threat of harm, but also when it is systematically developed and thereby becomes part of culturally acceptable dialogue. Part II of this article summarizes Supreme Court precedents dealing with hate speech. Part III evaluates what role anti-Semitic speech played in Germany in creating circumstances that made the Holocaust possible. Part III then analyzes whether racist speech contributed to the development of Black slavery and the ruthless destruction of many Native American tribes in the United States. Part III also contains a brief overview of the more prevalent current racist vitriol and its consequences. Part IV criticizes the Supreme Court's hate speech doctrine because it is not based on empirical evidence, but rather on a relativistic theory of law that potentially poses a threat to democracy. Part IV also considers legislation enacted by some Western democracies, like Germany and Canada, prohibiting certain forms of hate propaganda. Part IV then evaluates democratic institutions and the danger that hate speech poses to them. Finally, Part IV discusses policy considerations lawmakers should address in formulating statutes prohibiting the prom-

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14. See Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 86 (1994) (discussing the effect of hate speech on stigmatized minorities).

ulgation of speech aimed at instigating racial and ethnic violence.

## II. SUPREME COURT PRECEDENTS

There are two classes of laws in the United States aimed at eradicating hate crimes: (1) penalty-enhancing criminal statutes that increase the penalty for nonassertive acts committed with biased motives, and (2) "pure bias" criminal statutes that penalize the expression of bigoted messages.<sup>15</sup> The Supreme Court upheld the constitutionality of a penalty-enhancement statute in *Wisconsin v. Mitchell*,<sup>16</sup> while in *R.A.V. v. St. Paul* the Court found a statute that prohibited purely biased expressions, such as cross burning, unconstitutional.<sup>17</sup> This article focuses exclusively on the latter issue; that is, what parameters, if any, may constitutionally be established to prohibit biased speech that threatens outgroups. The regulation of hate speech has been based on Supreme Court precedents.

### A. *The Roots of First Amendment Jurisprudence*

Modern First Amendment jurisprudence began with *Schenck v. United States*.<sup>18</sup> Schenck was accused of printing and circulating a pamphlet declaring that forced conscription violated the Thirteenth Amendment's prohibition against involuntary servitude.<sup>19</sup> The Court found Schenck's intent was to influence men not to participate in the draft.<sup>20</sup> Therefore, the Court upheld Schenck's conviction.<sup>21</sup> Justice Holmes, writing for the Court, based his decision on what became known as the "clear and present danger" test:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to

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15. See Charles Lewis Nier III, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 DICK. J. INT'L L. 241, 265 (1995).

16. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

17. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

18. *Schenck v. United States*, 249 U.S. 47 (1919).

19. See *id.* at 48-49.

20. See *id.* at 51.

21. See *id.* at 53.

prevent. It is a question of proximity and degree.<sup>22</sup>

As an example of what speech the government may censure, Holmes provided the following oft-quoted example: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."<sup>23</sup>

Justice Holmes played a further role in establishing the doctrine concerning inflammatory speech in his dissent to *Abrams v. United States*.<sup>24</sup> In opposing Abrams's conviction, Holmes stated, "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."<sup>25</sup> It is important to read Holmes's dissent contextually. His statement refers to the fact that while Abrams supported the sovereignty of the Russian government, he did not advocate overthrowing the United States government.<sup>26</sup> Thus, Holmes thought that Abrams was only prosecuted and convicted because he supported communism, not because his words posed an immediate danger to the safety of the United States.<sup>27</sup> Holmes's "clear and present danger" test was meant to prohibit the suppression of abstract political ideas.

In his *Abrams* dissent, Holmes adopted the famous "marketplace of ideas" doctrine:

[M]en . . . may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>28</sup>

Holmes based this doctrine on relativistic premises that he

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22. *Id.* at 52.

23. *Id.*

24. *Abrams v. United States*, 250 U.S. 616 (1919).

25. *Id.* at 628 (Holmes, J., dissenting).

26. *See id.* at 620.

27. *See id.* at 629–30 (Holmes, J., dissenting). The Supreme Court has repeatedly reaffirmed the rule that there is a constitutional difference between mere advocacy of abstract theories justifying the use of violence and actual preparations taken in furtherance of such theories. *See, e.g., Noto v. United States*, 367 U.S. 290, 297–98 (1961).

28. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

espoused throughout his writings.<sup>29</sup>

Justice Brandeis held the optimistic view that the dissemination of "more speech" would expose falsehoods and fallacies and, thereby, avert evils.<sup>30</sup> Abstract fears about future harms, Brandeis argued, do not justify restricting free speech.<sup>31</sup> The drafters of the United States Constitution believed that liberties, such as the freedom to think and speak, are essential for the elucidation of political truths and the maintenance of happiness.<sup>32</sup> "Recognizing the occasional tyrannies of governing majorities, [the founding fathers] amended the Constitution so that free speech and assembly should be guaranteed."<sup>33</sup> Suppression of speech is only justifiable, Brandeis stated, when there is a "reasonable ground" to believe that the danger of "serious evil" is imminent.<sup>34</sup> "It is hazardous to discourage thought, hope and imagination; that fear breeds repression; repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."<sup>35</sup>

Holmes clarified the type of truth he envisioned emerging from the marketplace of ideas in his dissent in *Gitlow v. New York*.<sup>36</sup> Holmes argued that all ideas, especially eloquent ones, are incitements because they move people to action or inaction.<sup>37</sup> "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>38</sup> Holmes thereby implicitly acknowledged and condoned the notion that free speech could establish a dominant

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29. See *infra* text accompanying notes 283–307.

30. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

31. See *id.* at 376.

32. See *id.* at 375. Brandeis failed to mention that some of the very founders who believed that liberty is both a moral end and a moral means also condoned slavery. See discussion *infra* Part III.C.

33. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

34. See *id.*

35. *Id.* at 375. In a later opinion, the Court stated that the "wisest governmental policies" result from open debate and dialogue. *Dennis v. United States*, 341 U.S. 494, 502 (1951).

36. *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

37. See *id.* at 673.

38. *Id.*

majority willing to repress other people's liberties. Holmes's view contradicts Brandeis, who held that free speech is a safeguard against, not a facilitator for, "tyrannies of governing majorities."<sup>39</sup> Holmes's views in *Gitlow* are consistent with the relativistic philosophy he espoused throughout his writings and which have influenced later court decisions.<sup>40</sup>

While Holmes's dissent in *Gitlow* is often cited as indicative of the Supreme Court's later First Amendment jurisprudence, the majority opinion in that case remains good law. In his majority opinion, Justice Sanford recognized that the future effect of violent rhetoric "cannot be accurately foreseen."<sup>41</sup> Therefore, the state may enact laws to protect "public peace and safety" without having to "defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."<sup>42</sup> More recent cases dealing with the freedom of expression have built on the foundations Holmes and Brandeis established.

#### B. *Contemporary Formulations of First Amendment Doctrine*

The Court announced its "fighting words" doctrine in *Chaplinsky v. New Hampshire*.<sup>43</sup> The Supreme Court upheld Chaplinsky's conviction for violating a statute that forbade persons from using "offensive, derisive, and annoying" words and "derisive" names against persons in public places.<sup>44</sup> Writing for the majority, Justice Murphy concluded that certain types of speech, such as "fighting words," are not, and have never been, protected by the Constitution.<sup>45</sup> Fighting words are epithets reasonably expected to provoke a violent reaction if addressed toward an "ordinary citizen."<sup>46</sup> "[S]uch

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39. *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

40. See *infra* Part IV.A; see also John C. Ford, *Fundamentals of Holmes' Juristic Philosophy*, 11 FORDHAM L. REV. 255, 264 (1942) (discussing Holmes's view that "the essence of law is physical force, that might makes legal right").

41. *Gitlow*, 268 U.S. at 669.

42. *Id.*

43. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

44. *Id.* at 569 (reciting the relevant ordinance).

45. See *id.* at 571-72.

46. See *Cohen v. California*, 403 U.S. 15, 20 (1971).



utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>47</sup>

The interests of an entire racial group can be compromised by false aspersions about the character of its members. In 1952, the Supreme Court upheld the constitutionality of a group libel statute in *Beauharnais v. Illinois*.<sup>48</sup> The legislation in question made it unlawful to "portray depravity, criminality . . . or lack of virtue of a class of citizens, of any race, color, creed, or religion" and to expose those citizens to "contempt, derision, or obloquy."<sup>49</sup> The majority found that based on Illinois' history of racial conflict, the legislature had the power to punish group libel when it threatened "the peace and well-being of the State."<sup>50</sup> The Court upheld the defendant's conviction for distributing lithographs urging white homeowners to resist neighborhood integration.<sup>51</sup> The Court reasoned that since there was historical evidence that bigotry had caused damages to the inhabitants of Illinois, the statute was constitutional.<sup>52</sup> The Court declared group libel not integral to the exposition of truth and damaging to the social fabric.<sup>53</sup> Since libel laws protect individuals from being harmed and preserve social tranquility, the Court was "precluded from saying that speech . . . cannot be outlawed if directed at groups with whose position and esteem . . . the affiliated individual may be inextricably involved."<sup>54</sup> While the Court acknowledged the possibility of governmental abuse, it noted that all laws can be abused and such a possibility was too remote to find the law unconstitutional.<sup>55</sup>

In *Brandenburg v. Ohio*,<sup>56</sup> the Supreme Court enunciated the current rule for determining whether a statute aimed at limiting incitement infringes on individuals' First Amendment rights. At issue was a film showing a speech by the de-

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47. *Chaplinsky*, 315 U.S. at 572.

48. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

49. *Id.* at 252.

50. *Id.* at 258-59.

51. *See id.* at 252.

52. *See id.* at 254-63.

53. *See id.*

54. *Beauharnais*, 343 U.S. at 263.

55. *See id.*

56. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

fendant, the leader of an Ohio Ku Klux Klan chapter, asserting that revenge might be taken against the United States government if it “continues to suppress the white . . . race.”<sup>57</sup> Reversing the defendant’s conviction, the Court held that the First Amendment guarantee of free speech prohibits the government from proscribing the “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>58</sup> Further, the Court declared the Ohio statute unconstitutional because it did not distinguish between persons calling for the immediate use of violence and those teaching an abstract doctrine about the use of force.<sup>59</sup> However, the Court failed to evaluate the historical reasons why the Ku Klux Klan rally might have sparked racist conflict. Thus, its opinion that the speech would not incite listeners to lawless action was not grounded on an empirical foundation.

The most recent Supreme Court decision regarding limitations on “pure bias” laws is *R.A.V. v. St. Paul*.<sup>60</sup> The majority opinion in *R.A.V.* differed substantially from the views of the three concurring opinions. The case arose when several teenagers placed a burning cross on a Black family’s front yard.<sup>61</sup> The juveniles were charged under a St. Paul ordinance that outlawed placing symbols—such as Nazi swastikas or burning crosses—which were known to “arouse[] anger, alarm or resentment on the basis of race, color, creed, religion or gender,” in public or private places.<sup>62</sup>

Justice Scalia, writing for the majority, found that the St. Paul ordinance violated the First Amendment because it was a form of “content discrimination.”<sup>63</sup> The ordinance prohibited only those “fighting words” enumerated in the law, while other forms of potentially inflammatory utterances, such as those about persons’ political affiliations, were not pro-

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57. *Id.* at 446. The film also depicted hooded persons setting fire to a cross and carrying firearms. *See id.* at 445.

58. *Id.* at 447.

59. *See id.* at 448–49.

60. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

61. *See id.* at 379.

62. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990), *cited in R.A.V.*, 505 U.S. at 380.

63. *R.A.V.*, 505 U.S. at 387.

scribed.<sup>64</sup> While Scalia recognized the city's compelling interest in protecting the human rights of the "members of groups that have historically been subjected to discrimination,"<sup>65</sup> he nevertheless held that such legislative intent could only be constitutionally exercised by a total ban of all fighting words, rather than focusing on hate speech.<sup>66</sup> Scalia's view proclaims laws specifically intended to prohibit inflammatory racist and anti-Semitic utterances unconstitutional.

Justice White, in his concurring opinion to *R.A.V.*, decried the majority opinion as being contrary to Supreme Court precedent.<sup>67</sup> White argued that the Court had long allowed the regulating of low-level speech based on its content. It was disingenuous to require the government to regulate an entire class of utterances (i.e., fighting words), but forbid regulation of a subset of that class, which "by definition [is] worthless and undeserving of constitutional protection."<sup>68</sup> According to Justice White, banning all or some fighting words would help eliminate social harms, while not limiting the potential for opinions to compete in the marketplace of ideas.<sup>69</sup> The majority's approach "invites" persons to utilize racist expressions, which, in terms of the First Amendment, are worthless.<sup>70</sup>

Further, Justice White thought the majority's decision in *R.A.V.* would negatively influence future First Amendment case law.<sup>71</sup> The majority's opinion signaled to the disseminators of racial and ethnic animus that their expressions are more worthy of governmental protections than the peace and tranquility of the targeted groups.<sup>72</sup> By calling the use of fighting words a "debate," the majority placed hate speech on the level of political and cultural discourse.<sup>73</sup> Nevertheless, Justice White held the ordinance unconstitutional because of

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64. *See id.* at 391.

65. *Id.* at 395.

66. *See id.* at 394-95.

67. *See id.* at 401 (White, J., concurring).

68. *Id.*

69. *See R.A.V.*, 505 U.S. at 401 (White, J., concurring). Justice White believed that the majority's decision ignored "the city's judgment that harms based on race, color, creed, religion, and gender are more pressing public concerns than the harms caused by other fighting words." *Id.* at 407.

70. *See id.* at 402.

71. *See id.*

72. *See id.*

73. *See id.*

its "overbreadth" in prohibiting expressions that hurt feelings, caused offense, or produced resentment in others.<sup>74</sup>

Justice Blackmun, in a separate concurrence, agreed with Justice White that the St. Paul ordinance was unconstitutionally overbroad.<sup>75</sup> However, Justice Blackmun declared that it was generally constitutional for cities to enact laws aimed at preventing hooligans from burning crosses intended to drive minority residents from their homes.<sup>76</sup>

In yet another concurrence, Justice Stevens pointed out that there are many constitutional, governmental regulations that target utterances based on their content. For example, a city can "prohibit political advertisements in its buses while allowing other advertisements."<sup>77</sup> Therefore, the majority's contention that content-based regulations are unconstitutional is not supported by First Amendment jurisprudence.<sup>78</sup> Furthermore, Justice Stevens believed that just as a governmental entity could constitutionally restrict only certain forms of commercial speech, so too could St. Paul regulate only certain types of fighting words and not others.<sup>79</sup> According to Justice Stevens, a city can regulate certain fighting words based on the different social harms they cause. However, like Justices White and Blackmun, Justice Stevens found that the St. Paul ordinance violated the First Amendment because it was overbroad.<sup>80</sup>

From the forgoing discussion, it is clear that the Supreme Court has long held that the government cannot suppress ideas it finds "offensive or disagreeable."<sup>81</sup> However, there is also significant support for the view that restrictions on certain forms of hate speech are permissible given its low social value.<sup>82</sup> Before criticizing elements of the Supreme Court's First Amendment doctrine<sup>83</sup> and suggesting legislative policy

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74. *See id.* at 411.

75. *See R.A.V.*, 505 U.S. at 416 (Blackmun, J., concurring).

76. *See id.*

77. *Id.* at 423 (Stevens, J., concurring).

78. *See id.* at 425.

79. *See id.* at 434.

80. *See id.* at 436.

81. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

82. For the views of several Supreme Court justices on this point, see *R.A.V. v. St. Paul*, 505 U.S. at 377 (discussing First Amendment jurisprudence involving a form of hate speech, and including several concurring opinions).

83. *See infra* Part IV.A.

for restricting especially noxious hate speech,<sup>84</sup> it is important to evaluate some historically catastrophic consequences of systematically repeated bigoted utterances.

### III. HISTORICAL LESSONS ABOUT THE DANGERS OF HATE SPEECH

Contrary to the Supreme Court's insistence that only utterances leading to imminent lawless actions are dangerous,<sup>85</sup> empirical evidence indicates that bigotry developed over an extended period of time has led to crimes against humanity.<sup>86</sup> Expressed ideas about other members of the national community significantly influence peoples' perspectives on interpersonal relations.<sup>87</sup> Preconceived notions about outgroups influence how they are treated.<sup>88</sup> Xenophobia is developed, popularized, and spread by representing outgroup members as symbols and representatives of evil, rather than as unique persons.<sup>89</sup> The persecution and/or total annihilation of outgroup members is, then, rationalized by the desire to rid society of undesirable and deleterious members.<sup>90</sup> The experiences of Jews, Native Americans, and Blacks provide important historical examples.

#### A. *Dilatation of Anti-Semitism in Germany*

Anti-Jewish sentiments existed in Germany since medieval times. It was then common lore that Jews poisoned wells, caused the Black Death, and ritually murdered Christian children.<sup>91</sup> Germans considered Jews to be the enemies of Christ and treated them as an outgroup.<sup>92</sup> In fact, persecut-

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84. See *infra* Part IV.D.

85. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

86. See Kretzmer, *supra* note 1, at 447.

87. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385 (1991).

88. See Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 478 (1996).

89. See Gavin I. Langmuir, *Prolegomena to Any Present Analysis of Hostility Against Jews*, in 2 THE NAZI HOLOCAUST 153 (Michael R. Marrus ed., 1989).

90. See *id.*

91. See Lunabelle Wedlock, *The Reaction of Negro Publications and Organizations to German Anti-Semitism*, 3 HOW. U. STUDIES IN SOCIAL SCIENCES 195, 201-02 (1942).

92. See J. L. Talmon, *European History—Seedbed of the Holocaust*, in 2 THE NAZI HOLOCAUST, *supra* note 89, at 190. See generally JOSHUA TRACHTENBERG, THE DEVIL AND THE JEWS: THE MEDIEVAL CONCEPTION OF THE JEW AND ITS

ing Jews was considered a religious obligation.<sup>93</sup> Myths about Jewish insidiousness fueled pogroms<sup>94</sup> against them. For several hundred years, stories spread about the Jews desecrating the communal host.<sup>95</sup> Hatred gnawed the German populace until the latter myth culminated in a massacre of over three thousand Jews between 1298 and 1301.<sup>96</sup>

During the Reformation, attitudes toward German Jews did not improve. Martin Luther disseminated and developed anti-Jewish sentiments.<sup>97</sup> "Luther's anti-Semitism clearly had a religious and not a racial foundation, but it cannot be denied that it provided each successive Protestant generation with . . . sanction for animosity and persecution."<sup>98</sup> Luther's attitude toward Jews evolved from tolerance to animosity.<sup>99</sup> Three years before his death, Luther advocated a fanatical hatred of Jews. "First . . . set fire to their synagogues or schools."<sup>100</sup> "Second, I advise that their houses also be razed and destroyed."<sup>101</sup> "Third, I advise that all their prayer books and Talmudic writings . . . be taken from them."<sup>102</sup> "Fourth, I advise that their rabbis be forbidden to teach henceforth on pain of loss of life and limb."<sup>103</sup> Luther further advised that "they be forbidden on pain of death to praise God, to give thanks, to pray, and to teach publicly among us and in our country."<sup>104</sup> Lutheran anti-Jewishness took medieval concepts

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RELATION TO MODERN ANTISEMITISM (1943).

93. See Shmuel Ettinger, *The Origins of Modern Anti-Semitism*, in 2 THE NAZI HOLOCAUST, *supra* note 89, at 180.

94. A pogrom is an organized and often officially supported "massacre or persecution, especially one against Jews." AMERICAN COLLEGE DICTIONARY 1055 (3d ed. 1997).

95. See Ettinger, *supra* note 93, at 180, 189.

96. See *id.* at 179-208.

97. See RICHARD GUTTERIDGE, OPEN THY MOUTH FOR THE DUMB! 3 (1976).

98. *Id.*

99. For a synopsis of the development of Luther's views, see 6 WILL DURANT, THE REFORMATION: A HISTORY OF EUROPEAN CIVILIZATION FROM WYCLIF TO CALVIN 1300-1564, at 421-22 (1957) (citing Luther's 1520s publication, *That Jesus Christ Was Born a Jew*, to illustrate Luther's arguments for merciful dealing with Jews).

100. 47 MARTIN LUTHER, *On the Jews and Their Lies*, in LUTHER'S WORKS: THE CHRISTIAN IN SOCIETY IV 268 (Helmut T. Lehmann & Franklin Sherman eds., Martin H. Bertram trans., Concordia Publ'g House 1971) (1543).

101. 47 *id.* at 269.

102. 47 *id.*

103. 47 *id.*

104. 47 *id.* at 286.

a step further by ascribing an innate evil character to Jews.<sup>105</sup> In the 1930s, when the Nazis first came to power, they justified many anti-Semitic laws and racial policies on the basis of Luther's teachings.<sup>106</sup>

The enlightenment of the eighteenth century signaled a departure from religious anti-Jewishness to an acceptance of secular anti-Jewishness.<sup>107</sup> Germans blamed Jews for controlling economic and cultural life.<sup>108</sup> This line of thought developed into the myth that Jews secretly conspired to world domination with the intent of persecuting non-Jews.<sup>109</sup> Anti-Jewish hatred manifested itself in discriminatory laws, such as those prohibiting Jews from settling in some German towns and from practicing various professions.<sup>110</sup>

In the late nineteenth century, the widespread negative Jewish stereotypes made it possible to enlist social, religious, and pseudo-intellectual support for discriminatory laws.<sup>111</sup> Both the political right and left exploited contradictory views about Jews to support their plans. In the 1850s, Wilhelm Riehl expressed his contempt of Jews because he considered them the proletariat of German society.<sup>112</sup> On the other hand,

105. See R. Po-Chia Hsia, *The Usurious Jew: Economic Structure and Religious Representations in an Anti-Semitic Discourse*, in IN AND OUT OF THE GHETTO 161, 171 (R. Po-Chia Hsia & Hartmut Lehmann eds., 1995).

106. See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, at 23 (1975); see also Martha Sawyer Allen, *Righting Old Wrong: Anti-Semitism of Founder Disavowed by Lutherans*, HOUS. CHRON., Oct. 9, 1993, at 1. The Evangelical Lutheran Church in America issued a statement rejecting Luther's anti-Semitism. See *id.* It also recognized that Luther's words are still used by hate groups, such as the Ku Klux Klan and the Aryan Nation. See *id.*

107. This is not to say, however, that all German enlightenment thinkers were anti-Jewish. For example, Gotthold Ephraim Lessing advocated Jewish emancipation in GOTTHOLD EPHRAIM LESSING, *NATHAN THE WISE* (1779). See ALFRED D. LOW, *JEWS IN THE EYES OF THE GERMANS* 50-53 (1979). Johann Wolfgang von Goethe also had positive things to say about Jews. See *id.* at 67-71, 78.

108. See KARL D. BRACHER, *THE GERMAN DICTATORSHIP* 34 (Jean Steinberg trans., 3d ed. 1972).

109. See *id.* The myth of a Jewish conspiracy to dominate the world was most widely spread through the Russian forgery *Protocols of the Elders of Zion* ("Protocols"). See *id.* at 35. The year that *Protocols* was published in German, it sold 120,000 copies. See DAWIDOWICZ, *supra* note 106, at 47.

110. See Todd M. Endelman, *Comparative Perspectives on Modern Anti-Semitism in the West*, in 2 THE NAZI HOLOCAUST, *supra* note 89.

111. See BRACHER, *supra* note 108, at 34.

112. See Shulamit Volkov, *Antisemitism as a Cultural Code: Reflections on the History and Historiography of Antisemitism in Imperial Germany*, in 1 THE NAZI HOLOCAUST, *supra* note 89, at 319.

Marx claimed that Jews were at the root of capitalism.<sup>113</sup> Marx therefore conceived of the proletariat revolution as the “emancipation of society from Jewry.”<sup>114</sup> Jews were, therefore, the pariah of both extremes of German political thought.

Anti-Jewish thinkers developed and popularized expressions to disseminate their worldview (“*Weltanschauung*”). In 1873, Wilhelm Marr coined the term *Antisemitismus* (anti-Semitism) in his work, *Der Sieg des Judentums über das Germanentum* (*The Victory of Judaism over Germanism*).<sup>115</sup> The term became a rallying cry for gathering individuals and organizations into an ideological, social, and political camp.<sup>116</sup> Otto von Glogau, a journalist, provided additional conceptual framework for the widespread acceptance of Jew-hating in the widely read periodical *Die Gartenlaube* (*The Bower*).<sup>117</sup> During the 1870s, von Glogau used the linguistic casuistry of blaming Germany’s economic and social problems on the alleged Jewish domination of financial markets.<sup>118</sup> In 1887, Paul de Lagarde, who became a hero of the anti-Semitic movement, called for the seizure of all Jewish credit and banking facilities. Moreover, Lagarde advocated the “extermination” of Jews, whom he characterized as “germs,” “parasites,” and “vermin.”<sup>119</sup> Some sixty years later, Hitler carried out Lagarde’s dogma to its lethal conclusion by urging Nazis and their sympathizers to murder Jewish men, women, and children. Nazis found Lagarde’s ideology such an important indoctrination tool that they distributed an anthology of his works to German soldiers.<sup>120</sup>

What began as isolated bigotry became embedded in popular German culture by the 1890s.<sup>121</sup> Many Reichstag deputies argued that Jewish property should be confiscated

113. See KARL MARX, *A WORLD WITHOUT JEWS* (Dagobert D. Runes trans., Phil. Libr. 1959) (1843); see also Ettinger, *supra* note 93, at 224.

114. MARX, *supra* note 113, at 45.

115. See P.G.J. PULZER, *THE RISE OF POLITICAL ANTI-SEMITISM IN GERMANY AND AUSTRIA* 49 (1964).

116. See Volkov, *supra* note 112, at 320–21.

117. See *id.* at 321–22; see also BRACHER, *supra* note 108, at 38.

118. See Volkov, *supra* note 112, at 321–22.

119. PAUL DE LAGARDE, *JUDEN UND INDOGERMANEN*, cited in A. Bein, *Modern Anti-Semitism and its Effect on the Jewish Question*, 3 *YAD WASHHEM STUDIES ON THE EUROPEAN JEWISH CATASTROPHE AND RESISTANCE* 7, 14 n.19 (1959).

120. See FRITZ STERN, *THE POLITICS OF CULTURAL DESPAIR* 63 (1961).

121. See Volkov, *supra* note 112, at 325–26.



and distributed to the German poor.<sup>122</sup> By 1893, anti-Semitic political parties had a sixteen-person faction in the Reichstag.<sup>123</sup> Anti-Semitic university organizations, such as the Union of German Students and the Academic League of Gymnasts, enjoyed popular support among students and provided a forum for spreading racism to intellectuals.<sup>124</sup> Libraries contained extensive collections of anti-Semitic literature for popular consumption.<sup>125</sup> In sum, anti-Semitism permeated Germany at the turn of the century.<sup>126</sup>

Animosity toward German Jews intensified after the first World War.<sup>127</sup> Jewish entrepreneurs were widely blamed for the rise in inflation and shortages of vital goods. Those accusations contributed to the periodic looting of Jewish businesses.<sup>128</sup> Evangelical preachers participated in blaming Jews for Germany's postwar misfortunes.<sup>129</sup> The repetitiveness of those messages made development and implementation of the Nazi exterminationist propaganda easier.<sup>130</sup>

The democracy of the post-World War I Weimar Republic gave way to totalitarianism under Nazi rule. The Nazis often built their anti-Semitic propaganda on slogans developed decades beforehand. Julius Streicher, who published the savagely anti-Semitic newspaper *Der Stürmer*,<sup>131</sup> ordered that

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122. Numerous theoreticians propounded this political position, including Otto Böckel who was elected a deputy of the Reichstag in 1887. See Ettinger, *supra* note 93. Hermann Ahlwardt, who also called for the confiscation of Jewish property, see *id.*, was elected to the Reichstag in 1892, see DAWIDOWICZ, *supra* note 106, at 41. Ahlwardt's anti-Semitic views were well known from his book *Despairing Struggle of the Aryan Peoples with Jewry*, published in 1890. See *id.*

123. See Ettinger, *supra* note 93, at 241.

124. See GUTTERIDGE, *supra* note 97, at 18. The vociferous anti-Semitic campaign was not maintained by secular forces alone. Clergymen like Adolf Stoecker, who was the Berlin Court and Cathedral Preacher in 1874, preached that bloody attacks against Jews were unpreventable if they refused to relinquish supposed control of the German economy and politics. See *id.* at 4, 8.

125. See *id.*

126. See DAWIDOWICZ, *supra* note 106, at 45.

127. See *id.* at 59.

128. See DONALD L. NIEWYK, *THE JEWS IN WEIMAR GERMANY* 48 (1980).

129. See GUTTERIDGE, *supra* note 97, at 1; NIEWYK, *supra* note 128, at 55.

130. Although anti-Semitism was prevalent in pre-Nazi Germany, it did not take on its lethal raiment until the Nazis systematized that ideology. Between 1919 and 1923, the anti-Semitic vote was never greater than eight percent of the total. See NIEWYK, *supra* note 128, at 51.

131. By the 1930s, Streicher's newspaper was used as a teaching tool by elementary school teachers. See GUTTERIDGE, *supra* note 97, at 161-62.

posters be raised throughout the Third Reich with the inflammatory message, "*Die Juden sind unser Unglück*" ("The Jews are our misfortune").<sup>132</sup> This slogan was a verbatim restatement of the 1879 slogan of Heinrich von Treitschke, a university professor who helped legitimize anti-Semitism in intellectual circles.<sup>133</sup> Streicher's anti-Semitism can be traced even further back in time. Before being sentenced to death by hanging,<sup>134</sup> he "told the Nuremberg tribunal that Luther . . . had long before said what he himself had to say about the Jews, and much more sharply."<sup>135</sup> The Nazis developed and systematized animosity against Jews that had been developing many years prior to the advent of the Third Reich.

The attempt to murder all Jews, the "Final Solution," began sometime in 1941;<sup>136</sup> however, this plan was in the making for years prior to its commencement. National Socialists had advocated this goal before and after Hitler became German Chancellor in 1933.<sup>137</sup> On November 24, 1938, the SS periodical *Schwarze Corps* announced the plan to exterminate (*Ausrotten*) and annihilate (*Vernichtung*) all Jews.<sup>138</sup> Moreover, Hitler told Czechoslovakian Foreign Minister Chvalkovsky on January 21, 1939, "We are going to destroy the Jews."<sup>139</sup>

Hitler's diabolical plan and its implementation should be compared with Luther's ominous directives of how to deal with Jews. For example, Luther advocated burning synagogues,<sup>140</sup> and nearly four hundred years after his pronouncement, when ancient anti-Jewish sentiments were at their apex, the Nazis and their sympathizers did just that. During the night of November 9-10, 1938, known as *Kristallnacht* (Night of Broken Glass), frenzied crowds throughout

132. See BRACHER, *supra* note 108, at 37-38.

133. See Volkov, *supra* note 112, at 323-25.

134. See BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 200 (1977) (concerning Streicher's sentence).

135. GUTTERIDGE, *supra* note 97, at 315.

136. See DAWIDOWICZ, *supra* note 106, at 129.

137. The SA (*Sturmabteilung*), who were known as Hitler's storm troopers, proudly sang a fighting song that proclaimed that when a SA "soldier comes under fire / He feels courageous cheer / For when Jews' blood spurts from the knife / Good times are once more here." NIEWYK, *supra* note 128, at 82.

138. See GUTTERIDGE, *supra* note 97, at 227.

139. Helmut Krausnick, *The Persecution of the Jews*, in ANATOMY OF THE SS STATE 44 (Dorothy Long trans., 1968).

140. See *supra* text accompanying note 100.

Germany—stirred on by years of anti-Semitic propaganda that had become part of their psyche—set fire to a hundred synagogues, destroyed shops and houses, raped Jewish women, and killed Jews indiscriminately.<sup>141</sup> Furthermore, following Luther's ideas, the Nazis denied that Jews were members of a distinct religion<sup>142</sup> and denied Jews the right to practice Judaism.<sup>143</sup>

By the time the Nazis came to power, the malevolent vitriol that German leaders and thinkers spewed against Jews had become deeply entrenched in German culture. The Nazis were not elected in a cultural vacuum. Hitler could not have come to power and guided the Final Solution without the support and sadistic compliance of hundreds of thousands of Germans. Years of anti-Semitic indoctrination prepared Germans for Hitler's plan.<sup>144</sup> The most basic ethical principles, such as the one adjuring people not to kill innocent humans, were broken down by centuries of libel directed against Jews.<sup>145</sup> Synagogue burnings, physical attacks against Jews, and participation in mass deportations became acceptable for Germans, in large part because prior anti-Semitic rhetoric and systematic discrimination had dulled their consciences.<sup>146</sup>

The German experience contradicts Supreme Court opinions which concluded that only speech posing an imminent threat of harm is dangerous enough to warrant statutory censure.<sup>147</sup> To the contrary, the most dangerous form of bigotry takes years to develop, until it becomes culturally acceptable first to libel, then to discriminate, and finally to persecute outgroups. "[P]rolonged and intense verbal hostility

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141. See WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 431 (1960).

142. Jews were designated "unbelievers" on June 12, 1941. See *Chronology of Laws and Actions Directed against Jews in Nazi Germany 1933-1945*, in *THE HOLOCAUST YEARS* 27 (Roselle Chartock & Jack Spencer eds., 1978). For Luther's proclamation that Jews should be forbidden the right to religious observance, see *supra* text accompanying note 104.

143. See DAWIDOWICZ, *supra* note 106, at 248.

144. See Talmon, *supra* note 92; see also DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS* (1997) (discussing the critical and cruel role that ordinary Germans played in the Holocaust).

145. See Talmon, *supra* note 92, at 200.

146. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 15 (3d ed.1979).

147. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Gitlow v. New York*, 268 U.S. 652 (1925).

always precedes a riot."<sup>148</sup> Just as in Germany, hate speech in the United States was instrumental to the development of a social psyche that justified inhuman treatment of outgroups. The following section analyzes racism in the United States to evaluate what effect, if any, hate speech against Native Americans and Blacks had on the development of slavery and the forceful expropriation of Native American lands.

### B. *Racist Speech and the Dislocation of Native Americans*

Despite its history of republican democracy, the United States has, at times, ignored and condoned hate speech promoting a social psyche tolerant of persecuting outgroups. The widespread acceptance and promulgation of verbal labels that denied the worth and human equality of Native Americans contributed to the government condoning injustices committed against them.

Rather than investigate the differences among the numerous tribes of indigenous peoples, colonists dubbed all the native peoples as "savages."<sup>149</sup> Native Americans were persistently described as deficient in European ways rather than as possessing positive cultural norms of their own.<sup>150</sup> The linguistic framework, created by disregarding the native inhabitants' unique cultures, made it easier for Europeans to deny that Native Americans' shared a common humanity.<sup>151</sup> Instead of thinking of Native Americans as individuals possessing natural rights, colonists thought of them as a homogeneous group of savages. By denying their humanity and asserting their inferiority, European settlers found it psychologically and emotionally easier to violate Native Americans' human rights with equanimity.<sup>152</sup> Europeans believed that Native American religious worship was satanic and that

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148. ALLPORT, *supra* note 146, at 60.

149. Native Americans were not called "Indians" until the seventeenth century. See ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN* 13 (1979). Some explorers in the sixteenth century used the term "inhabitants" rather than savages. See *id.* at 14.

150. See *id.* at 26.

151. See LEWIS HANKE, *ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE SUPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIANS* 85 (1974).

152. See HELEN CARR, *INVENTING THE AMERICAN PRIMITIVE* 56 (1996) (discussing the role of the term "savage" in "the evasion" of Native Americans' rights).

medicine men practiced sorcery.<sup>153</sup> Statements about Native American morality alleged that Native Americans considered lying and stealing ethical.<sup>154</sup> Voices of persons expressing admiration for Native American culture, for the most part, were disregarded and unheeded.<sup>155</sup>

In practical terms, conquerors and explorers used negative images of Native Americans to justify unlimited land grabs.<sup>156</sup> Until the nineteenth century, Whites justified land expropriations by claiming that civilized Whites had the right to title over lands; on the other hand, the native "savages," who were thought to be merely hunters and gatherers, were denied the right of ownership to their ancestral land.<sup>157</sup> The colonists argued that as hunters Native Americans had no fixed ownership interests, but rather migrated with the game.<sup>158</sup> This often repeated characterization blinded American social consciousness to the fact that some indigenous tribes had developed farming to such an extent that they helped pilgrims survive in the New World by teaching them farming techniques.<sup>159</sup> Moreover, the United States government justified taking land from Native Americans on the basis of racist claims of White superiority that developed

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153. See Alexander Whitaker, reprinted in SAMUEL PURCHAS, HAKLUYTUS POSTHUMUS OR PURCHAS HIS PILGRIMES 110 (James MacLehose and Sons 1906) (1613).

154. See *id.* Even Samuel Clemens (Mark Twain), who protested against the institution of Black slavery in MARK TWAIN, HUCKLEBERRY FINN (1884), wrote that Native Americans were indolent and habitual drunks. See MARK TWAIN, ROUGHING IT 146-47 (Oxford Univ. Press 1996) (1880).

155. William Penn, a Quaker and founder of the Pennsylvania colony, wrote with interest about Native American languages, their family institutions, and governments. See Letter from William Penn, Proprietary and Governour of Pennsylvania in America to the Committee of the Free Society of Traders (1683), in WHITE ON RED 50-54 (Nancy B. Black & Bette S. Weidman eds., 1976) (1683). The great American statesman, Benjamin Franklin also wrote about Native Americans with some admiration. He wrote that Native American education was legitimate, although different, from that of the Europeans. See BENJAMIN FRANKLIN, *The Savages of North America*, in COMPLETE WORKS OF BENJAMIN FRANKLIN 25-27 (John Bigelow ed., G.P. Putnam's Sons, The Knickerbocker Press 1888) (1784). More importantly for race relations, Franklin represented Native Americans as being friendly to their White neighbors rather than as bloodthirsty savages. See *id.* at 30-31.

156. Explorers received title and jurisdiction over the land and people they conquered. See BERKHOFFER, *supra* note 149, at 126.

157. According to this conceptual framework, Indians were either going to assimilate to White society or die off completely. See *id.* at 30.

158. See CARR, *supra* note 152, at 49.

159. See *id.*

through the use of hate speech. Luke Lea, the Commissioner of Indian Affairs from 1850-1853, typified this attitude:

When civilization and barbarism are brought in such relation that they cannot coexist together . . . it is right that the superiority of the former should be asserted and the latter compelled to give way. It is, therefore, no matter of regret or reproach that so large a portion of our territory has been wrested from the aboriginal inhabitants and made the happy abodes of an enlightened and Christian people.<sup>160</sup>

Frontiersmen rationalized murdering Native Americans and violating their property rights by drawing upon images of unenlightened and savage Indians.<sup>161</sup>

Popular utterances about Native Americans shaped the views of English settlers. Using linguistic paradigms that characterized Native Americans as barbarous, the settlers committed inhumane and uncivilized acts against America's indigenous peoples. An early example of the dangerous effect of the colonists' conception of White superiority over Native Americans was the Pequot War of 1637.<sup>162</sup> Animosity arose between the Connecticut settlers and the Pequots who possessed what is now central Connecticut.<sup>163</sup> The War began as revenge for the murder of a White trader by Pequot tribal members.<sup>164</sup> However, the revenge perpetrated by the White vigilantes was greatly disproportionate.<sup>165</sup> At the Mystic River battle, the colonists set aflame wigwams, causing the death of several hundred Pequots.<sup>166</sup> The colonists' hatred

160. FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 324 (Univ. of Neb. Press 1984) (1852).

161. See BERKHOFER, *supra* note 149, at 148.

162. Some have argued that the Pequot War was not racially motivated since white settlers enlisted the help of some Narraganset Indians. See RICHARD DRINNON, *FACING WEST* 358-59 (1997). However this argument is not convincing, and it is equivalent to arguing that because Custer employed Crow scouts before the battle of Little Bighorn, he was not motivated by hatred for Indians. See *id.* at 359.

163. See EDWARD CHANNING, *A HISTORY OF THE UNITED STATES* 402 (1926).

164. See 1 GEORGE BANCROFT, *HISTORY OF THE UNITED STATES OF AMERICA* 225-66 (1885).

165. *But see* Alden T. Vaughan, *Pequots and Puritans: The Causes of the War of 1637*, 21 WM. & MARY Q. (1964) (arguing that the blame for the Pequot War should be fairly equally allotted between the colonists, the Pequots, and surrounding tribes).

166. See CHANNING, *supra* note 163, at 403.

was so vehement that they continued military operations until the Pequot nation ceased to exist.<sup>167</sup> All but a few of the remaining Pequots were sold into slavery.<sup>168</sup> Those who committed the massacre were greeted as heroes after their senseless carnage.<sup>169</sup>

Life among the colonists did not, in many cases, improve the lives of Native Americans. Tribes, like the Seminoles, were forcibly relocated thousands of miles from their ancestral lands because they were not believed to have deep attachment to those territories.<sup>170</sup> During times of war, retreating Indians were cruelly and unnecessarily slaughtered, regardless of their genders and ages.<sup>171</sup> Characterizing America's relations with Native Americans, Charles Francis Adams<sup>172</sup> wrote, "the knife and the shotgun have been far more potent and active instruments in dealings with the inferior races than the code of liberty."<sup>173</sup>

Chief Justice John Marshall's opinion in *Johnson v. M'Intosh*<sup>174</sup> acknowledged and maintained the disregard for Native American human and property rights. In *Johnson*, the Court addressed whether American Indians, specifically the Illinois Piankeshaw nations, could convey land to private individuals.<sup>175</sup> The Court decided that Native Americans did

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167. See *id.* at 403–04. After the Treaty of Hartford in 1638, which ended the Pequot War, the Pequots were forbidden from returning to their villages or using their tribal name. See Mashantucket Pequot Museum & Research Center, *Mashantucket Pequot Tribal Nation Timeline* <<http://www.mashantucket.com/handicap/tophome.html>> (visited Aug. 23, 1999). Mashantucket Pequot Indians, who were descendants of the original Pequots, received tribal recognition from the United States government on October 18, 1983. See *id.*

168. See 1 GEORGE B. TINDALL, *AMERICA: A NARRATIVE HISTORY* 65 (1984).

169. See 1 BANCROFT, *supra* note 164, at 268.

170. See 1 TINDALL, *supra* note 168, at 405.

171. See 1 *id.* Such brutal actions were perpetrated against members of the Sauk and Fox tribes during the Black Hawk War of 1832. See 1 *id.* The Black Hawk War began when the Black Hawks returned to their lands, which they had abandoned the year before to raise corn. See 1 *id.* The United States Regular Army, commanded by Colonel Zachary Taylor, who later became the twelfth President of the United States, unmercifully expelled the Black Hawks. See DRINNON, *supra* note 162, at 198–99. Even Native Americans approaching the Army with pacific signs were not spared a brutal death. See *id.* at 198.

172. Charles Francis Adams was an American historian and the grandson of President John Quincy Adams.

173. CHARLES FRANCIS ADAMS, "IMPERIALISM" AND "THE TRACKS OF OUR FOREFATHERS" 16 (1899).

174. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

175. See *id.* at 571.

not possess title to any land since they were roaming hunters, not settled farmers.<sup>176</sup> Marshall recognized that the United States appropriated lands from Native Americans by conquest.<sup>177</sup> He justified the conquest by reiterating the commonly accepted argument that, “the tribes of Indians inhabiting this country were fierce savages . . . whose subsistence was drawn chiefly from the forest.”<sup>178</sup> Rather than leaving the land a wilderness and allowing indigenous people to retain their liberty, the Europeans enforced their “pompous claims . . . by the sword.”<sup>179</sup> In his decision, Marshall recognized that the United States expansionist policy was “opposed to natural right[s],”<sup>180</sup> but he nevertheless held that Indians only had a possessory, but not fee simple, interest in the land they occupied. The accepted “legitimizing narratives”<sup>181</sup> and linguistic paradigms used by Whites to justify their cruelties against the aboriginal peoples of North America caused even great thinkers like Marshall to argue that Native Americans had less claims to basic human rights than their White counterparts.

As with the widely distributed Nazi stereotypes of Jews, American stereotypes of Native Americans served as the groundwork for claims of superiority. Repeated messages about the inferiority of Native Americans and Jews were later instrumental for carrying out racist policies. The hate propaganda regarding Jews in Germany and Native Americans in the United States provided a conceptual framework for systematic, widespread oppression. Although the persecutions experienced by these two groups were significantly different, in both cases racist utterances significantly contributed to discrimination and destruction.

### C. *Language and the Institution of Slavery*

Like the theories of Jewish and Native American inferiority, pseudo-scientific views about the inferiority of Blacks<sup>182</sup>

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176. *See id.* at 590–91, 604–05.

177. *See id.* at 589–90.

178. *Id.* at 590.

179. *Id.*

180. *Johnson*, 21 U.S. at 591.

181. SUSAN SCHECKEL, *THE INSISTENCE OF THE INDIAN* 27 (1998).

182. This article uses the term Blacks rather than the currently popular Afro-Americans or African-Americans because the latter terms are both over- and underinclusive. They are overinclusive because they include persons like



played a significant role in their oppression.<sup>183</sup> Unfortunately, only a few historical sources detailing the evolution of hate propaganda against Blacks and its effect upon their enslavement are available.<sup>184</sup> Nevertheless, sufficient information exists to piece together the role hate speech played in justifying the institutionalization of hereditary servitude. Specifically, viewing Blacks as a sub-species of humans, mentally inferior, and savage, perpetuated and supported American slavery.

Discrimination against Blacks developed among Europeans even before they systematized Black slavery.<sup>185</sup> "When slavery did become embodied in law, it could not help but reflect the folk bias within the framework of which it developed."<sup>186</sup> Europeans and American colonists used racial dogmas to justify the subjugation of Blacks.<sup>187</sup> Just as the exploitation of Native Americans manifested elements of barbarism present in European culture, the Black slave trade was a vestige of ancient despotism that continued to sway European minds in spite of philosophical, political, and cultural advances. Blacks were considered little better than animals, as evidenced by the unsanitary, despicably cramped, and often lethal conditions that they endured during transport from Africa through the Middle Passage.<sup>188</sup> Blacks were transported and fed like livestock because slave traders did not think them worthy of human amenities.<sup>189</sup> Considering

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White South Africans, whose ancestors were never persecuted in the United States or anywhere else. They are underinclusive because they do not include persons, such as the indigenous people of Papua New Guinea whose characteristics resemble people of African ancestry and who could, therefore, be targeted by racists.

183. See Wedlock, *supra* note 91, at 205 (comparing Jewish and Negro stereotypes).

184. See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 44 (1968).

185. See CARL N. DEGLER, *OUT OF OUR PAST* 30 (1959). Compare Oscar Handlin & Mary F. Handlin, *The Origins of Negro Slavery, in THE ORIGINS OF AMERICAN SLAVERY AND RACISM* 21 (Donald L. Noel ed., 1972) (1950).

186. DEGLER, *supra* note 185, at 30.

187. See Wedlock, *supra* note 91, at 203.

188. See Gustavus Vassa, *The Life of Olaudah Equiano, the African*, in *GREAT DOCUMENTS IN BLACK AMERICAN HISTORY* 47 (George Ducas ed., Praeger Publishers 1970) (1789). The cruelty of this trip from freedom to slavery is comparable to the cruelty with which Nazis shipped Jews to death camps in cattle cars containing no food or water. See BEREL WEIN, *TRIUMPH OF SURVIVAL* 368-69 (1990).

189. See 1 *DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE*

Blacks a different species from themselves, slave traders had no scruples about ignoring the emotional sufferings inflicted upon captive Blacks separated forever from their family members.<sup>190</sup>

In late seventeenth century New England, Puritans argued that slavery was the best means for converting Blacks to Christianity.<sup>191</sup> In 1701, John Saffin claimed that inequality of the races was part of the divine world order.<sup>192</sup> Other Puritans justified the suppression of human rights by drawing upon biblical verses, which they argued damned "heathen" souls to hell.<sup>193</sup> As Blacks began converting to Christianity, the language of inferiority changed from religious assertions to secular ones, purporting Blacks to be innately defective in character and mentally inferior.<sup>194</sup> This linguistic framework gave further justification for retaining slavery.<sup>195</sup> During the colonial period of American history, Whites often spoke about the inferior spiritual capacity of Blacks.<sup>196</sup> Further, colonial Americans regarded Blacks as members of a different species.<sup>197</sup> The development of pseudo-scientific ethnology gave the theories of black inferiority an air of intellectual acceptability. For example, Dr. Samuel Cartwright wrote that Blacks were members of a sub-human species that resembled

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TO AMERICA 129 (Elizabeth Donnan ed., Carnegie Institution of Washington 1930). The subhuman treatment of Blacks transported to be slaves is evident in a letter from the Guinea Company to Bartholomew Haward, dated December 9, 1651: "put aboard you so many negers as yo'r ship can cary and for what shalbe wanting to supply the Cattel, as also to furnish you with victualls and provisions for the said negers and Cattel." 1 *id.*

190. See Vassa, *supra* note 188, at 41, 42, 43-44, 50-51 (discussing how the author was forcefully separated from his family).

191. See WILLIAM S. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 7 (Peter Smith 1960) (1935).

192. See *id.* at 5.

193. See LORENZO J. GREENE, THE NEGRO IN COLONIAL NEW ENGLAND 1620-1776, at 61-62 (1942). Religious justifications for enslaving Blacks continued to be effective for gaining popular Southern support for slavery. See, e.g., ALEXANDER MCCAINE, SLAVERY DEFENDED FROM SCRIPTURE AGAINST THE ATTACKS OF THE ABOLITIONISTS (W.M. Woody 1842); *A Southern Clergyman, A Defence of Southern Slavery against the Attacks of Henry Clay and Alex'r Campbell*, in A DEFENSE OF SOUTHERN SLAVERY AND OTHER PAMPHLETS (Negro Univ. Press 1969) (1831).

194. See OSCAR REISS, BLACKS IN COLONIAL AMERICA 98 (1997).

195. See JORDAN, *supra* note 184, at 494.

196. See JENKINS, *supra* note 191, at 8.

197. See, e.g., J. H. Van Evrie, *Negroes and Negro Slavery*, in THE BURDEN OF RACE 105 (Gilbert Osofsky ed., Harper & Row 1968) (1853).

monkeys.<sup>198</sup> Edward Long, in his book *History of Jamaica*, argued that Blacks were closely linked to apes.<sup>199</sup> Therefore, race supremacists argued, Whites had the “imperative duty devolving on the superior race” to subordinate Blacks.<sup>200</sup>

More sophisticated arguments were also used to justify slavery. At a debate held at the 1773 commencement of Harvard University, one of the interlocutors argued that slavery was ethically justifiable based on act utilitarian<sup>201</sup> and racial superiority grounds.<sup>202</sup> The speaker took it as axiomatic that the happiness of the community members was the epitome of social accomplishments.<sup>203</sup> From this premise, he reasoned that it was ethical for the majority to increase their welfare and liberties by diminishing the freedoms of minority groups.<sup>204</sup>

Other rhetoricians argued that slavery was a “positive good.” Some who supported this position were in the upper echelons of political power. William Grayson, who served in the United States Congress, argued that slavery subdued Blacks’ “savage heart.”<sup>205</sup> Vice President John C. Calhoun believed that slave owners improved the lives of Blacks who otherwise would be “low, degraded and savage.”<sup>206</sup>

The English linguistic paradigm that formed the conceptual framework supporting slavery was highly evolved by the Civil War. Despite the utter incompatibility of slavery to the

198. See Samuel Cartwright, *Natural History of the Prognathous Species of Mankind*, in *SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH* (Eric L. McKittrick ed., Prentice-Hall 1963) (1857).

199. See JORDAN, *supra* note 184, at 491–94.

200. *Id.* at 107 (emphasis added).

201. For an elucidation about the basic principles of utilitarianism, see ROBIN BARROW, *UTILITARIANISM* (1991).

202. See A FORENSIC DISPUTE ON THE LEGALITY OF ENSLAVING THE AFRICANS (1773) (photocopy on file with Santa Clara Law Review).

203. See *id.* at 9.

204. See *id.* at 7. Contrary to the foregoing act utilitarian argument, rule utilitarianism holds that the reduction of happiness of any members of society, whether they be part of the majority or minority, reduces the happiness of the whole. See Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 129–34 (1999).

205. William J. Grayson, *The Hireling and the Slave*, in *SLAVERY DEFENDED*, *supra* note 198, at 64. Grayson also argued that Blacks were thrifty so long as they were slaves, but, if freed, they would turn to theft. See *id.* at 61. Grayson served in the United States Congress.

206. WILLIAM L. KATZ, *EYEWITNESS: THE NEGRO IN AMERICAN HISTORY* 95 (1974).

United States Constitution's protections of liberties,<sup>207</sup> hate propaganda against Blacks was widely believed in antebellum United States.

Shortly before the Civil War, Supreme Court Chief Justice Taney wrote the majority opinion in the infamous *Dred Scott* case and explained his decision by stating that Blacks were "a subordinate and inferior class of beings."<sup>208</sup> He reiterated and reinforced the view that Blacks were "so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."<sup>209</sup> Thus, from the days of slave trading to the Civil War era, repeated racist classifications of Blacks played a significant role in their subrogation.

#### D. *Bigotry in Contemporary United States Society*

Several dangerous trends in the contemporary United States indicate the need for restricting the type of hate speech that is intended to elicit violent and inhumane acts against outgroups. This section addresses hate speech on the Internet, the role of hate speech in recent crimes, and the emergence of hate speakers in political organizations.

##### 1. *Internet and Hate Speech*

Modern technology makes the transmission of ideas easier. The Internet is increasingly becoming a channel for the dissemination of hatred. The Simon Wiesenthal Center found approximately fifty hate groups with their own electronic bulletin boards on the Internet in 1995.<sup>210</sup> The neo-Nazi National Alliance, White Aryan Resistance, the Ku Klux Klan ("KKK"), and Aryan Crusaders use the Internet to disseminate their messages.<sup>211</sup> Hate groups distribute their messages

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207. See, e.g., U.S. CONST. amend. V.

208. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1856).

209. *Id.* at 407. Justice Curtis's dissent to *Dred Scott*, which was readily available in the marketplace of ideas, did not bring the Court, nor the Confederacy, any closer to adopting the truth about the cruelty of slavery.

210. See Steve Barmazel, *There Is No Stopping Hate Speech*, 15 CAL. L. REV. 41 (1995).

211. See *id.*; see also Mark Mueller, *Hate Groups Spewing Venom on Net*, BOSTON HERALD, Sept. 15, 1996, at 1. Other hate groups with their own Internet sites include Stormfront (found at <<http://www.stormfront.org>>), which continues to promote the concept that Blacks are racially inferior and supports National Socialism; Aryan Nation (found at <<http://www.christian-aryannations.com>>), which provides a biased look at Jewish teachings in the

through the Internet to a quantitatively greater and qualitatively more diverse audience than had previously been possible.<sup>212</sup> By 1999, there were at least eight hundred Internet sites promoting hate and targeting “religious groups, visible minorities, women and homosexuals.”<sup>213</sup>

The Southern Poverty Law Center monitors the Internet sites of hate groups, including information about militia organizations preparing their members for a race war through Internet propaganda.<sup>214</sup> Many of those calling for a race war consider the Internet an important vehicle for accomplishing their goals.<sup>215</sup>

Software filters such as CyberPatrol, NetNanny, SurfWatch, and HateFilter allow parents to prevent their children from accessing Internet sites advocating hate against identifiable groups.<sup>216</sup> These filters are beneficial for preventing the most vulnerable segment of United States society—children—from being influenced by bigotry. However, those filters are not definitive solutions to the potential dangers. The filters do not prevent unstable adults from accessing those hate-filled Internet sites to draw ideological sustenance, feed and further tantalize their bigotry, and inflame their already volatile passions against outgroups. Instead of voluntary purchases and installations of commercial products, state and federal laws preventing dangerous forms of hate speech are necessary to protect individual rights and social welfare.

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Talmud and uses Biblical passages to justify its belief that Blacks are “beasts”; and White Aryan Resistance (found at <<http://www.resist.com>>), which advertises its magazine “WAR, *White Aryan Resistance*.”

212. See Barmazel, *supra* note 210, at 41.

213. Louise Surette, *New Laws To Curb Hate on Internet?: Symposium Urges Federal Action*, THE GAZETTE (Montreal), Mar. 24, 1999, at A12.

214. See Southern Poverty Law Center, *Intelligence Project* (visited Apr. 1, 2000) <<http://www.splcenter.org/intelligenceproject/ip-index.html>>. Driving these movements is “the Christian Identity religion, a virulently anti-Semitic and racist theology.” *Id.*

215. See *id.*

216. See Michael Krantz, *Censor’s Sensibility; Are Web Filters Valuable Watchdogs or Just New Online Thought Police?*, TIME, Aug. 11, 1997, at 48; see also Robert Gearty, *Filter Bars Web Hate*, N.Y. DAILY NEWS, Nov. 12, 1998, at 11.

## 2. *The Instigation of Hate Crimes*

The proliferation of hate material over the Internet is only partially responsible for recent hate crimes. Hate messages typically precede violent hate crimes. The World Church of the Creator<sup>217</sup> is an organization that spreads hate propaganda through the Internet, pamphlets, and television interviews.<sup>218</sup> It calls on its members to participate in a racial holy war.<sup>219</sup> One of the World Church of the Creator's disciples, Benjamin Smith, recently acted on its doctrine, murdering a Black man and an Asian man, as well as wounding nine Jews.<sup>220</sup> Smith made his dangerous intent known in an interview given just weeks before the shooting.<sup>221</sup> "To want to live in a world where blacks have power over whites, where Jews are in control, I think that's a sickness and I'd like to eradicate that sickness. In some ways it's inevitable—racial holy war."<sup>222</sup> Under current First Amendment jurisprudence,<sup>223</sup> the government could not have charged Smith with a crime for those utterances because they did not pose an imminent threat of harm. Had Smith's words been actionable, based on his manifest intent to harm Blacks and Jews at some later time, his lethal actions may have been deterred.

Just as Smith announced his deadly intent before committing the hate crimes, Dylan Klebold and Eric Harris also made their nefarious intents known before the bloody attack against their fellow students in Littleton, Colorado.<sup>224</sup> Klebold and Harris planned their shooting spree to coincide with Adolf Hitler's birthday, and they rehearsed it on a video they showed to their fellow students several months before the

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217. Matthew Hale, leader of the World Church of the Creator, was recently denied a license to practice law by the Supreme Court of Illinois due to his overtly racist views. See Rob Stafford, *Dateline: The Practice; A Vowed Racist Fights Denial of License to Practice Law in Illinois*, (NBC television broadcast, Feb. 15, 1999) (transcript on file with Santa Clara Law Review).

218. See Michael A. Fletcher, *Behind the Hate: A Racist "Church" Linked to Violent Plots and Murder*, WASH. POST, July 6, 1999, at A8.

219. See *id.*

220. See *id.*

221. See *Smith on Video: Racial Holy War Inevitable*, ASSOCIATED PRESS, July 7, 1999, at State and Regional Section.

222. *Id.*

223. See *supra* Part II.

224. See Ellen O'Brien & Lynda Gorov, *School Killings Plotted in Diary; Conspirators Timed Massacre to Occur on Hitler's Birth Date, Colorado School Shootings*, BOSTON GLOBE, Apr. 25, 1999, at A1.

murders.<sup>225</sup> The depictions on the video did not constitute an imminent threat of lawless action,<sup>226</sup> because they were recorded several months before the murders. Nevertheless, the danger was real. The video provided a warning sign of future lawless actions, but under current First Amendment jurisprudence its transmission was not punishable because the danger depicted was not “imminent.”<sup>227</sup>

The bombing of the Federal Building in Oklahoma City, on April 19, 1995, provides another recent example of a tragedy that might have been avoided by enforcement of a statute prohibiting hate speech. William Pierce’s depiction of the bombing in his racist novel, *The Turner Diaries*,<sup>228</sup> influenced the bomber, Timothy McVeigh.<sup>229</sup> If Pierce intended his book to be a blue print to that deadly action, he might have been prohibited by statute from distributing the menacing book, and the deaths of 168 people might then have been avoided.

Hate speech also played a role in the murder of James Byrd, Jr.<sup>230</sup> John William King and two friends chained Byrd to a truck, dragged him for several hundred feet, and left him for dead.<sup>231</sup> King, who was sentenced to death by lethal injection, and one of his co-defendants adopted white supremacist ideology while serving sentences for different crimes in a local jail.<sup>232</sup> In prison, the two men joined a gang called the Confederate Knights of America, a chapter of the KKK.<sup>233</sup> Hate developed gradually in these men, until the racism they heard ignited into a racially inspired, brutal murder.

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225. See Paul Schwartzman, *A Lot of Signs Were Given—But Ignored*, N.Y. DAILY NEWS, Apr. 25, 1999, at 4.

226. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment guarantees of free speech prohibit government from proscribing the “advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

227. See *supra* Part II.

228. WILLIAM L. PIERCE, *THE TURNER DIARIES* (Barricade Books 1978).

229. See Doreen Carvajal, *Group Tries to Halt Selling of Racist Novel*, N.Y. TIMES, Apr. 20, 1996, § 1, at 8. Pierce is leader of National Alliance, a West Virginia white supremacist group. See *id.*

230. See Adam Cohen, *A Life for a Life: As America Watches, a Texas Town Searches for Racial Healing After a Grisly Murder Trial*, TIME, Mar. 8, 1999, at 28.

231. See *id.*

232. See *id.*

233. See *id.*

The dissemination of fallacies about the history and characteristics of identifiable outgroups has contributed to the rise of hate crimes in the United States. While in the past, hate speech led to mob violence and the lynching of Blacks, more recently, hate speech inflamed racists into a spate of Black church burnings.<sup>234</sup> Before the conflagration of Macedonia Baptist Church, the KKK posted a paper on the doors of the church warning that the “KKK—is watching you.”<sup>235</sup> A court subsequently ordered the KKK to pay \$37.8 million to the Church, after a jury determined that the KKK stirred up hatred “that led to the burning” of the “predominantly black church.”<sup>236</sup>

The spread of hate propaganda desensitizes people to the tragic consequences of bigotry. Although the Holocaust occurred just half a century ago, already there is a pseudo-intellectual movement denying that Jews were systematically murdered by Nazis.<sup>237</sup> Nationally known figures, such as presidential candidate Patrick Buchanan and Nation of Islam leader Louis Farrakhan, have expressed their disbelief that Nazis tried to commit genocide against the Jews.<sup>238</sup> The dissemination of this view by influential figures has infected the thoughts of ordinary Americans. According to a 1993 poll, twenty-two percent of the United States adult population thought that “it seemed possible the Holocaust never happened,” and another twelve percent did not know if the Holocaust was possible.<sup>239</sup>

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234. See Charles J. Ogletree Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 504–05 (1997).

235. Marlon Manuel, *Neo-Nazis Next Target of Lawyer Who Broke Klan*, ATLANTA J. & CONST., Mar. 5, 1999, at 1C.

236. Chris Burritt, *Klan Role in S.C. Arson Costs It \$37.8 Million*, ATLANTA J. & CONST., July 25, 1998, at 1A.

237. See Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35 (1997) (concerning the Holocaust denial made by Northwestern University Professor Arthur Butz). Professor Butz's Holocaust revisionism is broadcast on the Internet at the expense of Northwestern University. See Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71, 75 (1996). In 1990, a professor at Indiana University taught that the Holocaust is a “myth.” *Id.* at 76.

238. See Lasson, *supra* note 237, at 79.

239. Michiko Kakutani, *Critic's Notebook; When History is a Casualty*, N.Y. TIMES, Apr. 30, 1993, at C1.



### 3. *Hate Speech in Political Organizations*

In recent years, white supremacists have pursued influential jobs in the judicial and legislative branches of government to propagate their racist and anti-Semitic ideas. Some current members of the United States Congress support an overtly racist organization. Representative Robert L. Barr Jr. of Georgia was once the keynote speaker at a gathering of the Council of Conservative Citizens ("CCC").<sup>240</sup> The CCC rejects interracial marriages as being a form of "white genocide,"<sup>241</sup> argues that Blacks are mentally inferior,<sup>242</sup> has close connections with David Duke,<sup>243</sup> and regularly engages in racist and anti-Semitic rhetoric.<sup>244</sup> Barr has used his congressional power to oppose hate crime legislation, additional funds for social programs, and the continuation of civil rights protections.<sup>245</sup> In recent years, the Senate Majority Leader, Trent Lott, also attended and spoke at many CCC dinners and rallies.<sup>246</sup> Despite Lott's denial of knowledge about CCC's bigoted views, Arnie Watson, a member of the CCC's executive board and former Mississippi State Senator, said, "Trent is an honorary member."<sup>247</sup> Within the last two years, Mississippi Governor Kirk Fordice was the keynote speaker at the CCC's semi-annual national convention where he and others stood to sing "Dixie" and then sat during the rendition of "My Country, 'Tis of Thee."<sup>248</sup> The participation of high ranking politicians lends the CCC's brand of bigotry an air of respectability, and makes it more acceptable among their constituents.

Bigotry in the United States is not confined to white supremacists. Nation of Islam leader Louis Farrakhan, organ-

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240. See Thomas B. Edsall, *Barr Spoke to White Supremacy Group*, WASH. POST, Dec. 11, 1998, at A23.

241. *Id.*

242. See Daryl Lease, *Hate Group with Local Origins Makes National News* SARASOTA HERALD-TRIB., Mar. 1, 1999, at 8A.

243. See Earl Ofari Hutchinson, *Viewpoint, Bob Barr: The Point Man for a Civil War*, NEWSDAY, Dec. 28, 1998, at A30. David Duke is a former KKK Grand Dragon.

244. See Hugh B. Price, *Commentary, To Be Equal; White-Collar Ku Klux Klan*, COPELY NEWS SERV., Jan. 20, 1999.

245. See Hutchinson, *supra* note 243, at A30.

246. See Price, *supra* note 244.

247. John Kifner, *Lott, and Shadow of a Pro-White Group*, N.Y. TIMES, Jan. 14, 1999, at A9.

248. See *id.*

izer of the “Million Man March,” has grown in popularity in the Black community.<sup>249</sup> There are numerous similarities between white supremacist ideology and Farrakhan’s ideology. *The Final Call*, the official newspaper published by the Nation of Islam, contains separatist, non-democratic ideology. At the end of each issue of *The Final Call* is a list of the Nation of Islam’s demands and wishes. Among these is the following: “We want our people in America whose parents or grandparents were descendants from slaves, to be allowed to establish a separate state or territory of their own—either on this continent or elsewhere.”<sup>250</sup> Such ideas closely resemble those of David Duke and the KKK, which also advocate the view that Whites and Blacks should live separately because of their innate incompatibilities.<sup>251</sup> Wanting to return to the days of “separate but equal” education,<sup>252</sup> *The Final Call* argues for “equal education—but separate schools up to 16 for boys and 18 for girls . . . . We want all Black children educated, taught and trained by their own teachers.”<sup>253</sup> The Nation of Islam’s prohibition against intermarriage among races strikes an ominous and fascist tone.<sup>254</sup>

The main targets of the Nation of Islam’s bigotry are Jews. Farrakhan describes Judaism as a “gutter religion”<sup>255</sup>

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249. According to one poll, 48.8% of Blacks think favorably of Farrakhan. See Adam Dickter, *Mixed Messages on Blacks and Jews: Poll Shows Agreement on Need to Silence Haters, Though Farrakhan Still a Favorite; Martin Luther King III Pledges to Combat Anti-Semitism*, JEWISH WEEK, May 1, 1998, at 8.

250. *The Muslim Program*, THE FINAL CALL, Mar. 16, 1999.

251. See *Duke Seeks Ex-Rep. Livingston’s Seat*, CHI. TRIB., Mar. 19, 1999, at 23 (“[David] Duke . . . has written a new book that calls for separate nations for whites and blacks.”).

252. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding law that provided “separate but equal accommodations” for Whites and Blacks on railroad), *overruled by Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that segregating school children exclusively because of their race violates the Equal Protection clause of the Fourteenth Amendment).

253. *The Muslim Program*, *supra* note 250.

254. See *id.* (“We believe that intermarriage or race mixing should be prohibited.”).

255. David L. Schaefer, Commentary, *Farrakhan’s Vilifying Videos Don’t Belong in High School Classrooms*, TELEGRAM & GAZETTE, Mar. 27, 1998, at A11; *The Farrakhan Show*, WASH. POST, Aug. 1, 1984, at A23. In 1998, Farrakhan delivered a speech in Detroit, which the Anti-Defamation League characterized as “shockingly anti-Semitic,” saying Jews control the United States government. See George Bullard, *Farrakhan Speech Angers Jewish Leader*, DET. NEWS, Nov. 17, 1998, at D7.

and has called Hitler "a great man."<sup>256</sup> On a more dangerous note, Farrakhan "promised to 'grind' Jews and 'crush them into little bits.'"<sup>257</sup> Khalid Abdul Muhammad, one of Farrakhan's aids, ranted that Jews are the "blood-suckers of the black nation."<sup>258</sup> Kweisi Mfume, then President of the Congressional Black Caucus and the current President of the National Association for the Advancement of Colored People, said that Abdul Muhammad's speech had the same "tone of intolerance" that allowed slavery and the Holocaust to happen.<sup>259</sup> While the mainstream Black leadership regularly speaks out against anti-Semitism,<sup>260</sup> Farrakhan's hateful vitriol strengthens anti-Semitic attitudes festering in the Black inner city.<sup>261</sup> University students have also been charmed by the charisma of these known anti-Semites.<sup>262</sup>

Unlike the United States, Canadian criminal law permits the prosecution of the Nation of Islam leaders for derisive comments about an identifiable group (i.e., Jews).<sup>263</sup> On July 9, 1998, the Hate Crime Unit of the Toronto Police began investigating whether the Nation of Islam in Toronto violated section 319 of the Canadian Criminal Code, which prohibits advocating hatred against identifiable groups based on their color, race, religion, or ethnic origin.<sup>264</sup> The United States should impose similar laws to deter the Nation of Islam from

256. Schaefer, *supra* note 255, at A11.

257. *Id.*

258. Kevin Merida, *Black Leaders Call on Farrakhan to Repudiate Controversial Remarks by Aide*, WASH. POST, Jan. 26, 1994, at A3 (describing the comments of Abdul Muhammad during a speech at Kean College in 1994).

259. *Id.*

260. For example, Julian Bond, Chairman of the National Association for the Advancement of Colored People ("NAACP"), recently discussed the importance of strengthening the relationship between Blacks and Jews at the Anti-Defamation League's Annual Leadership Conference. See *New NAACP Head Seeks to Improve Weathered Black/Jewish Relations*, JACKSONVILLE FREE PRESS, Apr. 15, 1998, at 2. At a conference held at Yeshiva University, Martin Luther King III spoke out against racism and anti-Semitism stating that, "Even passive toleration of anti-Semitism serves the evils of prejudice and bigotry my father fought against." Dickter, *supra* note 249, at 8.

261. See Frank Eltman, *More Blacks Found To Be Anti-Semitic*, ASSOCIATED PRESS, Nov. 24, 1998. A 1998 Anti-Defamation League study found that 34% of Blacks harbored anti-Semitic views, as compared to only 9% of Whites holding such views. See *id.*

262. See Lasson, *supra* note 237, at 39-40.

263. See *Islam and the Farrakhan "Nation,"* TORONTO STAR, July 9, 1998, at A22.

264. See *id.*

making inflammatory remarks that could ignite a conflagration, threatening the peace and tranquility of United States citizens and democratic institutions.

While bigotry remains outside of mainstream United States society, many groups develop followings through their continued use of hate speech. The historical examples discussed in Parts II.A, II.B, and II.C indicate that the smoldering embers of hate speech are dangerous not only immediately, but also often after years of relative quiescence. Therefore, to wait until a clear and present danger of violent actions actualizes is to blind society to the empirical lessons of the past. This article demonstrates that widespread dissemination of bigotry has been the springboard for discrimination that has led to separation, persecution, oppression, enslavement, and genocide.<sup>265</sup> Ignoring history's lessons could threaten America's constitutional form of egalitarianism. This downward spiral is not, however, inevitable. It can be prevented by laws prohibiting hate speech aimed at violating outgroups' civil rights. Such laws can maintain domestic tranquility, while helping to prevent widespread, volatile, racial and ethnic violence.

#### IV. PREVENTING VIOLENT BIGOTRY

Historical evidence indicates that hate speech threatens liberty and democracy even when there is no imminent threat of harm at the time of dissemination.<sup>266</sup> Hate speech is critical to the development of cultural norms that permit, advocate, and justify violent acts against outgroups.<sup>267</sup> The issue then arises of whether Supreme Court precedents should be reconsidered based on this empirical evidence. A fresh approach to First Amendment jurisprudence should manifest awareness about the cultural diversity of the people cohabiting in the United States.

The United States is a multifarious quilt of different racial, ethnic, religious, and national groups where hate speech can promote inter-group animosity.<sup>268</sup> Cultural differences

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265. See ALLPORT, *supra* note 146, at 57; see also *supra* Parts III.A-C.

266. See *supra* Part III.

267. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

268. See Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595, 595 (1947).

strengthen society by providing unique perspectives about the empirical world and human relationships. When orators, especially those with a following, begin speaking of purging society of its diversity, the potential for discrimination and persecution against outgroups arises.<sup>269</sup> Speakers can incite persons receptive to racial hatred to commit hate crimes by using historical stereotypes about the depravity or inferiority of outgroups.<sup>270</sup> Hate crimes are not perpetrated in a psychological and social vacuum. Averse oratory against outgroups with the explicit intent to harm can inflame persons to violent actions.<sup>271</sup> Hate speech reinforces existing negative stereotypes or provides the false information necessary to create new ones.<sup>272</sup> The intensification and development of prejudice is a social evil that threatens harmonious democracy.<sup>273</sup>

Hate speech legislation should prohibit utterances intended to stir individuals or groups to oppress. Such legislation can prevent active discrimination.<sup>274</sup> The mere possibility that a hate speech statute could be abused is insufficient to gainsay its potential to benefit a multi-ethnic and multi-racial society.<sup>275</sup> All criminal laws can be abused, but that does not lead to the conclusion that anarchy is the best alternative. Based on the effectiveness of other anti-discrimination statutes, it is plausible to think that laws prohibiting hate speech may likewise reduce ethnic and racial animosity.<sup>276</sup> Hate speech laws' potential to safeguard human rights outweighs the interest of bigots in spreading their false stereotypes about outgroups. In short, legislation aimed at preventing hate speech may reduce bigoted violence before more innocent lives are lost.<sup>277</sup>

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269. See Miri Rubin, *Imagining the Jew: The Late Medieval Eucharistic Discourse*, in IN AND OUT OF THE GHETTO, *supra* note 105, at 178.

270. See *id.*

271. See Kretzmer, *supra* note 1, at 463.

272. See *id.* at 462.

273. See *id.*

274. Even the potential of criminal punishment may deter racists from spreading their messages. See Matsuda, *supra* note 267, at 2361.

275. See *id.* at 2381.

276. See ALLPORT, *supra* note 146, at 472 (discussing the improvement of ethnic relations from laws prohibiting discrimination in housing, employment and the armed forces).

277. See *id.* at 354-66, 497 (arguing that hate speech is not cathartic, but rather that it solidifies anti-social behavior and can lead to habitual bigotry).

### A. *Reconsidering Supreme Court Precedents*

The current Supreme Court hate speech doctrine fails to consider the long term social dangers of hate propaganda. A historical survey of how speech promoted intolerance until it instigated the Holocaust, Native American dislocation, and Black slavery demonstrates the need to reconsider the Supreme Court doctrines on hate speech.<sup>278</sup>

#### 1. *Relativistic Roots of the "Market Place of Ideas" Doctrine*

The "marketplace of ideas" doctrine, which Holmes formulated in *Abrams*,<sup>279</sup> provided no mechanism for determining whether specific speech is a conduit to the dissemination of truths or falsehoods.<sup>280</sup> Even John Stuart Mill, the philosophical founder of the "marketplace of ideas" doctrine, recognized that, "the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution."<sup>281</sup> The validity of Mill's observation is born out by United States colonial history. Even though some leading figures of the American Revolution, such as Thomas Paine and James Otis, argued that Blacks should have the same liberty rights as White colonists, the blight of slavery persisted in the United States.<sup>282</sup> The free flow of abolitionist ideas did not peacefully overcome slavery through logical arguments about its evils; instead, it took a Civil War to end that cruel practice.

The Supreme Court has continued adhering to the "marketplace of ideas" doctrine<sup>283</sup> in spite of the many historical

278. See *supra* Part III.

279. *Abrams v. United States*, 250 U.S. 616 (1919).

280. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 87 (1948) (discussing how the "marketplace of ideas" doctrine is unhelpful in assessing the differences between right and wrong, as well as the differences between true and false).

281. JOHN STUART MILL, *ON LIBERTY* 89 (Pelican Classics 1980) (1859).

282. See JENKINS, *supra* note 191, at 23–24, 33. Former President James Madison, a slave owner himself, nevertheless called slavery the "original sin." Letter from James Madison to General Lafayette (Nov. 25, 1820), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 190 (J.B. Lippincott & Co. 1867).

283. See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); see also *supra* Part.II.B (discussing contemporary Supreme Court doctrine).

examples of hate speech fomenting violence against out-groups.<sup>284</sup> Holmes formulated the “marketplace of ideas” doctrine aware that the freedom of expression could be exploited by a “proletariat dictatorship”<sup>285</sup> intent on repressing minority rights. The potential risk to democratic society from an unqualified acceptance of the “market place of ideas” doctrine becomes apparent upon a close examination of the conceptual roots of Holmes’s First Amendment jurisprudence.

Holmes’s view is that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>286</sup> Holmes’s message is not immediately clear because he did not explain what is meant by “the ultimate good desired” or by “truth.” However, in *Gitlow v. New York*,<sup>287</sup> Holmes clarified his position by arguing that whatever the political desires of the group holding power in society, the consequences should be accepted even if that group determines to forcefully impose dictatorial rule.<sup>288</sup> “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”<sup>289</sup> Holmes believed that the ultimate good meant giving free political reign to expressions that asserted the will of the most powerful, regardless of the political ramifications.

His view that government cannot meddle in the marketplace of ideas is rarely scrutinized. Holmes’s legal relativism and skepticism were the philosophical vertebrae of his “marketplace of ideas” doctrine. According to Holmes, freedom of speech is a transitory right that the dominant group in society (i.e., the majority) can withdraw at its discretion.<sup>290</sup> Holmes maintained a relativistic philosophy of law and morals throughout his writings.<sup>291</sup> Conceptions of truth, which according to Holmes are always subjective, are not derived

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284. See *supra* Part III.

285. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

286. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

287. *Gitlow*, 268 U.S. at 652.

288. See 2 OLIVER WENDELL HOLMES, HOLMES-POLLOCK LETTERS 36 (1941).

289. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

290. See Francis E. Lucey, *Holmes-Liberal-Humanitarian-Believer in Democracy?*, 39 GEO. L.J. 523, 546 (1951).

291. See Ford, *supra* note 40, at 266.

through rational argument but rather imposed by the dominant forces of society.<sup>292</sup> Powerful persons determine what is true and what is good.<sup>293</sup> His view that the “free trade of ideas” is “the best test of truth,” therefore, represents the position that the marketplace of ideas is a means of creating “truth” rather than of discovering it.

Holmes believed that law is grounded in the will of the sovereign to exert its “power to compel or punish.”<sup>294</sup> A legal right is an “empty substratum” that is useful for predicting how courts will decide cases, but it is not reflective of an objective reality.<sup>295</sup> Holmes’s view supports the notion that legal rights are created concepts representing the sovereign’s ability to enforce its will by force.<sup>296</sup> Thus, the sovereign, acting upon the express will of the majority, has the right to withhold liberty and property from outgroup members.

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292. See Oliver Wendall Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918) (writing that “[d]eep-seated preferences can not be argued about . . . and therefore when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way”).

293. See Lucey, *supra* note 290, at 544.

294. Oliver Wendell Holmes, *Book Review*, 6 AM. L. REV. 593 (1871), reprinted in 44 HARV. L. REV. 788 (1931); see *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

295. See 2 HOLMES, *supra* note 288, at 212.

296. See Ford, *supra* note 40, at 257 (stating that Holmes’s doctrine “is logically a step to the proposition that might makes right”). “The fact that Holmes was a polished gentleman who did not go about like a storm-trooper knocking people down and proclaiming the supremacy of the blonde [sic] beast should not blind us to his legal philosophy that might makes right.” Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 571 (1945).

Holmes’s view that laws are made at the discretion of the powerful is reminiscent of Friedrich Nietzsche’s theory that the *Übermensch* (roughly translated “Higher Man” or “Superman”) must reevaluate orthodox views of good and evil. See, e.g., FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 101 (R. J. Hollingdale trans., Penguin Classics 1964) (1883–85) (stating that the images of good and evil should not be referred to as sources of knowledge); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 885–86 (1988) (comparing the similarity of Nietzsche’s convictions on morality to Holmes’s views that the relative worth of laws is based on the views of the dominant group).

Holmes’s ideas on morality and law are not, however, identical to those of Nietzsche. For example, the former believed that the “dominant forces of a community” should be given the opportunity to establish the institutions of government. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (stating that the “dominant forces of a community” should be given the opportunity to establish a “proletarian dictatorship” if they so desire). Nietzsche, on the other hand, mocked herd mentality and extolled the domination of society by the exceptional *Übermensch*. See FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 111, 114 (Marianne Cowan trans., Gateway Editions 1955) (1886) (writing disparagingly about herd mentality and extolling an “independent intellect”).



Holmes's views are contrary to the social contract theory of government, which holds that the foremost reason why people—both those in the dominant group and those in outgroups—join to form societies and governmental entities is to secure their natural rights against infringement by others.<sup>297</sup> Since Holmes did not believe that there were any natural rights, the majority owed no ubiquitous duties to the minority.<sup>298</sup> The dominant forces of society may have sympathy for outgroups; however, they may also exert their rule unsympathetically. Recall Holmes's quote in *Gitlow*, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>299</sup> The implication of this argument is that the dominant members of society may use the power of speech to repress democracy with its marketplace of ideas and civil rights protections.<sup>300</sup>

Holmes fills the place of inalienable rights with a subjective set of laws, enacted and pursued at the discretion of the "dominant forces of the community."<sup>301</sup> "[T]he ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stay in the way."<sup>302</sup> In Holmes's governmental scheme, the ultimate judge of laws is the crowd, whose system of morality is based on emotional whims.<sup>303</sup> Its adverse feelings and prejudices toward outgroups could thereby propel dominant groups' behavior toward them. Taken to its logical conclusion, the argument that predominant powers should have the opportunity to establish a proletarian dictatorship by forcefully replacing democracy has horrifying im-

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297. See, e.g., JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 59–60 (Maurice Cranston trans., Penguin Books 1987) (1762).

298. See Lucey, *supra* note 290, at 540.

299. *Gitlow*, 268 U.S. at 673 (Holmes & Brandeis, JJ., dissenting).

300. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (setting out the "market place of ideas" doctrine); Murray Dry, *The First Amendment Freedoms, Civil Peace and the Quest for Truth*, 15 CONST. COMMENT. 325 (1998) (concerning Holmes's apparent belief that speech should take precedence over democracy).

301. ROUSSEAU, *supra* note 297, at 187 (quoting a letter from Oliver Wendell Holmes to John Wu).

302. *Id.*

303. See 1 HOLMES, *supra* note 288, at 163; Oliver Wendell Holmes, *Ideals and Doubts*, 10 U. ILL. L. REV. 1, 3 (1915).

plications: (1) Jews should be exterminated if Nazi ideology wins over the majority of people,<sup>304</sup> (2) Blacks should be enslaved if that is the will of the majority, and (3) Native American lands should be violently wrenched away from them if those people holding political power so decree.<sup>305</sup>

Such reasoning is diametrically opposed to the pluralistic principles Holmes espoused elsewhere. Holmes's nihilistic relativism might be understood to manifest a speculative view the practical application of which he would have abhorred.<sup>306</sup> Other philosophers who have held skeptical views have nevertheless moderated their ideas when it came to everyday life.<sup>307</sup>

In *Whitney v. California*,<sup>308</sup> Holmes joined Justice Brandeis in a concurring opinion. They recognized that the ultimate purpose of government was to make people free to realize their full potentials.<sup>309</sup> Brandeis and Holmes believed that the constitutional founders considered liberty in general, and freedom of thought and speech in particular, to be "the secret

304. As Holmes wrote,

I used to say, when I was young that truth was the majority vote of that nation that could lick all others. Certainly we may expect that the received opinion about the present war [World War I] will depend a good deal upon what side wins (I hope with all my soul it will be mine), and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view.

Holmes, *supra* note 292, at 40.

305. See Kretzmer, *supra* note 1, at 480. *But see* *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). Holmes, writing the dissenting opinion, made clear that while he believed the right to liberty embodied in the Fourteenth Amendment should not "prevent the natural outcome of a dominant opinion," he nevertheless thought the consequence of such a policy should not violate "traditions of our people and our law." *Id.* Fourteen years after he wrote the *Lochner* dissent, Holmes argued that dominant forces should be allowed to establish a proletarian dictatorship if they so desire. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Holmes seems to have changed his view since proletarian dictatorship, which would presumably trample on the right to liberty found in the Fourteenth Amendment, has no basis in United States traditions.

306. See Ford, *supra* note 40, at 263.

307. See, e.g., DAVID HUME, TREATISE OF HUMAN NATURE 183, 269 (L.A. Selby-Bigge ed., Oxford 1978) (1739) (writing that although the author maintained a skeptical philosophy, he nevertheless lived his daily life as if he had a degree of certainty about his knowledge of empirical reality).

308. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*overturned on other grounds*).

309. See *id.*

of happiness.”<sup>310</sup> This view is incompatible with Holmes’s statement that proletarian dictatorship should be given the opportunity through the marketplace of ideas to suppress the boons of democracy. Must the United States tolerate the use of one of its most precious institutions, free speech, to promote popular despotism targeting historically persecuted groups?<sup>311</sup> Surely the Constitution was not intended to be used to destroy democracy.<sup>312</sup> Hate speech is expressed both to exclude targeted outgroups from participatory democracy and to foment human rights abuses.<sup>313</sup>

## 2. *The Overlooked Long Term Effects of Hate Speech*

The “clear and present danger” test fails to address the long-term effects of hate speech on the development of autocratic governments.<sup>314</sup> Courts continue to apply this test in hate speech cases. This test has been refined to mean that laws aimed at preventing hate speech are constitutional only if they target “advocacy . . . inciting or producing imminent lawless action.”<sup>315</sup> First Amendment jurisprudence states that governments only have a compelling reason to prohibit those expressions capable of inciting immediate lawless actions. Contrary to the Supreme Court’s theory, however, the seeds of hate speech often lie dormant until conditions permit them to sprout into social cancers that pray on outgroups.<sup>316</sup> The “clear and present danger” test only recognizes those utterances that can elicit pugilistic responses as dangerous. The test is too narrow, as it fails to consider the real nature of racist “indoctrination,” which develops gradually.<sup>317</sup>

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310. *Id.* at 375. Brandeis used this background to argue that speech is of such great value to the examination of whether ideas were true or false, that it should only be repressed in emergencies. *See id.*

311. *See* Mary Ellen Gale, *On Curbing Racial Speech*, 1 RESPONSIVE COMMUNITY 47, 48–49 (1990–1991).

312. *See* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1962).

313. *See* Irwin Cotler, *Racist Incitement: Giving Free Speech a Bad Name*, in FREEDOM OF EXPRESSION AND THE CHARTER 251, 254 (David Schneiderman ed., 1991).

314. *See supra* Part III (discussing the historical role of hate speech in the development of discriminatory laws).

315. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

316. *See supra* Part III.

317. Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 801.

*Beauharnais v. Illinois* is the only First Amendment Supreme Court decision where the majority reflected on the historical background of a statute restricting hate speech.<sup>318</sup> At issue was an Illinois law prohibiting the expression of racist, group libel. The Court found that, based on Illinois' history of racist violence, the legislature reasonably concluded that bigoted utterances "played a significant part" in that turmoil.<sup>319</sup> Predicating its decision on empirical evidence about the potential dangers of racially inflammatory speech, the Court upheld the defendant's conviction.<sup>320</sup> *Beauharnais* considered historical facts rather than simply abstract theory. Therefore, it represents a more discerning opinion about the potential harms of hate speech. Moreover, since *Beauharnais*' utterances were libelous, the Court did not reach the "clear and present danger" test issues.<sup>321</sup>

However, the Court failed to follow the *Beauharnais* approach of considering the historical perspective when formulating the current common law restriction against the enactment of content-specific hate speech laws. In *R.A.V. v. St. Paul*, the majority focused exclusively on protecting the speaker's First Amendment rights.<sup>322</sup> The justices should have considered a broader constitutional picture involving the balancing of First Amendment values against those of the Thirteenth and Fourteenth Amendments. Justice Scalia, writing for the majority, failed to recognize that freedom of speech, despite being a right itself, is a powerful tool that can be manipulated to infringe on constitutional liberties.<sup>323</sup> Furthermore, the majority did not balance the rights of bigots to

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318. See *Beauharnais v. Illinois*, 343 U.S. 250, 258–59 (1952) (discussing historical instances when racism flared into dangerous violence in Illinois); see *supra* text accompanying notes 48–55. In 1978, the Seventh Circuit Court of Appeals questioned whether "*Beauharnais* would pass constitutional muster today." *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir.), *cert. denied*, 436 U.S. 953 (1978). In their dissent from a denial of a writ of certiorari in that case, Justices Blackmun and Rehnquist stated that "*Beauharnais* has never been overruled or formally limited in any way." *Id.* (Blackmun & Rehnquist, JJ., dissenting).

319. *Beauharnais*, 343 U.S. at 259.

320. See *id.* at 266–67.

321. See *id.* at 266.

322. See John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. J. 97, 101 (1998); see also Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992).

323. See Powell, *supra* note 322, at 101.

express their views against the rights of targeted outgroups to be protected from being buried by the landslide of bigotry. For example, Justice Scalia did not reflect upon the available historical examples of cross burnings that instigated the lynchings of Blacks. Burning a cross on a Black family's lawn raises issues beyond the free speech of the culprit.<sup>324</sup> Hate speech raises concerns of the personal safety of outgroup members, thereby inhibiting them from freely traveling in their own communities. Sometimes, fearing for their safety, outgroup members are forced to move from their homes. After a cross has been burnt on their lawn, a Black family is likely to be leery about approaching their own house. Finally, the spread of bigotry signals a diminution of egalitarian ideals in society. Not only is the United States a society that tolerates the value of dialogue, but it is also a nation committed to the principles of racial and ethnic equality.<sup>325</sup>

The First Amendment should not protect hate speech that incites others to commit violent or oppressive acts, regardless of when the intended harm is to be perpetrated.<sup>326</sup> First Amendment jurisprudence should be reevaluated to avoid Holmes's relativistic philosophy and its potentially anti-democratic consequences. Instead of permitting the most dominant forces of society to express any and all forms of hate speech, no matter how averse the effect might be on equal rights, expressions with a reasonable potential to lead dominant groups to maltreat outgroups should be prohibited. At the very least, the potential of hate speech to cause harm should be evaluated in light of historical reality, rather than abstract theory.

#### B. *Western Democracies' Approaches to Hate Speech*

Unlike the United States, many foreign countries recognize the dangerousness of hate speech and have enacted criminal laws to protect targeted outgroups from expositions of bigotry.<sup>327</sup> In its protection of bigoted rhetoric, the United

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324. *See id.* at 109.

325. *See* Shiffrin, *supra* note 14, at 67. Moreover, limitations on certain forms of speech (e.g., commercial speech and obscene speech) are well established in United States First Amendment jurisprudence. *See id.* at 66.

326. *See Beauharnais*, 343 U.S. at 255–57 (discussing the forms of speech not protected by the First Amendment).

327. *See* Mahoney, *supra* note 317, at 803.

States stands apart from the many democracies that punish the expression of hate propaganda.<sup>328</sup> Laws penalizing the dissemination of hate speech exist in the following countries: Israel, Germany, France, Canada, England, Belgium, Brazil, Cyprus, Italy, the Netherlands, Austria, and Switzerland.<sup>329</sup>

In Germany, the law seeks to preserve freedom of expression while precluding a totalitarian government from reasserting its dominion.<sup>330</sup> German criminal law prohibits undemocratic speech, including "the use of . . . symbols, flags, uniforms, and forms of address" associated with "organizations that advocate a non-democratic government."<sup>331</sup> Persons using "flags, insignia, parts of uniforms, slogans and forms of greeting" to propagate undemocratic political parties, such as the National Socialist party, are subject to three years of imprisonment or a fine.<sup>332</sup> Spreading or importing propaganda supportive of unconstitutional and anti-constitutional political parties or associations, such as the Nazi party, may also result in imprisonment and a fine.<sup>333</sup>

Germany determined that protecting human rights is more important than tolerating hate speech.<sup>334</sup> Germany also criminalizes the solicitation of others to commit acts of violence and arbitrary oppression against members of the population; "incite hatred against" them; and "insult them, maliciously exposing them to contempt or slandering them."<sup>335</sup> Another section of the German Criminal Code prohibits persons from disseminating publications or broadcasts that incite others to racial animus or that depict "cruel or otherwise

328. See Lasson, *supra* note 237, at 72.

329. See Mahoney, *supra* note 317, at 803; Lasson, *supra* note 237, at 72 n.286. One example of hate speech that is punishable in those countries is Holocaust denial. See *id.*

330. See Paul Lansing & John D. Bailey, *The Farmbelt Fuehrer: Consequences of Transnational Communication of Political and Racist Speech*, 76 NEB. L. REV. 653, 654-55 (1997).

331. *Id.* at 655.

332. § 86a StGB, reprinted in Juliane Wetzel, *Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany*, in UNDER THE SHADOW OF WEIMAR 104-05 n.11 (1993) (translating § 86a of the German Criminal Code). This section is part of a title of the German Criminal Code known as, "Crimes that Endanger the Democratic Legal State." See also Lansing & Bailey, *supra* note 330, at 655.

333. See Wetzel, *supra* note 332, at 104 n.10.

334. See Lasson, *supra* note 237, at 74.

335. Wetzel, *supra* note 332, at 105 n.12 (citing § 130 StGB).

inhumane acts.”<sup>336</sup> Such measures are meant to stem the tide of the persistent bigotry in Germany.<sup>337</sup> These legal measures protect the German population against expressions of hatred and incitements to violence, regardless of whether the threat of harm is imminent.

Canadian law also recognizes the potential dangers of hate speech. Restrictions on hate propaganda are balanced against the comprehensive guarantees of free speech provided in the Canadian Charter of Rights and Freedoms.<sup>338</sup> Canadian criminal law prohibits public utterances that promote “hatred against any identifiable group.”<sup>339</sup> The penalty for this form of speech is a maximum of two years imprisonment.<sup>340</sup> Further, inciting others to commit genocide is punishable by up to five years imprisonment.<sup>341</sup> Unlike the United States Supreme Court precedents, which only place restrictions on hate speech that presents a “clear and present danger” of harm,<sup>342</sup> the Canadian Criminal provisions are not so restrictive. Promotion of genocide, regardless of when the speaker intends it to be carried out, is criminally punishable. In making these laws, the Canadian legislature realized the long-term harmful influence of hate propaganda. Canadian laws are intended to protect identifiable groups from heinous, inhumane, and violent crimes.

As the legislatures of other Western countries recognize, society has a greater interest in protecting outgroup members from the threat of present and future harms resulting from hate speech than it has in protecting bigots’ right to call for persecutions against outgroups. Granting unrestricted verbal

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336. *Id.* at n.13 (citing § 131 StGB).

337. *See, e.g.*, Ferdinand Protzman, *Music of Hate Raises the Volume in Germany*, N.Y. TIMES, Dec. 2, 1992, at A1 (providing information about the growing popularity of German racist music); *Germans Protest Bombing*, CHI. SUN-TIMES, Mar. 27, 1994, at 41 (showing a group protesting the firebombing of a synagogue in Germany).

338. Fundamental freedoms under the Charter include: “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . . [and] freedom of association.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *Fundamental Freedoms* § 2 (visited May 8, 1999) <[http://canada.justice.gc.ca/Loireg/Charte/const\\_en.html](http://canada.justice.gc.ca/Loireg/Charte/const_en.html)>.

339. Criminal Law, R.S.C., ch. C-46, § 319(2) (1985) (Can.).

340. *See id.* § 319(2)(a).

341. *See id.* § 318(1). Genocidal acts are defined as those done to destroy all or part of “any identifiable group.” *Id.* § 318(2).

342. *See supra* text accompanying notes 22, 34, and 58.

freedom at the expense of outgroup members' rights weakens democracy because all members of the society cannot share equally in its benefits. Increased suffering in one segment of society decreases the overall happiness of the political community. Speech intended to deny civil rights to outgroups is meant to suppress, not further, democratic ideals. Therefore, in the best interest of equality and pluralism, there must be certain limits on hate speech.

### C. *Restricting Hate Speech in a Democratic Society*

Hate speech was a chief component in perpetrating some of the greatest human tragedies.<sup>343</sup> Contrary to many western democracies that recognize the long-term dangers of hate speech,<sup>344</sup> the United States has kept a "head in the sand" approach to historical realities by failing to acknowledge that any but the most immediate dangers can result from words targeting identifiable outgroups.<sup>345</sup> To prevent the seeds of hatred from sprouting, the United States should adopt legislation prohibiting certain forms of hate speech.

The legislation proposed in this article intends to protect outgroups from becoming victims. No identifiable groups, including those that have never been targeted by hate mongers, should be persecuted. However, there is a greater likelihood that traditional scapegoats will suffer such a fate. United States common law recognizes that, given the history of intolerance, the government has a more compelling interest in preventing discrimination based on race, alienage, and national origin than discrimination based on membership in other identifiable groups.<sup>346</sup> In his concurrence in *R.A.V. v. St. Paul*, Justice Blackmun recognized the legitimacy of government prohibitions of racially inflammatory symbols, such as

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343. See *supra* Part III.

344. See *supra* Part IV.B.

345. See *supra* Part II.

346. For purposes of this article, discrimination on the basis of race is particularly important. See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (ruling that in child custody decisions, laws favoring one parent over another solely based on race are suspect); *Loving v. Virginia*, 388 U.S. 1 (1967) (determining that marriage laws containing racially based restrictions are subject to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214 (1944) (finding that laws classifying persons by race are suspect and subject to strict scrutiny); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding a law unconstitutional that was facially discriminatory against Blacks).



burning crosses or Nazi swastikas.<sup>347</sup> Justice Stevens, in a separate concurrence in *R.A.V.*, argued that the city of St. Paul could determine which fighting words to regulate based on the different social harms caused by them.<sup>348</sup>

As Blackmun and Stevens recognized, the First Amendment is not an unlimited license for speech. Even the founding fathers did not consider false and injurious speech permissible.<sup>349</sup> Contemporary First Amendment jurisprudence recognizes numerous limitations on different speech, such as threatening the President,<sup>350</sup> electioneering within 100 feet of a polling place on election day,<sup>351</sup> operating adult theaters,<sup>352</sup> burning draft cards,<sup>353</sup> and disseminating pornography.<sup>354</sup> Arguably, like obscenity or threats made against the President, hate speech has little or no social and political value.<sup>355</sup> Similar to child pornography, hate speech is either non-speech, and therefore not protected by the Constitution, or it is speech so minor in its potential to elicit democratic values that its regulation will not limit significant civil liberties.<sup>356</sup> Moreover, bigotry is false and, therefore, libelous to the targeted outgroup.<sup>357</sup> Like legal disputes over personal libel, group libel pits the interests of individuals to make false claims against the interests of targeted groups to live free from antagonism and false stereotypes, which can restrict a libeled group's ability to participate in democracy.<sup>358</sup>

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347. See *R.A.V. v. St. Paul*, 505 U.S. 377, 416 (1992) (Blackmun, J., concurring). For more on the *R.A.V.* decision, see *supra* text accompanying notes 60–80.

348. See *R.A.V.*, 505 U.S. at 436 (Stevens, J., concurring).

349. Thomas Jefferson wrote James Madison proposing a restricted form of free speech: "The people shall not be deprived or abridged of their right to speak or to write or *otherwise* to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others." Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 367 (Julian P. Boyd ed., Princeton Univ. Press 1958).

350. See *Watts v. United States*, 394 U.S. 705 (1969).

351. See *Burson v. Freeman*, 504 U.S. 191 (1992).

352. See *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

353. See *United States v. O'Brien*, 391 U.S. 367 (1968).

354. See *Miller v. California*, 413 U.S. 15 (1973).

355. See Ogletree, *supra* note 234, at 502.

356. See Lasson, *supra* note 10, at 110.

357. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952); see also *supra* text accompanying notes 48–55 (discussing the *Beauharnais* case).

358. See Matsuda, *supra* note 267, at 2355.

While restrictions on hate speech limit bigots from distributing their vitriolic messages, unrestricted hate speech has the potential of abrogating a much wider set of liberty interests.<sup>359</sup> The argument that hate speech should be tolerated regardless of its potential consequences depreciates outgroups' interest to live unmolested lives. The continued ability of persons across racial and ethnic lines to benefit from equal rights and freedoms outweighs the interest of individuals to make false and divisive speeches aimed at destroying egalitarianism.<sup>360</sup> Hate speech perpetuates racial and ethnic stereotypes that are both meant to maintain discriminatory practices and provoke hate crimes.<sup>361</sup>

Hate speech constitutes a significant attack on democracy with potentially long-term effects on the ability of outgroup members to freely exercise their political and constitutional rights.<sup>362</sup> The purveyors of hatred rationalize why outgroups should not have an equal share of rights in the democratic community, and put outgroup members in fear of their safety.<sup>363</sup> Bigots seek to humiliate, ridicule, and devalue the common humanity of an identifiable group of people.<sup>364</sup> Bigotry lays the groundwork for future oppression, persecution, enslavement, genocide, and forceful expropriations.<sup>365</sup> "As all fascists know, it is just a matter of time, after hate propaganda and disparagement have done their work, that violence will follow."<sup>366</sup> Before committing mass acts of oppression and persecution, bigots systematically develop and disseminate a linguistic paradigm that becomes part of daily communication. With the unrestricted development of hate speech, the hate of outgroup members becomes more sophisticated and poised for destructive actions.<sup>367</sup>

However, the need to restrict hate speech does not require prohibition of all of its manifestations. The First

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359. See Lasson, *supra* note 237, at 80–81; see also *supra* Part III.A (discussing the development of totalitarianism from the Weimar democracy to Nazism).

360. See JOHN RAWLS, *THEORY OF JUSTICE* 220 (20th prt. 1994).

361. See Powell, *supra* note 322, at 126.

362. See Cotler, *supra* note 313, at 254.

363. See Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 390 (1992).

364. See Mahoney, *supra* note 317, at 792.

365. See *id.*

366. *Id.*

367. See Delgado & Stefancic, *supra* note 88, at 478.

Amendment protects persons making purely abstract arguments about the inferiority of specific groups because their speech does not advocate present or future violence or persecution.<sup>368</sup> Scientific or anthropological arguments, which do not call for violent action against outgroups, should not be censured. Bigotry which—when examined in light of historical patterns of oppression—poses a negligible potential for stirring people to commit hate crimes, should also remain protected by the First Amendment.<sup>369</sup> Such ideas do not pose a danger to society, and their presence in political discourse serves to fine-tune democratic ideals of racial and ethnic equality.<sup>370</sup> On the other hand, speech used to incite people to violent, bigoted actions against outgroups is not benign.<sup>371</sup>

As discriminatory laws make prejudice more socially acceptable, so too can outlawing discriminatory practices decrease prejudice.<sup>372</sup> Some authors argue that prohibiting the spread of virulently hateful messages strengthens bigots in their resolve.<sup>373</sup> Therefore, they argue against enacting laws prohibiting hate speech.<sup>374</sup> This viewpoint does not consider that the same argument could be made against the enforcement of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.<sup>375</sup> The existence and active enforcement of those constitutional provisions significantly decreased the occurrence of unequal treatment in housing and employment, eliminated laws prohibiting Blacks from voting, and generally decreased the incidents of racism in the United States. “That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in

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368. See Matsuda, *supra* note 267, at 2364–65.

369. See *id.*

370. See MILL, *supra* note 281, at 108 (discussing the value of discourse that questions accepted ideas).

371. The Supreme Court has stated that expressions that are “simply offensive or disagreeable” to society may not be prohibited. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988)).

372. See ALLPORT, *supra* note 146, at 469.

373. See, e.g., Neuborne, *supra* note 363, at 380.

374. See *id.*

375. See U.S. CONST. amend. XIII (prohibiting slavery and involuntary servitude), XIV (source for equal protection guarantees), and XV (ensuring voting rights regardless of race, color, or former status of servitude).

legislative efforts to deal with obstinate social issues.<sup>376</sup> Legislatures cannot be absolutely certain that enacted laws will eradicate the blight of racism, but the preservation of democracy and human rights requires the adoption of laws prohibiting violent forms of hate speech.<sup>377</sup>

#### D. *Delimiting Restrictions on Hate Speech*

In order to maintain the integrity of its constitutional system, the government must protect both equality and free expression.<sup>378</sup> Fair treatment of the United States population is more important to sustaining and nurturing constitutional principles than is permitting hate speech to prevail in the marketplace of ideas.<sup>379</sup> The value of political dialogue should be measured by the extent to which it advances equality and substantive justice.<sup>380</sup> The dissemination of hatred and calls to commit violence against outgroups promote political inequality and unfairness.<sup>381</sup>

Therefore, hate speech poses a potential threat to American democracy requires federal and state legislation. Based on principles inherent in the Fourteenth Amendment, the Supreme Court has repeatedly recognized the need to protect persons with immutable characteristics, such as race, color, and ethnicity against the tyranny of the majority.<sup>382</sup> Analogously, hate speech aimed at harming persons with immutable characteristics should be prohibited if, based on historic patterns, such speech has a realistic or actual potential of inciting oppression or persecution.

Hate speech has played a significant role in organized and systematic discrimination and persecution. It is therefore critical to enact legislation that is tailored narrowly enough to protect First Amendment rights, but sufficiently farseeing to prevent future harms to identifiable outgroups.

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376. *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952).

377. *See id.* (supporting the principle that government is a "science of experiment").

378. *See Cotler, supra* note 313, at 256–57.

379. *See Shiffrin, supra* note 14, at 87.

380. *See id.* at 88.

381. *See Cotler, supra* note 313, at 256–57.

382. *See Holland v. Illinois*, 493 U.S. 474, 496 (1990) (Marshall, J., dissenting) (asserting that immutable characteristics include race and ethnic background); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) (stating that race, national origin, and alienage are immutable characteristics).

The laws adopted must only prohibit speech that, in its virulent expression of hatred toward outgroups, poses a threat to republican democracy. The following issues should be considered in formulating such a policy.

1. *Whether the Group Targeted by the Speaker Has Been Historically Persecuted*

Hate speech directed at a historically oppressed and persecuted group<sup>383</sup> has no political value. Rather than enlightening listeners through accurate depiction of its subjects, hate speech menaces outgroups by expounding false characterizations of them.

The Thirteenth Amendment prohibits all indicia of slavery,<sup>384</sup> regardless of how they are manifested. Threatening signs, such as swastikas and burning crosses, have historical significances that draw upon and enhance the “badges” and “symbols” of servitude, discrimination, oppression, and persecution.<sup>385</sup> These forms of symbolic speech portend the perpetration of future or imminent destructive acts.<sup>386</sup> Persons expressing themselves may not contemporaneously have the resources to commit acts of oppression or persecution. However, if calls to future violent actions are left unchecked, the seeds of hatred, planted and nurtured in the hearts of bigots can—at opportune moments—lead to violent outbreaks. The potential of hate speech to bring injustices to fruition makes it vital to enact laws limiting the lawful use of racially and ethnically intolerant symbols to non-aggressive purposes, such as memorabilia collections or historical analyses.

When evaluating which expressions to prohibit, lawmakers should empathize with the historical consciousness of outgroups.<sup>387</sup> A prejudice remark may not be perceived as dangerous unless it is contextualized in the historical experience of the targeted outgroup. Legislative proposals should be ad-

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383. A “history of purposeful discrimination” is an indicia of membership in a suspect class of people. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

384. *See The Civil Rights Cases*, 109 U.S. 3, 35–36 (1883) (Harlan, J., dissenting) (arguing that certain “burdens and disabilities” are the substantive and visible forms of slavery and they are therefore prohibited by the Thirteenth Amendment).

385. *See Amar*, *supra* note 322, at 157.

386. *See id.* (discussing the *R.A.V.* decision).

387. *See Matsuda*, *supra* note 267, at 2373.

vanced against stereotypes that in the past have led their adherents to violate outgroups' human rights.

2. *Whether it Is Significantly Probable that the Dissemination of Racially or Ethnically Derogatory Remarks Will Elicit Violence, Persecution, or Oppression Against Targeted Outgroups*

Statutes should prohibit epithets reasonably capable of eliciting violence, vandalism, or discrimination against identifiable outgroups. Depictions that minimize the social value of outgroup members gradually deteriorate pluralism and make degradation and persecution more socially tolerable.<sup>388</sup> By depicting outgroups as sub-humans, it becomes easier for bigots to commit uncensored acts of violence and discrimination.<sup>389</sup> Charismatic leaders should be prohibited from harnessing racist, xenophobic, and anti-Semitic ideologies. Criminal statutes can serve as deterrents against the spread of active prejudice and prevent the deterioration of social mores and attitudes toward outgroups.

Even during times of social and fiscal tranquility, when there is no imminent threat of racial and ethnic intolerance, legislative policy should still prohibit hate speech and protect against moral and economic deterioration. Often during times of national crisis, racism and anti-Semitism draw persons, who were formerly only ideologues, to vehemently oppress and murder members of despised outgroups.<sup>390</sup> The potential for speech that is relatively benign today to take a malignant form tomorrow should not be taken for granted.<sup>391</sup>

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388. See Lasson, *supra* note 237, at 70.

389. See *id.* Part III.A. of this article argues that the Holocaust was rooted in traditional German anti-Semitism spread by oral and written utterances; that this ideological stage made possible racially discriminatory laws that were enacted with the approbation of most Germans; finally, that the propaganda so deadened people's consciences that they committed acts of genocide and torture with equanimity. Kenneth Lasson briefly discussed this progression. See *id.*

390. See Kretzmer, *supra* note 1, at 464.

391. Another important issue, which is beyond the scope of this article, concerns the need to redress the emotional harm outgroup members suffer when they are targeted by hate speech. See Keith N. Hylton, *Implications of Mill's Theory of Liberty for the Regulation of Hate Speech and Hate Crimes*, 3 U. CHI. L. SCH. ROUNDTABLE 35, 52 (1996).

3. *Whether the Speaker Intended His Declarations to Cause Criminal Acts such as Violence, Oppression, Discrimination, or Persecution to Be Taken Against an Outgroup*<sup>392</sup>

In incitement cases, the Supreme Court considers the speaker's intent material.<sup>393</sup> In *Schenck v. United States*, the Court upheld the defendant's conviction for printing and distributing a pamphlet that equated conscription with involuntary servitude.<sup>394</sup> The Court found that by mailing the pamphlet, Schenck manifested the intent to obstruct the government from conscripting soldiers.<sup>395</sup>

Pursuant to the holding in *Schenck*, an element of future hate speech legislation must require proof that the speaker intended to encourage persons to commit inhumane acts against an identifiable outgroup. By adding a *scienter* element to hate speech legislation, lawmakers assure that theoretical utterances will not be punished. This intent requirement protects First Amendment rights while punishing utterances outside First Amendment protection.

Hate speech that is intended to elicit violent responses from bigots can be dangerous both when it is uttered and in the future. At the time of the utterance, the menace may be in its developmental stage, but the ultimate intended ends—inhumane acts and civil rights abuses against outgroups—materialize after systematic development. It is unpredictable how far the hateful flames produced by one ember of bigotry can spread.<sup>396</sup> It is only reasonable for the government to seek to extinguish bigotry before it burns out of control to consume society in the flames of totalitarianism or fascism. A law prohibiting speech intended to raise a following of people willing to act violently is not arbitrary, but rather conscious of historic examples in which racist and anti-Semitic rhetoric led to violence, enslavement, deportation, and genocide.<sup>397</sup> The government should not stand idly by while intentionally volatile

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392. Reckless oratory that has a realistic potentiality of leading to harms directed at a historically oppressed group might also be sufficient for culpability.

393. See *Schenck v. United States*, 249 U.S. 47 (1919).

394. See *id.* at 49–50, 53.

395. See *id.* at 51.

396. See *Gitlow v. New York*, 268 U.S. 652, 669 (1925) (discussing the dangers of revolutionary speech).

397. See *id.*

speech consolidates the forces of bigotry to infringe upon autonomy rights and to destroy democratic ideals; instead, it should "suppress the threatened danger in its inception."<sup>398</sup>

A speaker who intends listeners to commit a diabolical scheme against a historically oppressed group of people should be held criminally responsible before governmental inaction compromises public safety.<sup>399</sup> Eventually, hate speech may cross a juncture whereupon the protagonist succeeds in inciting his followers to hurt and/or oppress outgroups. Bigots intending their words to be part of an incremental plan to efface equal rights should be prosecuted to deter future persecution. Hate speech aimed at the long term development of racial and ethnic animus is even more dangerous than hate speech posing only an immediate threat of harm. The deliberate and knowing orchestration of prejudice whittles away those social mores that are based on equality. Systematic hate propaganda is easier to marshal and sustain than utterances that seek immediate, singular acts of violence.<sup>400</sup> Therefore, the former is capable of eliciting greater harms than the latter.

#### 4. *If the Speech Involves Religious Beliefs, then Incitement Laws Must be Neutral*

Religion is often used to spread intolerant hatred. The institution of slavery was justified on the basis of religion<sup>401</sup> and terrorism has been fomented by religious vitriol.<sup>402</sup> Therefore, the government should adopt a set of legal guidelines to prohibit the use of religion as a catalyst for oppression, while simultaneously protecting the First Amendment right to freely exercise religion. Where the state has a compelling interest in protecting the well-being of its citizens

398. *Id.*

399. See Murray Dry, *Free Speech in Political Philosophy and Its Relation to American Constitutional Law: A Consideration of Mill, Meiklejohn, and Plato*, 11 CONST. COMMENT. 81, 99 (1994).

400. See *supra* Part III.

401. See *supra* text accompanying notes 191–96.

402. See, e.g., Nicholas Goldberg, *People Behind Militancy*, NEWSDAY, Apr. 4, 1999, at B13 (regarding an Islamic fundamentalist preacher justifying the use of terrorism); Patrick McMahon, *Abortion Opponent's Banquet to Honor Militant Defendant in Ore. Lawsuit Calls Use of Force Justifiable*, USA TODAY, Jan. 21, 1999, at 5A (discussing the support of terrorist tactics by some Christian fundamentalists).



against the development of violent bigotry, it can enact narrowly drafted laws that prohibit religious hate speech.<sup>403</sup>

Courts traditionally refuse to "approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."<sup>404</sup> The proscription against governmental meddling in religious tenets and institutions should be maintained.<sup>405</sup> However, hate speech couched in religious terminology should be banned when it poses a significant danger to public welfare. The victim of a hate crime suffers no less if his persecutor is a religious, rather than a secular, bigot. Laws passed to prevent religiously inspired hate speech should not discriminate against any specific religion. Furthermore, no policy should be adopted to regulate or limit religious speech which does not threaten the human rights of identifiable groups of people.

Hate speech that is nominally couched in doctrinal tenets should not be protected simply because it uses religious terminology. Courts should evaluate expert witness testimony, the content of the message, and whether a substantially similar message, expressed in like circumstances, has previously incited people to commit acts of violence or oppression against the targeted outgroup.<sup>406</sup> First Amendment protections are not absolute, and they should be weighed against the right of individuals to enjoy their lives without realistic threats of religious intolerance.

## V. CONCLUSION

United States First Amendment jurisprudence protects the right of individuals to expound hateful messages against historically persecuted outgroups as long as they do not pose

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403. See *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (stating that to regulate content-based religious speech, the state must have a compelling interest and the law must be drafted as narrowly as possible to achieve the desired end).

404. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (reversing and remanding the conviction of a Jehovah's Witness for preaching at a public meeting).

405. See *Grinstein*, *supra* note 8, at 1367.

406. See *id.* at 1379. If an orator's sermon calls for the persecution or destruction of outgroups, and an "overt act" is taken by the orator in furtherance of that call, then the speaker may be charged with aggravated conspiracy. See *id.* at 1377-78; *United States v. Offutt*, 127 F.2d 336, 340 (D.C. Cir. 1942) (stating that "overt acts" in furtherance of a crime are "manifestations that a conspiracy is at work").

an imminent danger to others.<sup>407</sup> In contrast, numerous Western democracies, such as Canada and Germany, protect free speech while enacting and enforcing criminal laws prohibiting hate propaganda.<sup>408</sup> Democracy is not a license for absolute liberty. Protecting individuals' rights to freely disseminate hate propaganda should be counterbalanced against the more important democratic, social values: civil rights and human happiness. The First Amendment should not protect hate speech intended to cause oppression or persecution of specific groups of people.

Hate speech, Supreme Court Justice White said, is politically "worthless and undeserving of constitutional protection."<sup>409</sup> Bigots in the United States and elsewhere have repeatedly used hate speech to spread stereotypes about outgroups. Once the stereotypes became part of the collective cultural psyche, disparaged outgroups were discriminated against, enslaved, and even killed.

Some constitutional commentators argue that it is unnecessary to create laws in the United States to punish any but the most imminently dangerous forms of hate speech.<sup>410</sup> According to their arguments, the United States, unlike countries such as Germany, does not have a long history of bigotry; therefore, it is unnecessary to punish hate speech unless it poses an immediate threat to public order.<sup>411</sup> This argument is based on abstract legal theory, but not grounded on empirical and historical evidence. The propagation of demeaning generalizations about Native Americans and Blacks helped establish the schema of social mores that justified and perpetuated expropriations, dislocations, and cruelties against Native Americans, and that justified and sanctioned Black slavery and disenfranchisement. Furthermore, the widespread dissemination of anti-Semitic rhetoric in Germany prior to and until the rise of the Nazi party demonstrates how quickly bigotry can flare into a virtually uncon-

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407. See *supra* Part II.

408. See *supra* Part IV.B.

409. *R.A.V. v. St. Paul*, 505 U.S. 377, 401 (1992) (White, J., concurring).

410. See, e.g., Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 VILL. L. REV. 743, 754 (1992). See also *supra* Part II.

411. See Abrams, *supra* note 410, at 754. "There are no current risks of the communal violence that has plagued India . . . no history, fortunately, such as that of Germany." *Id.* (arguing that the restrictions on speech that are necessary in those countries are unnecessary in the United States).

trollable conflagration.<sup>412</sup> Language plays a significant role in structuring social relationships. Hate crimes, discrimination, oppression, and persecution are almost inevitable<sup>413</sup> in a society that allows its linguistic “paradigms” to interweave bigotry into everyday speech. To avoid the recurrence of the greatest crimes against humanity, laws should be adopted prohibiting the dissemination of those racial and ethnic stereotypes that have a reasonable potential of eliciting crimes against outgroups.

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412. The Nazi party received only 2.61% of the total vote in the May 20, 1928 German elections. *See* SHIRER, *supra* note 141, at 118; Kretzmer, *supra* note 1, at 464. By July 1932, the National Socialist party received 37% of the vote. *See* SHIRER, *supra* note 141, at 185. Then, on January 30, 1933, Hitler became Chancellor of Germany, and the fate of the six million Jews who died in the Holocaust was sealed. *See id.* at 187.

413. *See* Delgado & Stefancic, *supra* note 88, at 479–80.