

2009

Dignity and Speech: The Regulation of Hate Speech in a Democracy

Alexander Tsesis

Loyola University Chicago, atsesis@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>

 Part of the [Law Commons](#)

Recommended Citation

Tsesis, Alexander, Dignity and Speech: The Regulation of Hate Speech in a Democracy, 42 Wake Forest Law Review 497 (2009)

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

DIGNITY AND SPEECH: THE REGULATION OF HATE SPEECH IN A DEMOCRACY

*Alexander Tsesis**

INTRODUCTION

Free speech is quintessential for maintaining democracy because it facilitates the exchange of diverse opinions. In a representative democracy, dialogue facilitates the testing of competing claims and obtaining of diverse input into political decision making. Free speech is also essential to the enjoyment of personal autonomy.¹

The American tradition of free individual expression exists side-by-side with its Fourteenth Amendment commitment to equality. In the area of hate speech, the libertarian notion of free expression comes into tension with the aspiration of equal dignity. While it is evident that maintaining equality means that government has no power to treat the speech of similarly situated persons differently, potential interpersonal friction exists where the speech of one person threatens the rights or safety of another. With the expansion of the Internet, new regulatory challenges more frequently arise because of the global reach of hate propaganda transmitted from the United States, where it is legal, and streamed into countries, like France, where such communications are criminal offenses.²

The global reach of supremacist ideology creates a challenge to world democracies. Societies committed to pluralism are obligated to safeguard individual expression while promoting egalitarian principles against harming others' safety and dignity. Consequently, as much as American society extols freedom of

* Assistant Professor, Loyola University School of Law, Chicago. I am indebted to Geoffrey Stone, Shannon Gilreath, Mark Tushnet, Richard Delgado, Sanford Levinson, Alexandra Roginsky, Femi Alese, and Becky Warburton for their advice.

1. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 129–32 (2007).

2. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004); *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001); Richard Raysman & Peter Brown, *Yahoo! Decision in France Fuels E-Commerce Sovereignty Debate*, N.Y. L.J., Dec. 12, 2000, at 3; *Yahoo! Loses Nazi Case*, NAT'L L.J., Dec. 4, 2000, at B4.

speech, there are many instances in which competing interests, such as retaining a good reputation in one's community, place restraints on public communications. Where one person wishes to express false statements about another, defamation law sides not with the desire for inaccurate catharsis but with the protection of reputation.³ The preference for an "individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being.'"⁴ Public policy favors the interest of libeled individuals over that of anyone wishing to intentionally or negligently spread fallacy.⁵ So too where words are likely to result in the immediate breach of the peace. The Supreme Court has found that the government has a countervailing social interest in order and morality that justifies some limitations on speech.⁶

This Article opens with an analysis of hate speech in a democratic society. The first topic to investigate is the role of speech in our constitutional democracy. The current Supreme Court cases that affect the status of hate speech are then reviewed and critiqued. Finally, the Article contrasts the American approach to destructive messages with the European and Canadian models.

I. SPEECH AND DEMOCRACY

The protection of free speech is essential for a democracy committed to personal autonomy and political pluralism. Scholars in the United States, like Robert Post, have tended to view hate speech as a protected form of expression. In a seminal article, *Racist Speech, Democracy, and the First Amendment*, Post pointed out that the First Amendment debate on the legitimacy of hate speech regulation must be mindful of the "social context" of racist communication.⁷ He drew attention to the importance of speech, both for personal self-determination and for deliberative development of public opinion.⁸ Those who advocate for the imposition of restrictions on hate propaganda, Post argues, "carry the burden of justifying" the democratic value of such a policy.⁹ Public discourse is so critical to the development of a democratic collective will, Post wrote elsewhere, that "racist speech is and ought to be immune from regulation within public discourse."¹⁰

3. John Murphy, *Rethinking Injunctions in Tort Law*, 27 OXFORD J. LEGAL STUD. 509, 518 n.50 (2007); Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 57 (2005).

4. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

5. *See id.* at 345-46.

6. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

7. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 325-26 (1991).

8. *Id.* at 326.

9. *Id.* at 327.

10. *Id.* at 322.

Post's theory of free speech offers a useful starting point. Self-determination is essential to democratic discourse and decision making. This framework is helpful for assessing how equal community membership can be reconciled with the individual First Amendment freedom of self-assertion. Post, however, emphasizes the personal autonomy aspect of the First Amendment without himself adequately balancing it against competing democratic values. The freedom to intimidate vulnerable groups, for instance, can prevent others from enjoying their equal right to public safety. Aggressive advocacy against identifiable groups also attacks their sense of dignity.¹¹ Post's approach to this topic correctly emphasizes democracy's obligation to respect self-assertion, but he should have also factored in individual interest to be free from reasonably anticipated risks flowing from inflammatory statements.

Hate speakers seek to intimidate targeted groups from participating in the deliberative process. Diminished political participation because of safety concerns, in turn, stymies policy and legislative debates.¹² Discriminatory assertions are meant to stymie the depth of pluralistic speech.¹³ Demeaning stereotypes can delegitimize the opinions of disfavored groups. Post points out that the First Amendment serves the democratic role of safeguarding "the value of self-determination."¹⁴ "The normative essence of democracy," he writes, "is . . . located in the communicative processes necessary to instill a sense of self-determination."¹⁵ This characterization, however, only captures part of the rationale behind the protection of free speech. In a pluralistic society, where clashes of interests among equals are unavoidable, reconciling them often requires weighing competing concerns. Speech, like any other individual right, sometimes has to give way to other democratic values, such as equality.¹⁶ Self-assertion is not an absolute trump

11. See R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 544–45 (2006).

12. Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502 (1996). See generally Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141 (2005) (reviewing RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* (2004)).

13. See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1561–62 (2003).

14. Post, *supra* note 7, at 281.

15. *Id.* at 282.

16. *Virginia v. Black*, 538 U.S. 343, 399 (2003) (Thomas, J., dissenting) ("That the First Amendment gives way to other interests is not a remarkable proposition."); Ronald J. Krotoszynski, Jr., *I'd Like to Teach the World to Sing (In Perfect Harmony)*: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1326 (2006) (reviewing *JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION* (Robert Badinter & Stephen Breyer eds., 2004) and mentioning the European model of regulating hate

against egalitarian decision making.

The Supreme Court has found that several restraints on speech do not interfere with the First Amendment. The depiction of obscenity, for instance, may be restricted when it portrays conduct in a patently offensive manner in order to appeal to a "prurient interest in sex."¹⁷ While this standard does not allow for suppression of sexual depictions solely because they are "utterly without redeeming social value,"¹⁸ courts may weigh speech rights against "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁹ The Court's obscenity test is predicated on the premise that an autonomous right of lewd communication may sometimes be outweighed by well-defined contemporary community concerns.²⁰ In the case of adult book stores, local governments can place restrictions on their locations in order to reduce criminal activities and prevent a precipitous drop in neighborhood real estate values.²¹ Elsewhere, a plurality similarly noted that "society's interest" in protecting businesses engaged in the sale of explicit sexual products is of lesser importance than the safeguarding of "untrammelled political debate."²² Like obscenity and the operation of adult theaters, the dissemination of hate speech raises concerns unassociated with self-determination.

Even though political speech is essential to the functioning of a democratic government, it is not afforded absolute protection under the First Amendment. In *Nebraska Press Ass'n v. Stuart*, the majority explicitly stated that the "Court has frequently denied that First Amendment rights are absolute."²³

Restrictions can even be placed on electioneering within one hundred feet of polling places on election day to prevent voter intimidation.²⁴ A plurality of the Court has determined that

speech on pluralistic grounds).

17. *Miller v. California*, 413 U.S. 15, 24 (1973).

18. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413, 418 (1965); see also *Miller*, 413 U.S. at 24.

19. *Miller*, 413 U.S. at 24.

20. For a debate on the democratic value of obscenity speech, see James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865 (2007); Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007); James Weinstein, *Free Speech Values, Hardcore Pornography and the First Amendment: A Reply to Professor Koppelman*, 31 N.Y.U. REV. L. & SOC. CHANGE 911 (2007); see also David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974). I do not wish to enter this debate here, but it is worth pointing out that current Supreme Court jurisprudence places greater emphasis on limiting obscene speech than on the ability to express it.

21. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

22. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

23. 427 U.S. 539, 570 (1976).

24. *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality opinion).

protecting the electoral process against the harassment of voters is a compelling governmental policy.²⁵ Neither is harassing anti-abortion speech shielded by the First Amendment even though it may be politically motivated.²⁶ In this circumstance, as Justice Clarence Thomas recently pointed out in a dissent, it is an established proposition that “the First Amendment gives way to other interests.”²⁷ The privacy right of patients outweighs that of persons resorting to intimidation to counsel against abortion. In another case, the Court found that a law preventing picketing in front of a residence was constitutional even though it was enacted to prevent the politically motivated harassment of abortion providers.²⁸

Maintaining public order is another social value that the government may balance against speakers’ rights.²⁹ In order to protect democracy, a state can promulgate narrowly tailored criminal regulations against intimidation that threatens public safety.³⁰ The threat to individuals’ physical well-being and dignity interests may supersede those of individuals who resort to intimidating symbols like burning crosses and swastikas to elicit violence. Hate speech is a threatening form of communication that is contrary to democratic principles. It not only asserts personal opinion but also aims to prevent segments of the population from participating in deliberative decision making.³¹ In combating the threat, states committed to free speech may adopt laws that prevent the dangerous dissemination of messages without interfering with legitimate, although sometimes offensive, discourse.

When harassing expression is disguised as political expression it adds nothing to democratic debate. This is most clearly illustrated by the use of political hate speech in Nazi Germany and Rwanda, where politicians relied on anti-Semitic and anti-Tutsi

25. *Id.* at 199.

26. *Hill v. Colorado*, 530 U.S. 703, 708, 716 (2000).

27. *Virginia v. Black*, 538 U.S. 343, 399 (2003) (Thomas, J., dissenting); see also *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495 (2007)

[T]he scope of a government employee’s First Amendment rights depends on the “balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

(quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968)).

28. *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988).

29. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 375–76 (1997) (balancing free speech and public safety); *New Jersey v. T.L.O.*, 469 U.S. 325, 351–53 (1985) (Blackmun, J., concurring) (discussing balancing public order as a social value).

30. See David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1769 (2005) (“In most of its current forms, . . . participatory democracy tends to highlight the importance of order and public safety.”).

31. Ogletree, *supra* note 12, at 502; Tsesis, *supra* note 12, at 148.

diatribe to temporarily gain control of the governments.³² Even a verbal altercation with a governmental figure that poses an immediate risk of harm can be punished. In *Chaplinsky v. New Hampshire*, the Court found that a Jehovah's Witness who verbally attacked a police marshal had used "fighting words." The Court ruled that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."³³ Society's interest in "order and morality" outweighs any benefit that the speaker might derive from such utterances.³⁴ The continued vitality of the "fighting words" doctrine has been repeatedly affirmed by the Supreme Court.³⁵ Hate speech, like imminently threatening expression, threatens the public peace; neither, therefore, is protected by the First Amendment.³⁶ They are both unrelated to the First Amendment interest of facilitating the free exchange of ideas in the search for truth.³⁷ The social valuation of personal security and dignity allows for some limitation on the content of speech when its expressive value is significantly lower than its likelihood of causing harm.³⁸

Judicially recognized limitations on offensive speech indicate

32. See Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 501 (2008). On the use of political hate speech in pre-genocidal Rwanda, see MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 189–90 (2001); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 142–43 (1995); JOSIAS SEMUJANGA, ORIGINS OF RWANDAN GENOCIDE 155–56 (2003). And on the use of National Socialist hate speech prior to Nazi accession and governance, see LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933–1945, at 23–47, 56–58 (1975); RICHARD J. EVANS, THE THIRD REICH IN POWER 1933–1939, at 573–79 (2005); SAUL FRIEDLÄNDER, 1 NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933–1939, at 26–27 (1997); DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 90–92 (1996); ALEXANDER TESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 21–25 (2002).

33. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

34. *Id.* at 572.

35. See, e.g., *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

36. See *R.A.V.*, 505 U.S. at 401 (White, J., concurring).

37. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)

[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.

38. See *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (stating that "it is not rare that a content-based classification of speech has been accepted [as being constitutional] because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests").

that, in our constitutional democracy, certain social values can outweigh speakers' interests in self-determined expression. The most recent Supreme Court case on the use of intimidating communications signaled that hate speech was even more socially harmful than statements that, as in *Chaplinsky*, tend to illicit an immediate breach of the peace. In *Virginia v. Black*, the Court upheld a state criminal statute against intimidating cross burning.³⁹ The justices split on another issue of whether the prima facie element of the Virginia statute was constitutional, with a plurality of the Court holding that the *scienter* element of the offense must be proven beyond a reasonable doubt.⁴⁰

The Court weighed historical evidence of the burning cross's connection with domestic terrorism against the social interest in leaving speakers unimpeded to use the symbol for ascertaining truth.⁴¹ The burning cross, the justices found, is historically linked to violence and intimidation rather than any truth-seeking activity.⁴² States are free to pursue a policy against dangerous messages in an effort to prevent the likely instigation of violence.⁴³

As *Black* made clear, regulations against intimidating hate speech can reflect that there is a greater governmental interest in preventing the use of historically incitable expressions than in tolerating the cathartic expression of menacing animus. That case was monumental because it provided states with guidance on how to contour hate speech legislation without running awry of the Constitution's democratic principles. The Court's focus might have been even more valuable had it analyzed democratic institutions, as Robert Post had suggested.⁴⁴

II. LIBERAL EQUALITY AND HATE SPEECH

Hate speech commonly relies on stereotypes about insular groups in order to influence hostile behavior toward them.⁴⁵ Supremacist and outright menacing statements deny that targeted groups have a legitimate right to equal civil treatment and advocate against their equal participation in a democracy.⁴⁶ Destructive

39. 538 U.S. at 363.

40. *Id.* at 363–64 (plurality opinion); *id.* at 369–70 (Scalia, J., concurring) (arguing that the prima facie element of the offense was unconstitutional).

41. *Id.* at 360–62 (plurality opinion).

42. *Id.* at 357.

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

44. Post, *supra* note 7, at 287–88.

45. See HOWARD J. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE: A SYSTEMATIC THEORETICAL REVIEW AND PROPOSITIONAL INVENTORY OF THE AMERICAN SOCIAL PSYCHOLOGICAL STUDY OF PREJUDICE* 21 (1973).

46. See Rory McVeigh, *Structured Ignorance and Organized Racism in the United States*, 82 SOC. FORCES 895, 902–03 (2004) (discussing how supremacist protest can harness collective action against minorities during favorable political circumstances).

messages are particularly dangerous when they rely on historically established symbolism, such as burning crosses or swastikas, in order to kindle widely shared prejudices. Messages that are meant to hurt individuals because of their race, ethnicity, national origin, or sexual orientation have a greater social impact than those that attempt to draw out individuals into pugilistic conflicts.⁴⁷ Establishing a broad consensus for large-scale harmful actions, such as those carried out by supremacist movements, relies on a form of self-expression that seeks the diminished deliberative participation of groups of the population.⁴⁸ Hate speech extols injustices, devalues human worth, glamorizes crimes, and seeks out recruits for antidemocratic organizations.⁴⁹

Advocacy to commit crimes against an identifiable group, to publically burn a cross, or to exhibit a swastika during a public meeting can be posted on a supremacist Internet site.⁵⁰ All of these are not merely assertions of abstract, unpopular ideas, nor are they solely defamatory statements. They often aim to intimidate and exclude readily identifiable groups from enjoying their political freedoms.⁵¹ Charismatic leaders rely on hate propaganda to recruit others to join their organization, which may advocate violence, bigotry, and discrimination.⁵² The risks associated with hate speech are particularly acute during times of economic crisis, when

47. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (explaining the restriction on fighting words because of their “slight social value” (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

48. See Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 795–96 (2004).

49. Chris Demaske, *Modern Power and First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL’Y 273, 283, 291 (2004) (linking hate speech and hate crimes); Sévane Garibian, *Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law*, 9 CARDOZO J. CONFLICT RESOL. 479 (2008) (concerning the harm to democracies resulting from hate speech and genocide denial); Tsesis, *supra* note 12, at 148 (discussing the empirical correlation between hate crimes and hate speech); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 779–80 (2000).

50. See Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, at pt. II (2002) (describing internet hate cites), http://www.vjolt.net/vol7/issue2/v7i2_a05-Tsesis.pdf (last visited Mar. 30, 2009).

51. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (assessing the intimidating threat of cross burning); Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2291 (2004) (“There can be little doubt that the swastika is as intimidating to some as the burning cross.”).

52. Plato’s *Republic* is the earliest mention, to my knowledge, of how charismatic leaders can degrade democracy. The philosopher recognized that agitators systematically generate broad support by denigrating their enemies with false accusations. Plato also had the foresight to realize that the freedoms people enjoy in a democracy can be exploited to establish mob rule and, subsequently, tyranny. Plato, *The Republic*, in *THE DIALOGUES OF PLATO* 820–24 (B. Jowett trans., Random House 1937).

scapegoating becomes a common reaction for the loss of jobs or financial instability.⁵³

Racist instigation ascribes undesirable traits to disparaged groups—greediness to Jews, lasciviousness to blacks, and laziness to Mexicans—in order to diminish their political and social standing.⁵⁴ The message conveyed is that differences in race, gender, ethnicity, and sexual orientation “are distinctions of merit, dignity, status, and personhood.”⁵⁵

Easily identifiable symbols of intimidation, like burning crosses, make the affective part of demagogues’ messages more influential.⁵⁶ The very purpose of intimidating hate speech is to perpetuate and augment existing inequalities. Although the spread of intimidating hate speech does not always lead to the commission of discriminatory violence, it establishes the rationale for attacking particular disfavored groups.

Some historical examples will demonstrate how hate groups rely on destructive messages to develop ideologically grounded organizational infrastructure.⁵⁷ Before Nazis began implementing the attempted genocide of the Jews, German political folklore regarded Jews as vermin, unworthy of life and requiring

53. W. FITZHUGH BRUNDAGE, *UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH* 133 (1997); JOSEPH F. HEALEY, *RACE, ETHNICITY, GENDER, AND CLASS: THE SOCIOLOGY OF GROUP CONFLICT AND CHANGE* 437 (2006); NANCY MACLEAN, *BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN* 159–60 (1994).

54. ALBERT MEMMI, *RACISM* 174–75 (Steve Martinot trans., 2000) (explaining the evolution of anti-Semitic stereotypes); ROBERT C. SMITH, *RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T* 10 (1995) (discussing the black stereotype); DAVID J. WEBER, “Scarce more than apes.”: *Historical Roots of Anglo American Stereotypes of Mexicans in the Border Region*, in 2 *RACE AND U.S. FOREIGN POLICY IN THE AGES OF TERRITORIAL AND MARKET EXPANSION, 1840 TO 1900*, at 89, 89–98 (Michael L. Krenn ed., 1998) (describing some roots of stereotypes against Mexicans); Dana DiFilippo & Stephanie Farr, *A New Way of Hate*, *PHILA. DAILY NEWS*, Oct. 29, 2008, at 3 (documenting a 35% rise in hate crimes between 2003 and 2006 that were perpetrated against Latinos and stating that “[s]upremacists who used to express their loathing for blacks, gays, Jews and other minorities with fists and fire now post fliers, blog online, ramble on talk radio, commune at invitation-only white-power concerts and gather for subdued ceremonies with subtle messages”); *Latinos Targeted For Hate Crimes?* (CNN television broadcast Nov. 12, 2008), available at <http://archives.cnn.com/TRANSCRIPTS/0811/12/cnr.07.html> (discussing how an increased incidence of the demonization and vilification of immigrants, especially Latinos, leads to increasing incidents of hate crimes).

55. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C.R.-C.L. L. REV.* 133, 136 (1982).

56. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* 14 (1996) (relating how hate speech affects human emotion).

57. Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 *U. ILL. L. REV.* 789, 792.

fumigation.⁵⁸ In our country, proslavery advocates widely disseminated claims that blacks were subhumans who were ordained to subservience.⁵⁹ In these cases, supremacists recruited followers to act on the propaganda of ethnic and religious superiority. The availability of these messages in German and American democratic discourse had the opposite effect of Robert Post's expectation: they tainted the political process and prevented certain groups from participating in it.

Permitting persons or organizations to spread ideology touting a system of discriminatory laws or enlisting vigilante group violence erodes democracy.⁶⁰ So it was in the Weimar Republic, where the repeated anti-Semitic propaganda of vulgar ideologues like Julius Streicher, who published perverse attacks against Jews in *Der Stürmer*, chipped away at the post-World War I German democratic experiment.⁶¹ Avowedly influenced by nineteenth century anti-Semitism, his weekly stories of Jewish ritual murder and sexual exploitation were a crude way of antagonizing the victims and gaining support for widespread prejudice against Jews.⁶² It is truly eerie, now, looking at photographs relating the effectiveness of Nazi propaganda: respectable looking adults in suits and dresses listening to long lectures on Jewish inferiority; children, barely able to stand on their two feet, raising their right arm in a Nazi salute.⁶³

Nazi propaganda incorporated numerous well-known nineteenth century slogans. To take one example, Streicher, who was later sentenced to death by the Nuremberg War Crimes Tribunal,⁶⁴ used an inflammatory slogan, "The Jews are our

58. On the nineteenth century German stereotype of Jews and the Nazis' incorporation of it into their official political doctrine, see RICHARD M. LERNER, *FINAL SOLUTIONS: BIOLOGY, PREJUDICE, AND GENOCIDE* 27–28 (1992); FRITZ STERN, *THE POLITICS OF CULTURAL DESPAIR: A STUDY IN THE RISE OF THE GERMANIC IDEOLOGY* 61–63 (1961); TESIS, *supra* note 32, at 13–20.

59. See 2 EDWARD LONG, *THE HISTORY OF JAMAICA* 353–73 (1774) (taxonomizing blacks somewhere between humans and simians); *PERSONAL SLAVERY ESTABLISHED, BY THE SUFFRAGES OF CUSTOM AND RIGHT REASON* 18 (1773).

60. Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1375–76 (1998).

61. See RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 188–89 (2003).

62. DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY* 64–65 (2001); EVANS, *supra* note 61, at 188–89 (describing *Der Stürmer* and Streicher's place in the Nazi Party); G.M. GILBERT, *NUREMBERG DIARY* 23 (1947) (providing personal testimony of Streicher's influence).

63. EVANS, *supra* note 61, at 217 (depicting young people on the street looking at Nazi propaganda); EVE NUSSBAUM SOUMERAI & CAROL D. SCHULZ, *DAILY LIFE DURING THE HOLOCAUST* 54 (1998) (depicting Germans saluting Hitler).

64. By the 1930s, Streicher's newspaper was used as a teaching tool by elementary school teachers. RICHARD GUTTERIDGE, *OPEN THY MOUTH FOR THE*

misfortune!" on his newspaper masthead.⁶⁵ At one point over 130,000 copies of his publication were sold and displayed on public message boards throughout the country.⁶⁶ The phrase also became prominently featured on posters throughout the Third Reich.⁶⁷

This slogan was taken verbatim from an 1879 article by Professor Heinrich von Treitschke, arguably the greatest German historian of the nineteenth century.⁶⁸ Its visibility in pre-World War II German society helped legitimize anti-Semitism there in intellectual circles.⁶⁹

A gradual process of incitement also occurred elsewhere. In many American colonies, authors and legal institutions had been degrading blacks since the seventeenth century.⁷⁰ By national independence, in 1776, the colonies of South Carolina and Georgia had long-standing commitments to retaining slavery despite the oft-repeated mantra of universal natural rights.⁷¹ In 1787, those two

DUMB!: THE GERMAN EVANGELICAL CHURCH AND THE JEWS, 1879–1950, at 161–62 (1976).

65. KARL DIETRICH BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE, AND EFFECTS OF NATIONAL SOCIALISM* 37–38 (Jean Steinberg trans., Praeger Publishers 1970) (1969).

66. SOUMERAI & SCHULZ, *supra* note 63, at 51.

67. *Id.*

68. HEINRICH VON TREITSCHKE, *A Word About Our Jews*, 575, translated in *ANTISEMITISM IN THE MODERN WORLD: AN ANTHOLOGY OF TEXTS* 69–73 (Richard S. Levy ed., 1990); see also ALBERT S. LINDEMANN, *ESAU'S TEARS: MODERN ANTI-SEMITISM AND THE RISE OF THE JEWS* 131 (1997).

69. Shulamit Volkov, *Antisemitism as a Cultural Code: Reflections on the History and Historiography of Antisemitism in Imperial Germany*, in 2 [The Origins of the Holocaust] *THE NAZI HOLOCAUST: HISTORICAL ARTICLES ON THE DESTRUCTION OF EUROPEAN JEWS* 307, 323–25 (Michael R. Marrus ed., 1989).

70. See ALEXANDER TESISIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 22–24 (2008) (discussing colonial racism).

71. For a variety of colonial slave laws, see An Act Repealing an Act Intituled [sic] An Act for Rendering the Colony of Georgia More Defensible by Prohibiting the Importation and Use of Black Slaves or Negroes Into the Same (1742), *reprinted in* 1 *THE COLONIAL RECORDS OF THE STATE OF GEORGIA* 59–60 (Allen D. Candler compiler, 1904); Supplementary Act to the Act Relating to Servants and Slaves (1717), *reprinted in* 33 *PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND* 112 (Clayton Colman Hall ed., 1913); An Act . . . (1704), *reprinted in* 26 *PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND* 259–60 (William Hand Browne ed., 1906) (1704); An Act Concerning Negros & Other Slaves (1664), *reprinted in* 1 *PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND* 533–34 (William Hand Browne ed., 1883); 1 *ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY* 578–79 (1869); 4 *THE STATUTES AT LARGE OF PENNSYLVANIA* 62–63 (1897); 7 *THE STATUTES AT LARGE OF SOUTH CAROLINA* 352–53, 363, 371 (David J. McCord ed., 1840); An Act for the Better Governing and Regulating White Servants, No. 383 (1717), *reprinted in* 3 *THE STATUTES AT LARGE OF SOUTH CAROLINA* 20 (Thomas Cooper ed., 1838); 2 *STATUTES AT LARGE: BEING A COLLECTION OF ALL LAWS OF VIRGINIA* 170 (William W. Hening, ed., 1823); 3 *STATUTES AT LARGE: BEING A COLLECTION OF ALL LAWS OF VIRGINIA* 170 (William W. Hening, ed., 1823) 86–87; *id.* at 453–54; EDWARD R. TURNER, *THE NEGRO IN PENNSYLVANIA* 30 n.37 (1911).

states refused to endorse the proposed Constitution without provisions protecting that undemocratic institution.⁷²

Senator John Calhoun, Congressman Henry Wise, and other powerful racist orators misled the public about the supposedly benevolent slave owner, feeding his slaves and treating them like his own children.⁷³ The repeated inculcation of supremacism proved effective in misrepresenting blacks as moveable property. Abolitionists like Theodore Weld, Angelina and Sarah Grimké, Frederick Douglass, and William Lloyd Garrison were unable to win over the country to their abolitionist views.⁷⁴ To the contrary, proslavery thought monopolized the Southern marketplace of ideas.⁷⁵ Slavery came to an end after a bloody Civil War, not through articulate or even heated debate.⁷⁶

Because intimidating hate speech has so often inflamed dangerous attitudes, the value of such expression should be balanced against the likelihood that it will cause harm. The risks are greater when hate propaganda incorporates symbolism, like swastikas, that demagogues have historically displayed to rally supporters to action. Robert Post is undoubtedly correct that speech is valuable because it provides a breeding ground for “collective self-determination.”⁷⁷ The more difficult question is how self-expression should be treated when it conflicts with the safety of its target.

As much as self-expression is fundamental to democratic institutions, it can, nevertheless, be balanced against the social interest in safeguarding a pluralistic culture by preventing the instigation of demagogic threats. Placing no limits on speech—even on expressions blatantly intended to make life miserable for minorities—preserves the rights of speakers at the expense of targeted groups. Defamation statutes, zoning regulations, and obscenity laws indicate that the freedom of speech is not shielded where it undermines other individuals’ legitimate interests.⁷⁸ Hate

72. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 371–73 (Max Farrand ed., 1911) (containing speeches of South Carolina and Georgia representatives at the Constitutional Convention insisting on the inclusion of slave-protecting clauses).

73. EDWARD L. AYERS, IN THE PRESENCE OF MINE ENEMIES: WAR IN THE HEART OF AMERICA 1859–1863, at 117 (2003); EDWARD P. CRAPOL, JOHN TYLER: THE ACCIDENTAL PRESIDENT 68 (2006).

74. See generally LOUIS FILLER, THE CRUSADE AGAINST SLAVERY 1830–1860 (1960).

75. LARRY E. TISE, PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701–1840, at 8 (1987).

76. Two articles in this symposium offer differing views on abolitionist speech in the antebellum South. See Michael Kent Curtis, *Be Careful What You Wish For*, 44 WAKE FOREST L. REV. 431, 479 (2009); Shannon Gilreath, *Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand*, 44 WAKE FOREST L. REV. 557, 610–11 (2009).

77. Post, *supra* note 7, at 283.

78. See *infra* Part III.

speech regulation undoubtedly inhibits some opportunities for self-expression; more importantly, it prevents instigative communication from undermining its targets' ability to live unaccosted by harassment.

In the many historic examples when destructive messages proved to be effective in instigating violence, they caused enormous social turmoil. Just like shouting "fire" in a crowded movie theater, which can be prohibited without violating the First Amendment,⁷⁹ hate speech can cause a stampede. Take Spain, for instance, which expelled its Jewish population in 1492.⁸⁰ The expulsion came after years of Inquisition propaganda and hurt both the exiled Jews and the remaining Spanish population.⁸¹ Teachings by zealous preachers like Vincent Ferrer, a later-canonized Dominican monk, in the late fifteenth century brought on a nationwide anti-Jewish hysteria that opposed the free practice of Judaism while decrying overt violence.⁸² Pursuant to his instigation, a Castilian decree discriminated against Jews in employment, dress, and criminal punishments.⁸³ Historian Heinrich Graetz explained the connection between anti-Jewish preaching and draconian edicts: the populace was "inflamed by the passionate eloquence of the preacher [and] emphasized his teaching by violent assaults on the Jews."⁸⁴ Another historian explained that:

For centuries, Christians had been encouraged to hate the Jews. With preachers telling them, Sunday after Sunday, that Jews were perverted and guilty of complicity in the death of Christ, the faithful ended up by detesting them with a hatred that was bound one day to express itself in violence.⁸⁵

Once unleashed, the expulsion of Jews from Spain followed naturally from the verbal spread of hatred during the Inquisition.⁸⁶ The economic consequences were grave. Many commercial

79. *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.").

80. BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 70 (2007).

81. MARVIN PERRY & FREDERICK M. SCHWEITZER, *ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT* 128 (2002).

82. JAMES M. ANDERSON, *DAILY LIFE DURING THE SPANISH INQUISITION* 92 (2002); 4 HEINRICH GRAETZ, *HISTORY OF THE JEWS* 200–06 (1894); FREDERIC DAVID MOCATTA, *THE JEWS OF SPAIN AND PORTUGAL AND THE INQUISITION* 17 (1973); JOSEPH PÉREZ, *THE SPANISH INQUISITION: A HISTORY* 9–12 (Janet Lloyd trans., 2005); MIRI RUBIN, *GENTILE TALES: THE NARRATIVE ASSAULT ON LATE MEDIEVAL JEWS* 128 (1999); GRETCHEN D. STARR-LEBEAU, *IN THE SHADOW OF THE VIRGIN: INQUISITORS, FRIARS AND CONVERSOS IN GUADALUPE, SPAIN* 37–38 (2003).

83. ANDERSON, *supra* note 82, at 92.

84. GRAETZ, *supra* note 82, at 204–05.

85. PÉREZ, *supra* note 82, at 9.

86. PERRY & SCHWEITZER, *supra* note 81, at 128.

enterprises in Seville and Barcelona, for instance, were ruined.⁸⁷ “Spain lost an incalculable treasure by the exodus of Jewish . . . merchants, craftsmen, scholars, physicians, and scientists,” wrote the encyclopedic Will Durant, “and the nations that received them benefitted economically and intellectually.”⁸⁸ Anti-Jewish preaching in parts of Spain influenced a wide social segment of the population, and the result was devastating both for the Jews who fled and for the country that renounced them on dogmatic grounds. Elsewhere in the ancient world, as historian Ben Kiernan has compellingly documented, periodic mass massacres perpetrated against segments of the native populations in Ireland, North and South America, and Australia were likewise influenced by widely disseminated dehumanizing statements.⁸⁹

The spread of ethnic and racial hatred continues to elicit violence throughout the modern world. The dissemination of ethnically incitable messages has precipitated tribal clashes in Kenya.⁹⁰ In Rwanda, ethnic stereotyping and repeated media calls for the extermination of Tutsi led to a massive genocide perpetrated against that group.⁹¹

Arab racial hate propaganda in the Sudan has catalyzed a government-sponsored attempt to “cleanse” black Africans in Darfur, Sudan.⁹² Likewise, in the Democratic Republic of the Congo the government has relied on the incitement of ethnic hatred, creating a culture where ethnic murder is a routine militia practice.⁹³ In the Arab world, terror organizations like Hamas and Hizballah spread hatred against Jews without any interference from

87. ANDERSON, *supra* note 82, at 92.

88. 6 WILL DURANT, *THE STORY OF CIVILIZATION* 220 (1957). Durant further discusses Spain’s economic loss caused by the Muslim expulsion from Castile and León. *See id.* at 220.

89. KIERNAN, *supra* note 80, at 77–100, 187–212, 219–48, 252, 276–309.

90. BINAIFER NOWROJEE, HUMAN RIGHTS WATCH, *FALLING THE INTERNALLY DISPLACED: THE UNDP DISPLACED PERSONS PROGRAM IN KENYA* 61–63 (1997); JOHN OUCHO, *UNDERCURRENTS OF ETHNIC CONFLICT IN KENYA* 90 (2002).

91. ANTHONY CORTESE, *OPPOSING HATE SPEECH* 45–46 (2006); Charity Kagwi-Ndungu, *The Challenges in Prosecuting Print Media for Incitement to Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE* 330, 339–40 (Allan Thompson ed., 2007).

92. BRIAN STEIDLE & GRETCHEN STEIDLE WALLACE, *THE DEVIL CAME ON HORSEBACK: BEARING WITNESS TO THE GENOCIDE IN DARFUR* xvii (2007); Mahgoub El-Tigani Mahmoud, *Inside Darfur: Ethnic Genocide by a Governance Crisis*, 24 *COMP. STUD. S. ASIA, AFR. & MIDDLE E.* 3 (2004); Save Darfur, *Darfur Update* n.3 (Oct. 2007), http://www.savedarfur.org/newsroom/policypapers/september_briefing_paper_the_genocide_in_darfur (last visited Mar. 30, 2009).

93. *See generally* 1 *DEMILITARIZATION AND PEACE-BUILDING IN SOUTHERN AFRICA* 113 (Peter Batchelor & Kees Kingma eds., 2004); CHRISTIAN P. SCHERRER, *GENOCIDE AND CRISIS IN CENTRAL AFRICA: CONFLICT ROOTS, MASS VIOLENCE, AND REGIONAL WAR* 283 (2002). The current Democratic Republic of the Congo’s Constitution criminalizes the incitement to ethnic hatred. 2006 *CONST. art. 10* (Dem. Rep. Congo).

several governments, including Egypt, Syria, Lebanon, and Saudi Arabia.⁹⁴ School texts that are “written and produced by Saudi government” teach children to kill Jews and to hate Christians and Jews.⁹⁵

Hate propoganda in these countries is far more virulent than it is in the United States; nevertheless, a democracy committed to the protection of individual rights does not run afoul of free speech principles by criminalizing group incitement that has so globally proven to influence harmful social movements.

A First Amendment theory, as the Supreme Court made clear in *Virginia v. Black*, must examine whether there are historical reasons to believe that offensive expression against an identifiable group is likely to intimidate reasonable audiences.⁹⁶ Robert Post’s argument about the undemocratic nature of hate speech regulation regards “the function of public discourse” to be the reconciliation of “the will of individuals with the general will. Public discourse is thus ultimately grounded upon a respect for individuals seen as ‘free and equal persons.’”⁹⁷ He emphasizes democracy’s central obligation to protect private “autonomous wills.”⁹⁸ His insightful characterization, however, captures only part of the *raison d’être* of democracy; on a more community-oriented level, that system of governance serves to protect the overall well-being of the polity against the wanton call for discriminatory conduct or violence. And *Black* explicitly sanctions states’ use of historical records to identify symbolism that is likely to terrorize the populace and, therefore, detract from the common good.⁹⁹ This development in First Amendment jurisprudence indicates that there is more to democracy than self-determination.

Post’s most recent statement on hate speech does not address *Black*, even though the chapter was written after the Court rendered its decision.¹⁰⁰ He connects the expression of hate to “‘extreme’ intolerance and ‘extreme’ dislike.”¹⁰¹ This description, while correct, does not account for the connection between hate speech and extreme conduct. While the Constitution does not authorize laws against negative emotions, speech that is substantially likely to cause discriminatory harm, especially

94. RAPHAEL ISRAELI, ISLAMIKAZE: MANIFESTATIONS OF ISLAMIC MARTYROLOGY 453 (2003).

95. Anne Applebaum, Op-Ed., *The Saudi Guide to Piety*, WASH. POST, July 22, 2008, at A21.

96. See *supra* text accompanying notes 39–44.

97. Post, *supra* note 7, at 284 (quoting John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 230 (1985)).

98. *Id.* (quoting Rawls, *supra* note 97, at 230).

99. *Virginia v. Black*, 538 U.S. 343, 352–60 (2003).

100. Robert Post, *Hate Speech*, in EXTREME SPEECH AND DEMOCRACY (Ivan Hare & James Weinstein eds., forthcoming 2009) (on file with the author).

101. *Id.*

violence, can be regulated without infringing on the fundamental principles of democracy.

The First Amendment is designed to allow for open debate, encompassing popular, controversial, and unpopular points of view. In and of itself, speech is a neutral medium that can just as easily promote fascism as democracy, justify genocide as it does the equal enjoyment of civil rights. Hate messages can sway attitudes by playing into existing derogatory racial paradigms and pejorative attitudes. They can establish ties between supremacists as well as develop recruitment directed at youths. Misethnic speech is an essential component of hate group recruitment, drawing on prejudice and fear to attract followers. As such, it is unrelated to the open debate that the marketplace of ideas metaphor champions.

Ethnically or racially threatening diatribe is intended to undermine democratic inclusiveness by communicating aggression and influencing behavior.¹⁰² Hate speakers aim to gain supporters who share a vision of intolerance and manifest hostility rather than to engage listeners in intellectual or political debate.¹⁰³

Given the many instances when symbols like cross burning have been used to incite violence,¹⁰⁴ there is reason to think that the regulation of hate messages implicates legitimate democratic concerns for preserving civility. Hate propaganda not only spreads aggression and enmity, it can also be instrumental for racist and ethnocentric groups to gain political office.¹⁰⁵ In light of this danger, the United Nations' Universal Declaration of Human Rights recognizes that democracies can place certain limitations on individuals' right of self-determination in order to preserve public order.¹⁰⁶ The state need not sit idly by while the fundamental freedoms of democracy are exploited by powerful social forces bent

102. Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT'L L. REV. 557, 588 (2006); John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 143-44 (1998).

103. Helen Ginger Berrigan, "Speaking Out" About Hate Speech, 48 LOY. L. REV. 1, 2 (2002) ("The purpose of hate speech is to promote inequality and intolerance."); Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's R.A.V. Decision*, 61 TENN. L. REV. 197, 226 (1993) ("Hate speech is more than intolerance; it is direct and open hostility and the manifestation of racism, sexism, and other 'isms.'").

104. *Black*, 538 U.S. at 389-95 (Thomas, J., dissenting).

105. David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 464, 480 (1987).

106. Universal Declaration of Human Rights, G.A. Res. 217A (III), at art. 29, U.N. Doc. A/810 (Dec. 10, 1948)

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

on undermining justice and the common good.¹⁰⁷ While the United States Constitution protects freedom of speech, “it is not a suicide pact.”¹⁰⁸

A democracy is a quilt of individuals sown together by principles and laws. Each person adds color and contributes to its overall pattern. When propagandists undo the threads that bind all the separate parts, the entire network of public safety loosens. Hate speech increases social discord.¹⁰⁹ The claims of individuals who wish to call for the mutilation, degradation, murder, or oppression of identifiable groups are not as convincing as the state’s interest in maintaining the peaceful coexistence of groups living in a pluralistic society.¹¹⁰

When supremacist expression is employed to terrorize others from participating in the privileges of an open society, such as voting and traveling, it is more than merely offensive.¹¹¹ It

107. See *Terminiello v. Chicago*, 337 U.S. 1, 24 (1949) (Jackson, J., dissenting) (explaining that disorderly conduct statutes are meant to prevent demagogues, such as those using fiery anti-Semitic speeches, from using “terror tactics to confuse, bully and discredit those freely chosen governments” and from causing “people [to] lose faith in the democratic process”); Mary Ellen Gale, *On Curbing Racial Speech*, 1 *RESPONSIVE COMMUNITY* 47, 48–49 (1991) (asking rhetorically whether “we watch—and even applaud—when cultural and constitutional tools intended to plow the social ground for planting seeds of tolerance and diversity instead are beaten into swords by bigots and wielded to injure or destroy the fragile hopes and rights of historically despised minorities?”).

108. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (stated in the context of draft evasion).

109. Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 *SANTA CLARA L. REV.* 345, 373 (1991) (“Hate speech produces in the target a range of mental and emotional distress, including feelings of guilt, shame, anxiety, fear, vulnerability, inferiority, inadequacy, and personal degradation.”); John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 *BUFF. L. REV.* 653, 676–77 (1994); Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 *HARV. L. REV.* 778, 791–92 (2000) (reviewing STEPHEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)) (“Stereotype anxiety . . . afflicts minorities alone and is a product of hate speech, belittlement, and other forms of negative social characterization.”).

110. Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 *B.U. L. REV.* 1275, 1384–85 (1998).

111. Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 *CAP. U. L. REV.* 281, 287–91 (1995); Matthew Silversten, Note, *What’s Next for Wayne Dick? The Next Phase of the Debate over College Hate Speech Codes*, 61 *OHIO ST. L.J.* 1247, 1256 (2000). Burning a cross on a black family’s lawn raises autonomy issues other than just those about the free speech of the actor. Hate speech engenders personal safety concerns in outgroup members, thereby inhibiting them from freely traveling in their own communities. Sometimes, fearing for their safety, minorities are forced to relocate. After a cross has been burnt on their lawn, a black family is likely to be leery about approaching its own house. The spread of bigotry diminishes autonomy.

threatens listeners and serves to organize social groups that espouse exclusionary, rather than democratic, ideologies.¹¹²

Hate speech poses a long-term threat to the social well-being of a democracy that differs from the immediate threat of harm associated with fighting words.¹¹³ Over time, popular prejudices can become normal features of local or even national discourse.¹¹⁴ An example of the phenomenon is the Arabic “*abd.*” The word means both a black male and a servant or slave.¹¹⁵ Thus, both referents are merged in countries, like Mauritania and the Sudan, where black slavery persists.¹¹⁶ Nothing in *Virginia. v. Black* indicates that the cross burning in that case threatened to incite an immediate breach of the peace.¹¹⁷ As the great psychologist of prejudice, Gordon W. Allport described, “prolonged and intense verbal hostility always precedes a riot.”¹¹⁸ He illustrated this point through a historical example:

Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking. Fully seventy years of political anti-Semitism of the verbal order preceded the discriminatory Nürnberg Laws passed by the Hitler regime. Soon after these laws were passed the violent program of extermination began. Here we see the not infrequent progression: antilocution → discrimination → . . . violence.¹¹⁹

Slurs are disseminated by many media, including news print, schools, music, and movies.

112. L.W. SUMNER, *THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION* 162 (2004); see also Carolyn Petrosino, *Connecting the Past to the Future: Hate Crime in America*, in *HATE AND BIAS CRIME: A READER* 1, 21 (Barbara Perry ed., 2003).

113. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572; Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 80 (1994).

114. See Luis E. Chiesa, *Outsiders Looking In: The American Legal Discourse of Exclusion*, 5 RUTGERS J.L. & PUB. POL’Y 283, 293 n.29 (2008); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 535 (2008).

115. ARABIC-ENGLISH DICTIONARY 664–65 (2005); see also BERNARD LEWIS, *RACE AND SLAVERY IN THE MIDDLE EAST: AN HISTORICAL ENQUIRY* 22, 56–57, 92, 95 (1990); KENNETH LITTLE, *URBANIZATION AS A SOCIAL PROCESS: AN ESSAY ON MOVEMENT AND CHANGE IN CONTEMPORARY AFRICA* 71 (2004); Leon Carl Brown, *Color in Northern Africa*, in *COLOR AND RACE* 186, 193 (John Hope Franklin ed., 1968).

116. FRANCESCA DAVIS DIPIAZZA, *SUDAN IN PICTURES* 49 (2006); Runoko Rashidi, *The Global African Community History Notes: Racial Struggle in Mauritania*, <http://www.cwo.com/~lucumi/mauritania.html> (last visited Mar. 30, 2009).

117. See *Chaplinsky*, 315 U.S. at 572 (articulating the fighting words doctrine).

118. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 60 (1979).

119. *Id.* at 57.

Often, preconceived animosities are coupled with spurious accusations that can spread like wildfire through communities harboring misethnic attitudes.¹²⁰ Since medieval times, mobs have often accused Jews of kidnapping Christian children, crucifying them, and using their blood as an ingredient in Passover matzah.¹²¹ This myth was often repeated to incite anti-Semitic mobs.¹²² All American Indians were reputed to be brutal savages who killed frontier people, providing a rationalization for mass extermination and land misappropriation.¹²³ Lynch mobs in the United States were often riled up by allegations of arson, or that a black man had raped a white woman or a black man argued with a white man.¹²⁴ These accusations were unquestioned by riotous crowds of individuals who, even though they had grown up in a democratic culture, had been

120. The Constitutional Court of Hungary has made a similar point:

The power of words was noted already in the 1878 Codex Csemegei whose accompanying ministerial annotation stated the following: "The free communication of ideas, to which mankind owes its greatest achievements, becomes just as dangerous as fire, which gives light and warmth, but which, when raging uncontrollably, very often becomes the cause of great misfortune, much suffering and destruction."

Alkotmánybíróság [Constitutional Court] May 18, 1992, *translated in* 2 E. Eur. Case Rep. Const. L. 8, 15 (1995) (Hung.).

121. MAX I. DIMONT, *JEWS, GOD AND HISTORY* 240–41 (2d ed., 2004); RONALD FLORENCE, *BLOOD LIBEL: THE DAMASCUS AFFAIR OF 1840* (2004); RUTH GAY, *THE JEWS OF GERMANY: A HISTORICAL PORTRAIT* 26–27 (1992); RAPHAEL ISRAELI, *POISON: MODERN MANIFESTATIONS OF A BLOOD LIBEL* 21 (2002); TONI L. KAMINS, *THE COMPLETE JEWISH GUIDE TO FRANCE* 6–8 (2001); DENNIS PRAGER & JOSEPH TELUSHKIN, *WHY THE JEWS?: THE REASON FOR ANTISEMITISM* 81–84 (2003).

122. EMIL MURAD, *THE QUAGMIRE* 252 (1998); TADEUSZ PIOTROWSKI, *POLAND'S HOLOCAUST: ETHNIC STRIFE, COLLABORATION WITH OCCUPYING FORCES AND GENOCIDE IN THE SECOND REPUBLIC, 1918–1947*, at 135 (1998) ("Just before the pogrom [in Kielce, Poland] . . . vicious rumors of blood-libel, so characteristic of Russian-inspired pogroms, and of missing children were circulated."); SHULAMIT VOLKOV, *GERMANS, JEWS, AND ANTISEMITES: TRIALS IN EMANCIPATION* 54 (2006) ("[B]lood-libel suits often preceded pogroms in the various parts of Europe. In these cases, an accusation of murder perpetrated by Jews against a Christian . . . was used for inciting the mob.").

123. KIERNAN, *supra* note 80, at 318–30. For early claims of Native American savagism, see SAMUEL PURCHAS, *19 HAKLUYTUS POSTHUMUS OR PURCHAS HIS PILGRIMES: CONTAYNING A HISTORY OF THE WORLD IN SEA VOYAGES AND LANDE TRAVELLS BY ENGLISHMENT AND OTHERS* 231 (James MacLehose & Sons 1905) (1625); WILLIAM ROBERTSON, *1 HISTORY OF AMERICA* 282–83 (1777); *Nova Britannia*, in *1 TRACTS AND OTHER PAPERS RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICA, FROM THE DISCOVERY OF THE COUNTRY TO THE YEAR 1776*, no. 6, at 11 (Peter Force ed., 1836).

124. JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* 67–68 (2001); STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS 1882–1930*, at 47 (1995); Mary E. Odem, *Cultural Representations and Social Contexts of Rape in the Early Twentieth Century*, in *LETHAL IMAGINATION: VIOLENCE AND BRUTALITY IN AMERICAN HISTORY* 353, 364 (Michael A. Bellesiles ed., 1999).

reared on the common assumption that blacks could not control their sexual urges, especially in respect to white women.¹²⁵ Japanese Americans living on the West Coast during World War II were interned after being branded spies who were inimical to the United States' war efforts.¹²⁶ The democratic process in states like California and Washington actually facilitated the use of anti-Japanese hate speech to pass a series of discriminatory laws preceding the internment.¹²⁷ The democratic electoral system was also no barrier in Rwanda, where genocide followed repeated democratic radio statements calling for the extermination of the Tutsi minority.¹²⁸

The historical evidence that hate speech is critical to the perpetration of violence is overwhelming. Expressions meant to incite harm are not merely self-expressive, as Robert Post indicates. They can influence some of the most destructive behavior. So, in assessing the potential harm an instance of hate speech poses to ordered democracy, a court's role is to look both at the context of the expression and its historical significance.

Exhorting others to commit discriminatory acts threatens the orderliness of a multi-ethnic, representative democracy.¹²⁹ Hate speech provides the ideological ground for fascist and racist organizations. It is a vital ingredient in any political movement determined to harm outgroups.¹³⁰ Rather than being a catalyst for discussion, hate propaganda promotes intergroup animosity and foments social unrest.¹³¹ Intimidating, bigoted assertions exploit

125. See Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to excite indignation in every heart,"* 60 J.S. HIST. 749, 752 (1994); James W. Vander Zanden, *The Ideology of White Supremacy*, 20 J. HIST. IDEAS 385, 401 (1959).

126. JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 262–65, 302 (1954); TESIS, *supra* note 70, at 231–37; Eugene V. Rostow, *Our Worst Wartime Mistake*, HARPER'S MAG., Sept. 1945, at 193–94; see also Raymond Leslie Buell, *Some Legal Aspects of the Japanese Question*, 17 AM. J. INT'L L. 29, 36 (1923); Oliver C. Cox, *The Nature of the Anti-Asiatic Movement on the Pacific Coast*, 15 J. NEGRO EDUC. 603, 603 (1946).

127. ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 116–17, 138 (1988); K.K. KAWAKAMI, THE REAL JAPANESE QUESTION 79–102 (1921); Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 605, 608–09, 617 (1922).

128. Alison Des Forges, *Call to Genocide: Radio in Rwanda, 1994*, in THE MEDIA AND THE RWANDA GENOCIDE 41, 42–43 (Allan Thompson ed., 2007); Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, in THE MEDIA AND THE RWANDA GENOCIDE 90, 97–98 (Allan Thompson ed., 2007).

129. See Irwin Cotler, *Racist Incitement: Giving Free Speech a Bad Name*, in FREEDOM OF EXPRESSION AND THE CHARTER 249, 254 (David Schneiderman ed., 1991).

130. David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 463 (1987).

131. See Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 797 (1993). The Israeli Supreme Court similarly has held that both "hate

common stereotypes to degrade the hated "other."¹³² Ethnocentric ideology relies on overgeneralizations about a rejected outgroup, depicting it as not having the rights common to all members of a democracy.¹³³ Not only do stereotypes rely on readily recognizable prejudices, they also dehumanize members of the targeted groups by depicting them as born slaves, sexual predators, savages, insects, and brutes.¹³⁴

This form of vilification empowers supremacist groups by depicting the objects of hatred as pathetic individuals against whom acts or aggression are either normal or expected. Disparagement based on historically recognizable hate symbolism is meant to depict an entire class of society as unworthy of equal treatment.¹³⁵

Painting sinister caricatures that advocate violence significantly increases the likelihood of supremacist aggression.¹³⁶ Hate symbols, like burning crosses and swastikas, are antidemocratic because they are meant to deny that entire classes of persons have the rights of conscience, freedom of expression, religion, culture, and intimacy.¹³⁷ Paradigms that subordinate individuals—for instance, those that denominate Indians as savages or blacks as uncontrollably lascivious—become dangerous to society when they are not merely opinionated statements but intentionally used to incite acts of civil or political inequality. Such paradigms aim to sanction moral and economic oppression.¹³⁸ The claim that blacks would corrupt a well-ordered democracy was often invoked to prevent them from

speech and anti-democratic speech" are not part of the "process of investigating the truth." Avi Weitzman, *A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious-Secular Kulturkampf*, 15 EMORY INT'L L. REV. 1, 28–29 (2001) (quoting H.C. 73/75, "Kol Ha'am" Co. Ltd. v. Minister of the Interior, 7 P.D. 871 (1953), translated in 1 SELECTED JUDGMENTS 90 (1962)).

132. See RODERICK STACKELBERG, *HITLER'S GERMANY: ORIGINS, INTERPRETATIONS, LEGACIES* 42 (1999).

133. See Daniel J. Levinson, *Study of Ethnocentric Ideology*, in *THE AUTHORITARIAN PERSONALITY* 102, 147 (T.W. Adorno et al. eds., 1950).

134. Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 520 (2008); Richard Delgado & David Yun, *Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1813 (1994); see also EHRlich, *supra* note 45, at 21; TEUN A. VAN DIJK, *COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK* 23–24 (1987).

135. See Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?—An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253, 1257 (2000).

136. Albert Bandura et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. RES. PERSONALITY 253 (1975).

137. See Steven J. Heyman, *Introduction to HATE SPEECH AND THE CONSTITUTION* vii (Steven J. Heyman ed., 1996).

138. See PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 281 (2000); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 882 (1994).

participating in representative government.¹³⁹

The meaning of hate speech is connected to the social history of a people. As Justice Thomas pointed out in his dissent in *Black*, the burning cross, like other cultural symbols of hate, “instills in its victims well-grounded fear of physical violence” because it draws from culturally charged threats.¹⁴⁰ Linguists, like Pierre Bourdieu, have pointed out that language is not vacuous. Linguistic practices draw on socio-historical content to establish acceptable interpersonal behavior.¹⁴¹ Speech acts that rely on culturally recognized images of subordination are not merely the sentiments of a single person. They rely on the symbolic efficacy of group slogans to express acceptable conduct toward a named class of individuals.¹⁴² Group defamation, which the Court in *Beauharnais v. Illinois* upheld to be sanctionable under the First Amendment,¹⁴³ assigns certain negative traits to specific groups of people. Poles are said to be ignorant, rural, and incompetent; Jews to be materialistic, rich, and conniving; and blacks to be animalistic, lazy, and promiscuous.¹⁴⁴ Besides mere name calling, hate speech also labels certain groups as antisocial because of their traits, presenting them to be outsiders in their own country of citizenship. For instance, Jews might be considered incapable of participating in democracy because they engage in the ritual murder of children, and Native

139. Here I am, thinking of disenfranchisement movements that virtually shut black voters out of state and federal elections at the end of the nineteenth and early twentieth centuries. TESIS, *supra* note 70, at 132–42. In South Carolina Senator Benjamin R. “Pitchfork Ben” Tillman led the drive to eliminate blacks from voting openly. Tillman recognized that violence was not enough; discriminatory political advocacy was essential to any long-term changes to the post-Reconstruction political system. *Id.* at 136. For an example of Tillman’s use of hate rhetoric, see 56 CONG. REC. 2245 (daily ed. Feb. 26, 1900) (statement by Rep. Tillman) (“Therefore we have been confronted by the condition of a large, ignorant debased vote. . . . That vote to-day stands as a menace to the freedom, to the purity of the ballot box, to the purity and honesty of elections, to the decency of government.”); see also *Ben Tillman: Memories of an Agrarian Racist*, 32 J. BLACK HIGHER EDUC. 48, 49 (2001) (noting Tillman’s invective against a black delegate to South Carolina’s constitutional convention: “You dirty black rascal, I’ll swallow you alive.”). In the early twentieth century, the Aryanization of Germany and the depiction of Jewish culture as depraved eventually drove Jews out of all political, cultural, and educational institutions there.

140. *Virginia v. Black*, 538 U.S. 343, 391 (2003) (Thomas, J., dissenting).

141. John B. Thompson, *Introduction to PIERRE BORDIEU, LANGUAGE AND SYMBOLIC POWER* 5 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991).

142. See PIERRE BORDIEU, *LANGUAGE AND SYMBOLIC POWER* *supra* note 141, at 105–06; DAVID MILNER, *CHILDREN AND RACE* 75 (1983); David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION, AND RACISM 127, 132–33 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

143. 343 U.S. 250, 266 (1952).

144. MILTON KLEG, *HATE PREJUDICE AND RACISM* 176 (1993).

Americans might be labeled drunks who are unworthy of self-determination because of their cultural infancy.¹⁴⁵

Speech, then, is structured in a particular syntax having a semantic value that is intrinsically cultural.¹⁴⁶ Through a long history of slavery and Jim-Crowism in this country, blacks came to represent evil.¹⁴⁷ Gays and lesbians have been thought of as deviants, too scary to be alone with children.¹⁴⁸ And, more recently, Arabs have come to be linguistically linked with all manners of terrorism.¹⁴⁹ The Internet has made it increasingly easier to spread these effectively degrading characterizations.¹⁵⁰

As the popular psyche assigns negative traits to certain groups, internalized negative stereotypes play an increasing role in personality development and dispositional characteristics.¹⁵¹ Dispositions, in turn, “generate practices, perceptions and attitudes” toward a disparaged group.¹⁵² A danger to democracy from hate speech is that, through repetition, the violent paradigm of treatment toward disparaged groups can become inculcated into destructive social practices. In this way, the internalization of hate messages can not only affect immediate conduct but also inform habitual behavior toward social groups. Thereby, an individual can be spooked by the mere sight of a black person, without any indication of danger, perceive a drunk at the sight of a sober Mexican American, or disparage the intelligence of a person because of her gender. Prejudices are structured not merely on the percipients’ epistemic knowledge but also on cultural ideation.¹⁵³

Even in a state dedicated to self-determination, which Robert Post demonstrates is an essential component of democracy, the passionate repetition of violent messages can lead to brawls and even riots.¹⁵⁴ Suppressing aggressive hate speech aims to preserve social order, not, as Post claims, the mere suppression of “extreme”

145. See *id.* at 179–80.

146. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 17–18 (Charles Lam Markmann trans., 1986).

147. Cf. *id.* at 188–89 (making a similar point about European prejudice); Lloyd T. Delany, *Other Bodies in the River*, in *BLACK PSYCHOLOGY* 595 (Reginald L. Jones ed., 1991) (detailing psychological statement of association between blackness and evil).

148. Ashley Surdin, *Gay Youth’s Slaying Spurs Call for Tolerance*, WASH. POST, Mar. 29, 2008, at A2.

149. See Mrinalini Reddy, *Muslims on TV, No Terror in Sight*, N.Y. TIMES, Nov. 11, 2007, §2 (Magazine), at 30; Shibley Telhami, *Cartoon Villains*, N.Y. TIMES, Jan. 6, 2008, at 13 (reviewing PETER GOTTSCHALK & GABRIEL GREENBERG, *ISLAMOPHOBIA: MAKING MUSLIMS THE ENEMY* (2007)).

150. Tesis, *supra* note 50, at pts. I & II.

151. BOURDIEU, *supra* note 142, at 12.

152. *Id.*

153. See GEORGE EATON SIMPSON & J. MILTON YINGER, *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 64 (4th ed. 1972); ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 347–48 (1996).

154. ALLPORT, *supra* note 118, at 57–61.

dislikes.¹⁵⁵ The “[r]espect for the equality of diverse communities” in America,¹⁵⁶ which Post recognizes, rather counsels toward prohibitions against speech that has historically been proven to have a substantial causal connection to discriminatory violence. As sociologist Milton Kleg has explained:

Stereotypic beliefs form the rationale for feelings of disdain and disparagement. When tied to prejudiced attitudes, stereotypes help create a number of behaviors ranging from avoidance to violence. Our review of stereotypes indicates that one’s perceived reality is not reality itself, but is a mixture of fact and fiction, if not total fiction. Yet when people act upon these stereotypes, the actions are carried out in the real world, not in their stereotypic world

The sources of prejudice are varied. But regardless of how and why prejudices form, the fact remains that, like seeds, prejudice takes root,¹⁵⁷ grows, and blossoms into what may become violent hate.¹⁵⁷

Ethnocentric speech serves to both establish individual pride in a group’s membership and to maintain a sense of group entitlement against others.¹⁵⁸ There is no logical connection between the overgeneralizations expressing group hatred and the individuated reality of the victims, but they render the objects of animosity politically vulnerable.¹⁵⁹ Whether hatred is directed at Asians, Jews, blacks, or Catholics, the unchecked virulent verbal racism tends to alienate these groups from the body politic. Hate speech is a rallying cry that aims to subvert democracy by persuading listeners to treat disparaged groups unequally and unfairly.¹⁶⁰

As Richard Delgado and Jean Stefancic have pointed out, verbal racial attacks differ from ordinary insults because they negatively impact individuals and society at large.¹⁶¹ Where victims lack any legal redress against intimidating hate speech, their legitimate fears of harm are ignored in favor of demagoguery.¹⁶²

This Section’s historical and linguistic theoretical musings,

155. Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72, 79 (2007).

156. *Id.* at 82.

157. KLEG, *supra* note 144, at 155.

158. *Id.* at 165.

159. See JAMES PARKES, ANTISEMITISM 17–18 (1963).

160. See T.W. Adorno, *Prejudice in the Interview Material*, in THE AUTHORITARIAN PERSONALITY, *supra* note 133, at 653 (discussing the undemocratic nature of the authoritarian personality); DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 8–11 (1987) (concerning the effectiveness of political rhetoric).

161. RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 7 (1997).

162. *Id.*

which were meant to address Post's challenge that the hate speech debate address democratic theory, give a structural argument. I will next analyze whether these ideas accurately reflect the regulation of hate speech in existing democracies.

III. THE REGULATION OF HATE SPEECH BY DEMOCRACIES

Many democracies throughout the world consider free speech to be a fundamental human right.¹⁶³ The common trend is, nevertheless, to enforce criminal laws prohibiting the public dissemination of discriminatory messages.¹⁶⁴ These policies are driven by the conviction that hate speech tends to incite conduct that is violent and otherwise harmful to human dignity.¹⁶⁵ A non-exhaustive list of countries that have restricted hate speech includes: Australia, Austria, Belgium, Brazil, Canada, Cyprus, Denmark, England, France, Germany, India, Ireland, Israel, Italy, Sweden, and Switzerland.¹⁶⁶ Nations that punish the use of hate propaganda weigh orators' interests to the right of free expression against both the dignitary harm to individuals and the collective harm to pluralism.¹⁶⁷ In this area of law, countries that bar the use of racially and ethnically incitable rhetoric tend to follow international norms on civility to a greater extent than the United States. The prevalent international trend to regulate hate speech is grounded in what, to borrow Martha Nussbaum's description of constitutional governance, is meant to "secure for all citizens the prerequisites of a life worthy of human dignity."¹⁶⁸

Shortly after World War II, on December 9, 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁶⁹ Signatory states commit themselves to punishing the "[d]irect and public

163. See ANTHONY CORTESE, *OPPOSING HATE SPEECH* 15 (2006).

164. *Id.*

165. *Id.* at 16.

166. See, e.g., THOMAS DAVID JONES, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 189–224, 259–313 (1998); Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 *GEO. MASON L. REV.* 35, 72 n.286 (1997); Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 *U. ILL. L. REV.* 789, 803; Alexander Tsisis, *Regulating Intimidating Speech*, 41 *HARV. J. ON LEGIS.* 389, 396 (2004); Abigail Jones Southerland, Note, *The Tug of War Between First Amendment Freedoms of Antidiscrimination: A Look at the Rising Conflict of Homosexual Legislation*, 5 *REGENT J. INT'L L.* 183, 192 (2007).

167. Martha C. Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 *HARV. L. REV.* 4, 7 (2007).

168. *Id.*

169. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), at 174, U.N. DOC. A/810 (Dec. 9, 1948), available at http://untreaty.un.org/English/CTC/Ch_IV_1p.pdf.

incitement to commit genocide.”¹⁷⁰ Following a series of anti-Semitic incidents, multiple U.N. member states also entered into the Convention on the Elimination of All Forms of Racial Discrimination, requiring parties to punish

all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.¹⁷¹

The International Covenant on Civil and Political Rights is yet another relevant international agreement.¹⁷² Article 20 of that agreement requires “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” to be “prohibited by law.”¹⁷³

Canada is one of the democratic states that has adopted international hate speech standards in its domestic laws. That nation guarantees the freedom of expression through the Canadian Charter of Rights and Freedoms, which is its bill of rights.¹⁷⁴ The Supreme Court of Canada has recognized that the three values associated with the Charter’s guarantee of expression are: (1) seeking truth; (2) participating in “social and political decision-making”; and (3) achieving “self-fulfillment and human flourishing” in a pluralistic society.¹⁷⁵ The latter is very close to the concept of

170. *Id.* For a list of signatory states, see The Secretary-General, *Report of the Secretary-General on the Status of the Convention on the Prevention and Punishment of the Crime of Genocide, delivered to the General Assembly*, U.N. DOC. A/51/422 (Sept. 27, 1996), available at <http://www.un.org/documents/ga/docs/51/plenary/a51-422.htm>.

171. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), at 48, U.N. GAOR 20th Sess., Supp. No. 14, U.N. DOC. A/6014 (Dec. 21, 1965), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/218/69/IMG/NR021869.pdf?OpenElement>; see also Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT’L & COMP. L.Q. 996, 997–1000 (1966) (discussing events leading up to the adoption of the Convention).

172. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 52–58, U.N. GAOR 21st Sess., Supp. No. 16, U.N. DOC. A/6316 (Dec. 16, 1966), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>.

173. *Id.* at 53. A list of signatory states appears at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en> (last visited Mar. 30, 2009).

174. *Switzman v. Elbling*, [1957] S.C.R. 285, 326 (Can.) (“The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.”).

175. *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 728 (Can.).

self-determination that Robert Post regards as being at the heart of free speech guarantees.¹⁷⁶ Unlike Post, however, the Supreme Court of Canada has determined that statutes punishing the spread of hate speech are in accordance with those interests.¹⁷⁷ Canada has found that safeguarding fundamental liberties is compatible with “reasonable limits prescribed by law” that are necessary to maintain “a free and democratic society.”¹⁷⁸

What counts as a reasonable limitation on free speech was defined in a Canadian Supreme Court case that upheld the constitutionality of the Canadian Human Rights Act’s prohibition against the use of telephonic communications equipment to spread group hatred.¹⁷⁹ Restrictions on hate propaganda, the Court noted, rest on the serious threat it poses to society. The Court explained that Parliament had passed the Act because

messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.¹⁸⁰

The law had achieved the “necessary balance” between a multi-ethnic society’s need to protect dignity and an individual’s right to self-expression.¹⁸¹ This decision was available a year before Robert Post made his call for an inquiry into whether hate speech was compatible with democratic institutions.¹⁸²

The Supreme Court of Canada further upheld a human rights ordinance against the spread of propaganda premised on a group’s racial, religious, or ethnic inferiority in *Regina v. Keegstra*.¹⁸³ The majority decision found that hate propaganda was not only an affront to individual dignity, much as defamatory statements might be, but also noted the potential risk “that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.”¹⁸⁴ Canadian restrictions on such potentially harmful messages, the Court went on to say, fall within the ambit of the country’s human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination

176. Post, *supra* note 7, at 281.

177. *Keegstra*, 3 S.C.R. at 728.

178. CAN. CHARTER OF RIGHTS AND FREEDOMS, Constitution Act, 1982, pt. I, §1.

179. *Taylor v. Canadian Human Rights Comm’n*, [1990] 3 S.C.R. 892 (Can.).

180. *Id.* at 919.

181. *Id.* at 963–64.

182. See *supra* text accompanying notes 7–10.

183. See *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 699–700 (Can.).

184. *Id.* at 748.

and the International Covenant on Civil and Political Rights, both of which guarantee freedom of speech but prohibit hate speech.¹⁸⁵ Canada is committed to the democratic principles of free expression, but restricting speech that is “anathemic to democratic values” is “not substantial.”¹⁸⁶

The use of the Internet to propagate criminally prohibited messages, by the likes of hate purveyors Ernst Zundel and Heritage Front,¹⁸⁷ has posed a recent challenge in Canada. The Canadian Human Rights Act of 1999 addressed that increasingly prevalent phenomenon of cyberspace.¹⁸⁸ The law punishes the repeated use of telecommunications devices, including the Internet, to communicate messages exposing persons “to hatred or contempt” based on their “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability [or] conviction for which a pardon has been granted.”¹⁸⁹ The most important decision upholding the Act balances Canada’s commitment to free expression with its other human rights obligations.¹⁹⁰ The statute prevents the dissemination of hate propaganda to promote “equal opportunity unhindered by discriminatory practices.”¹⁹¹

The Canadian Supreme Court has consistently upheld laws that restrict some virulent expressions in order to protect vulnerable groups against the use of hatred or deliberately false statements.¹⁹² Laws against hate defamation

can play a useful and important role in encouraging racial and social tolerance which is so essential to the successful functioning of a democratic and multicultural society. It

185. *Id.* at 751–52, 754–55.

186. *Id.* at 763–64.

187. Mary Gusella, Chief Comm’r, Canadian Human Rights Comm’n, Opening Address at A Serious Threat: A Conference on Combating Hate on the Internet and Section 13 of the Canadian Human Rights Act (Dec. 15–16, 2005), in CANADIAN ISSUES, Spring 2006, at 4–7 (detailing Zundel’s use of the Internet to spread group defamation); Charlie Gillis, *Righteous Crusader or Civil Rights Menace?*, MACLEAN’S, Apr. 21, 2008, at 22 (concerning the Canadian Human Rights Tribunal hearings about the Heritage Front’s dissemination of hate messages); Warren Kinsella, *The Racist Face of SARS*, MACLEAN’S, Apr. 14, 2003, at 60 (discussing the use of the Internet by a “supporter of the pro-Nazi Heritage Front”); *Jail for German Holocaust Denier*, THE INDEP. (London), Feb. 16, 2007, at 24 (mentioning the conviction of Zundel for Holocaust denial).

188. Canadian Human Rights Act, R.S.C., ch. H-6, § 13(1) (1999).

189. *Id.* §§ 3(1), 13(1), 13(2).

190. *Taylor v. Canadian Human Rights Comm’n*, [1990] 3 S.C.R. 892 (Can.).

191. *See id.* at 894.

192. *See, e.g., id.* at 893–94 (upholding the Canadian Human Rights Act and dismissing the appeal of appellants who distributed cards inviting people to call a telephone number answered by recorded messages denigrating the Jewish faith and people); *Regina v. Keegstra*, [1990] 3 S.C.R. 697, 698 (Can.) (upholding sections 319(2) and 319(3)(a) of the Criminal Code and allowing the government’s appeal in its case against a teacher accused of “willfully promoting hatred against an identifiable group”).

achieves this goal by expressing the repugnance of Canadian society for the willful publication of statements known to be false that are likely to cause serious injury or mischief to the public interest which is defined in terms of *Charter* values.¹⁹³

Canadian law is consistent with the policies of many other democracies. France, like the United States, regards “[t]he free communication of ideas and opinions” to be “one of the most precious of the rights of man.”¹⁹⁴ France nevertheless prohibits “abuses of this freedom.”¹⁹⁵ There, the emphasis is on the promotion of democracy rather than on the naive libertarian belief, which is commonly embraced in the United States, that truth will emerge even when inflammatory statements are made about vulnerable groups.¹⁹⁶ France places restrictions on the use of hate speech and even requires that Internet Service Providers “assist law enforcement officers in eliminating online material that justifies crimes against humanity, incites racial hatred or can be classified as child pornography.”¹⁹⁷ This latter regulation seeks to prevent the abuse of freedom of expression that is guaranteed under the Declaration of the Rights of Man and of the Citizen, and the Law of 1881 on Freedom of the Press.¹⁹⁸ As is the case in the United States, in France many forms of expression do not fall under the protection of that value. Among the crimes against humanity in France is the “incitement to discrimination, hatred and violence.”¹⁹⁹ While this formulation differs from the American model, which requires intentional intimidation and does not simply punish the spread of false information about such crimes of humanity as the Holocaust, the two laws are similar in their purpose of protecting democratic order.²⁰⁰ France, like Canada, has legislatively and judicially

193. *Zundel v. Regina* [1992] 2 S.C.R. 731, 809–10 (Can.).

194. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (F.R. 1789).

195. *Id.*

196. See Philip S. Cook, *introduction* to LIBERTY OF EXPRESSION 1, 5–6 (Philip S. Cook ed., 1990) (discussing France’s policy preference on speech).

197. Lyombe Eko, *New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet*, 28 LOY. L.A. INT’L & COMP. L. REV. 69, 102–03 n.208 (2006).

198. *Id.* at 104.

199. France in the United Kingdom, Freedom of Speech in the French Media, <http://www.ambafrance-uk.org/Freedom-of-speech-in-the-French.html> (last visited Mar. 30, 2009).

200. On the U.S. law, see *supra* text accompanying notes 17–44. For the French law, see Law No. 90-615 of July 13, 1990, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1990, art. 48-1, p. 8333. For an unsuccessful challenge to the French law against Holocaust denial, see *Faurisson v. France*, Decisions U.N. Human Rights Comm., Comm’n No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996), in *Restrictions on Freedom of Expression for Denial of the Holocaust Under the 1990 Gaysot Act: Author’s Conviction Justified*, 18 HUM. RTS. L.J. 40 (1997).

addressed Robert Post's query about the compatibility of hate speech and democracy.

Germany, like Canada and the other countries in this study, guarantees "the right freely to express and disseminate" ideas through its Constitution, known as the Basic Law for the Federal Republic of Germany.²⁰¹ The same provision of the Basic Law prohibits censorship.²⁰² On the other hand, the country's constitution outlaws political parties that "undermine or abolish the free democratic basic order."²⁰³

Germany, like France and Canada, shows a striking concern about violations of human dignity resulting from intimidating hate speech. A German criminal provision prohibits the distribution or supply of any "written materials . . . which describe cruel or otherwise inhuman acts of violence against human . . . beings in a manner expressing glorification or which downplays such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which violates human dignity."²⁰⁴ Moreover, individual and group violators are subject to imprisonment for attacking the human dignity of others by: (1) inciting people to hate particular segments of the population; (2) advocating "violent or arbitrary measures against them";²⁰⁵ and (3) "insulting them, maliciously exposing them to contempt or slandering them."²⁰⁶ With the increasing popularity of the Internet, Germany has added a new criminal provision penalizing the use of computer technology to disseminate antidemocratic group propaganda.²⁰⁷

The German Constitutional Court has reaffirmed the constitutionality of such penal laws. One case arose when David Irving, a well-known Holocaust denier, gave a speech to the National Democratic Party of Germany. The German government brought charges against him under the Public Assembly Act, which prohibits meetings where the planned speeches constitute criminal violations. The Constitutional Court upheld the Act, finding that it does not violate Basic Law article 5(1)'s protection of publicly aired opinions.²⁰⁸ The Court weighed competing democratic values, concluding that "[i]f the [assumed facts] are demonstrably untrue,

201. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 5(1) (F.R.G.), *translated in* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & David P. Currie trans., 2008).

202. *Id.*

203. *Id.* at art. 21.

204. Strafgesetzbuch [StGB] [Penal Code] Dec. 2007, § 131(1) (F.R.G.), *translated in* THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION 116 (Michael Bohlander trans., 2008).

205. StGB § 130(1).

206. StGB § 130.

207. StGB § 86.

208. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 383 (2d ed. 1997).

freedom of expression usually gives way to the protection of personality.²⁰⁹ It also examined Holocaust denial against historical facts, eyewitness accounts, and documentation, finding David Irving's spurious comments unprotected by the Basic Law.²¹⁰ Holocaust denial was found to be insulting to Jews. Others had "a special moral responsibility" to respect that ethnic group's historical sensibility.²¹¹ Denial of this event amounted to rejecting the "personal worth" of the Jewish people and continuing discrimination against them.²¹²

Among other German judicial opinions upholding the constitutionality of hate propaganda laws was a 1994 case, decided by the Constitutional Court, which ruled that freedom of speech was not a defense available to groups propagating the "Auschwitz lie."²¹³ Later, in 1995, a Berlin state court convicted a leader of Germany's neo-Nazi movement for "spreading racial hatred and denigrating the state" by telling persons visiting the Auschwitz concentration camp that the Holocaust was a fiction.²¹⁴ On the other hand, the state may not suppress the recitation of an interpretive opinion, such as the belief that Germany was not at fault for starting World War II.²¹⁵

Germany's commitment to punishing the use of hate speech is grounded in the first article of its Basic Law, which imposes a political obligation on the state to "respect and protect" "[h]uman dignity."²¹⁶ Most Western nations, as one scholar pointed out, are more attuned to the German model of "balancing human dignity and freedom of expression . . . than to America's robust free speech protection."²¹⁷

209. *Id.* at 384.

210. *Id.* at 385.

211. *Id.* at 386.

212. *Id.*

213. James J. Black, *Free Speech & the Internet: The Inevitable Move Toward Government Regulation*, 4 RICHMOND J.L. & TECH. 1, ¶¶ 53, 56 (Winter 2007), available at <http://law.richmond.edu/jolt/v4i2/black.html> (last visited Mar. 30, 2009).

214. Lasson, *supra* note 166, at 76. See generally Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and other—"Lies,"* 85 MICH. L. REV. 277, 289–99 (1986) (providing a synopsis of German case law).

215. KOMMERS, *supra* note 208, at 387. For a general analysis of German constitutional case law, see Rainer Hofmann, *Incitement to National and Racial Hatred: The Legal Situation in Germany*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 159, 167–70 (Sandra Coliver ed., 1992).

216. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 23, 1949, art. 1(1) (F.R.G.), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & David P. Currie trans., 2008), available at http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf.

217. Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 988 (2007).

A British law criminalizes hateful propaganda referring “to colour, race, nationality (including citizenship) or ethnic or national origins.”²¹⁸ It requires prosecutors to prove either that a defendant intended the abusive, threatening, or insulting words “to stir up racial hatred” or that “having regard to all the circumstances racial hatred is likely to be stirred up thereby.”²¹⁹ Violations can occur in either public or private places but not where the statements are made in a dwelling to others within the same dwelling.²²⁰ A 2006 amendment to the law prohibits the public or private assertion of threats to stir up religious hatred,²²¹ however, religious criticism—even the expression of “antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents”—remains a protected form of expression.²²² The Criminal Justice and Immigration Act of 2008 added sexual orientation to the protected categories.²²³

Australia, which is a member of the British Commonwealth, likewise prohibits the public assertion of hatred based on a group’s race, color, or national or ethnic origin.²²⁴ While the Australian Constitution does not expressly mention the freedom of speech, it is well-established as an implied constitutional right.²²⁵ Nevertheless, in 2004 an Australian appellate court found that as a democratic society the country may safeguard political pluralism and tolerance by prohibiting the use of insulting, humiliating, or intimidating statements that have a real chance of causing harm.²²⁶ This model goes beyond the United States Supreme Court’s ruling that statutes against intimidating hate speech do not violate the right to free expression,²²⁷ but the Australian model is instructive because its support for hate speech regulations are more highly attuned to democratic issues than the more libertarian-oriented American

218. Public Order Act, 1986, ch. 64, § 17 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1986/pdf/ukpga_19860064_en.pdf.

219. *Id.* § 18(1).

220. *Id.* § 18(2).

221. Racial and Religious Hatred Act, 2006, ch. 1, § 29B (U.K.), *available at* http://www.opsi.gov.uk/acts/acts2006/ukpga_20060001_en_1.

222. *Id.* § 29J.

223. Criminal Justice and Immigration Act, 2008, c. 4, § 74, sched. 16(a) (U.K.), *available at* http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080004_en.pdf.

224. *Bropho v. Human Rights & Equal Opportunity Comm’n* (2004) 204 A.L.R. 761 para. 62 (Austl.).

225. *See Lange v. Austl. Broad. Corp.*, 189 C.L.R. 520, 523–24 (1997) (Austl.); *Austl. Communist Party v. Commonwealth*, 83 C.L.R. 1, 262–63 (1951) (Austl.); Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. U. GLOBAL STUD. L. REV. 281, 313 (2007).

226. *Bropho*, 204 A.L.R. 761 para. 65.

227. *Virginia v. Black*, 538 U.S. 343, 362 (2003) (holding that a Virginia statute banning cross burning with intent to intimidate did not violate the free speech clause of the First Amendment).

jurisprudence.²²⁸

Scandinavian countries have likewise made the legislative connection between incitement to harm and risks to civil society. The Danish Penal Code prohibits anyone from intentionally disseminating statements to a wide group of people that impart “information threatening, insulting, or degrading a group of persons on account of their race, colour, national or ethnic origin, belief or sexual orientation.”²²⁹ Unlike other countries’ codes, there is no mention of dignity rights, but Denmark’s law implicates extreme forms of degradation. The Danish Director of Public Prosecutions explains that this provision requires narrow interpretation that does not interfere with democratic society.²³⁰ The law applies to anyone who “might provoke in someone serious fear for his own or other persons’ lives, health or well-being [or] threatens to commit a punishable act.”²³¹

A conviction obtained under the Danish Act brings to mind the United States Supreme Court’s recent cross burning decision, *Virginia v. Black*, finding that a cross burning statute with a *scienter* element does not run afoul of the First Amendment.²³² The Eastern Division of the High Court of Denmark convicted individuals who had burned a cross “in the road outside a house they knew was inhabited by Turks,” intending to intimidate members of a Turkish family.²³³ However, given the importance of

228. See William Buss, *Constitutional Words About Words: Protected Speech and “Fighting Words” Under the Australian and American Constitutions*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 489, 494 (2006); Carmi, *supra* note 217, at 965–66; Ambika Kumar, Note, *Using Courts to Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights*, 7 *CHI. J. INT’L L.* 351, 357 n.43 (2006).

229. Christoffer Badse, *The Test of Necessity in a European Context: The Case of Denmark*, at 7, <http://www.badse.dk/Freedom%20of%20Expression%20-%20The%20Test%20of%20Necessity.pdf> (last visited Mar. 30, 2009). Section 266b is also translated in Søren Baatrup, *Denmark*, in *COMM’N OF THE EUROPEAN CMTYS., REPORT THE EUROPEAN GROUP OF EXPERTS ON COMBATING SEXUAL ORIENTATION DISCRIMINATION, COMBATING SEXUAL DISCRIMINATION IN EMPLOYMENT: LEGISLATION IN FIFTEEN EU MEMBER STATES* 145, 148 n.14 (2004), available at http://www.ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/sexorfull_da.pdf.

230. Memorandum from Henning Fode, Director of Public Prosecutions, Decision on Possible Criminal Proceedings in the Case of Jyllands-Posten’s Article “The Face of Muhammed” 8 (Mar. 15, 2006), available at http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf.

231. United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Denmark*, ¶ 36, U.N. Doc. CERD/C/280/Add.1 (May 3, 1995) (quoting Strafflov [Penal Code] § 266B (Den.)), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b95ac4e38d06ddd58025654e005c7c9b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b95ac4e38d06ddd58025654e005c7c9b?Opendocument). This source contains both a discussion of § 266B and three convictions under it. *Id.* ¶¶ 47–66.

232. See *supra* text accompanying notes 39–44.

233. United Nations Committee on the Elimination of Racial Discrimination,

communicative self-determination to a democracy, which Robert Post points out, statements that simply offend personal beliefs do not fall under the Danish Penal Code's provisions. In this category, depictions of Muhammad, which is prohibited by some sects of Islam, is unlikely to cause serious fear for personal well-being nor is it likely to constitute an extreme form of degradation.²³⁴ Therefore, Denmark's Director of Public Prosecutions determined not to institute criminal proceedings against a Danish newspaper that printed twelve cartoons critical of radical Islam.²³⁵

The Finnish Constitution protects the right of free expression, as do all the democracies reviewed in this Article.²³⁶ This and other basic rights are balanced against the nation's commitment to democratic governance that "entails the right of the individual to participate in and influence the development of society."²³⁷ Finland criminalizes the targeting of any racial, national, ethnic, religious, or "comparable group" through threats, slanders, or insults.²³⁸ Actionable statements can be made "verbally, in writing, by illustration, or by gestures."²³⁹

The maximum sentence in Sweden for dissemination of statements against a national or ethnic group is two years, as it is in Finland.²⁴⁰ Specifically, the Swedish Penal Code prohibits the expression of "contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin or religious belief."²⁴¹ The constitutional right to the freedom of expression, which is explicitly called a fundamental right, can be restricted under statutorily defined circumstances.²⁴² In a 2005 decision, the Swedish Supreme Court recognized that the free

supra note 231, ¶ 56.

234. For a more complete discussion of this point, see STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 181–82 (2008).

235. See Edwin Jacobs, *Cartoon Case: Denmark Will Not Prosecute*, BRUSSELS J., Mar. 16, 2006, available at <http://www.brusselsjournal.com/node/915>.

236. CONST. FIN. ch. 2 § 12 (1999), available at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

237. *Id.* § 2.

238. PENAL CODE ch. 11 § 8 (Fin.), available at <http://www.finlex.fi/pdf/saadkaan/E8890039.PDF>.

239. Laiva on täynnä, <http://laivaontaynna.blogspot.com/search/label/english> (Apr. 5, 2007, 19:02 EET).

240. See PENAL CODE ch. 11 § 8 (Fin.), available at <http://www.finlex.fi/pdf/saadkaan/E8890039.PDF>; Brottsbalken [BrB] [Criminal Code] 16:8 (Swed.), available at <http://www.sweden.gov.se/sb/d/574/a/27777>.

241. Brottsbalken [BrB] [Criminal Code] 16:8 (Swed.), available at <http://www.sweden.gov.se/sb/d/574/a/27777>.

242. Regeringsformen [RF] [Constitution] 1:1 (Swed.). A printable text of the constitutional provision protecting freedom of expression can be found at http://www.riksdagen.se/templates/R_Page___6316.aspx (last visited Mar. 30, 2009).

exchange of ideas is “one of the foundations of democracy.”²⁴³ Nevertheless, in special circumstances, including incitement against a protected group, restrictions on speech increase the breadth of political, religious, labor, scientific, and cultural communication.²⁴⁴ The Court thereby acknowledged that hate speech stifles victims from participating in democracy while it increases bigoted individuals’ right to self-determination.

The Norwegian government regards access to information to be “a cornerstone of Norwegian democracy.”²⁴⁵ That commitment is no barrier to hate speech legislation, however. Section 135a of the Norwegian Penal Code prohibits inciting propaganda that relies on racial, xenophobic, ethnocentric, and homophobic hatred directed against specific groups or individuals. However, the bare expression of racism or ethnocentrism is not actionable.²⁴⁶ That qualification is similar to the standard set by the Supreme Court of the United States in *Virginia v. Black*, where the plurality found that a cross burning statute could only be constitutional if it included a *scienter* element.²⁴⁷ In 1996, eight of the eighty-six trials on discrimination charges brought in the Netherlands were against persons for allegedly inciting others to hatred, discrimination, or violence.²⁴⁸

CONCLUSION

International norms and the penal codes of numerous countries

243. Prosecutor Gen. v. Green, Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 10 (Swed.), available at http://www.domstol.se/Domstolar/hogstadamstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf.

244. *Id.*

245. Kultur- og Kirkedepartementet, Ministry of Culture and Church Affairs: Media in Norway (1996), available at http://www.regjeringen.no/nb/dep/kkd/dok/veiledninger_brosjyrer/1996/Media-in-Norway.html?id=419207.

246. Straffelodn [Penal Code] 13:135a (Nor.). A translation of Section 135a is available at <http://www.legislationline.org/download/action/download/id/1690/file/c428fe3723f10dcbcf983ed59145.htm/preview>. For further discussion of section 135a, see Gro Lindstad, *Norway, in IGLHRC BOOK NORWAY 134* (2003), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/53-1.pdf> (discussing the § 135a provision against hate speech directed at gays and lesbians); Communication from the Norwegian Government to the Committee on the Elimination of Racial Discrimination in Communication (Feb. 21, 2006) (describing how the Norwegian government has strengthened section 135a since 2004, providing the law more effective provisions against racist and ethnocentric speech), available at http://www.regjeringen.no/upload/kilde/jd/prm/2006/0014/ddd/pdfv/273990-cerd_reply_norway.pdf; COUNCIL OF EUROPE, EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE: THIRD REPORT ON NORWAY (Jan. 27, 2004) (detailing the latest law efforts under section 135a), available at <http://www.unhcr.org/refworld/country,,COECRI,,NOR,4562d8b62,46efa2e52d,0.html>.

247. See *supra* text accompanying notes 39–44.

248. See U.S. DEPT OF STATE, THE NETHERLANDS COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997 (1998), available at http://www.state.gov/www/global/human_rights/1997_hrp_report/netherla.html.

demonstrate the broad consensus that inciting others to hatred is threatening and inconducive to dialogue. Democracies around the world generally recognize that the value of preserving human rights supersedes bigots' self-determined desire to spread destructive messages. Countries that have examined the legitimacy of hate speech regulations in a democracy, the very analysis that Robert Post has advocated, have found that they can protect people's self-determinative right of expression without adhering to free speech absolutism. Free speech is essential to collective decision making; however, when hate speech places reasonable people in fear for their well-being or advocates discriminatory conduct it undermines the very collective autonomy Post espouses.

Like the many countries surveyed in this Article, the United States, through the Supreme Court's decision in *Virginia v. Black*, has determined that public displays of intentionally intimidating hate symbols, like burning crosses, undermine groups' ability to safely participate in a pluralistic polity. What the Court has left unresolved is whether other forms of hate speech, such as those that are not intimidating but that incite an audience to commit discrimination at work or in public places, can also withstand First Amendment scrutiny.²⁴⁹ Such an extension of current American jurisprudence would indicate a greater respect for human dignity than for degrading expression.

249. See Gilreath, *supra* note 76, for a proposed substantive equality approach to free speech that emphasizes the harm of hate propaganda.
