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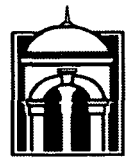

FREEDOM OF EXPRESSION AND HATE SPEECH

Onder Bakircioglu[*]

"Sir, I do not share your views, but I would risk my life for your right to express them." [1]
- Voltaire

I. INTRODUCTION

Not very long ago, it was believed that the sun rotated around the earth, that unicorns existed, toads were poisonous, and that there could be no men living in the antipodes as it was believed they would fall off. Not until the 16th Century was the efficacy of witchcraft questioned, and those who dared to question this superstition were burned at the stake.[2] Similarly, the legitimacy of servitude was not questioned for many centuries. All these absolute doctrines are discarded and new truths have replaced the old ones. No doubt, some of today's truths will share the same fate one day.

Moreover, some scholars who are now universally acknowledged to be remarkably virtuous were condemned or dishonoured in their own time. Socrates, for instance, was condemned to drink the hemlock because of his unorthodox views. Giordano Bruno was burnt alive by the Inquisition. Servetus Michael was branded as a heretic and executed by Calvinists.[3] In short, throughout history, those who held untraditional views were despised and silenced. This, to a certain extent, holds true even today, although the methods of

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1. Francious Marie Arouet, Voltaire, 1694-1778 (quotation attributed to Voltaire although not found in any of his writings).

2. BERTRAND RUSSELL, UNDERSTANDING HISTORY: AND OTHER ESSAYS 61-62 (Philosophical Library 1957).

3. *Id.* at 66; *see* Ben Clarke, *Freedom of Speech and Criticism of Religion: What are the Limits*, 14 MURDOCH U. ELEC. L.J. 94, 95-98 (2007).

suppression are somewhat milder and restrictions are justified on different grounds.

Today, there is a common understanding that free speech constitutes the basic pillar of progress for democratic societies. The scope of this right is an important yardstick against which the sophistication and confidence of a given democracy can be measured. This is not the case in authoritarian regimes, which are characterized by the suppression of their political opponents by all necessary means. It is thus arguable that democracy is built on a paradox: by protecting freedom of expression and its requirements it gives its opponents the possibility to undermine its very existence.[4]

II. THE NEED TO STRIKE A BALANCE

Free speech is not merely of fundamental importance for democratic societies, but it is one of the most basic rights of an individual that enables him to form and develop his opinions, and thereby to realize himself.[5] Freedom of expression, however, is not absolute, but may be subject to certain limitations.[6] Most democratic states impose restrictions on certain forms of expression, depending on the political and historical context. Germans, for instance, are naturally more sensitive about Nazi propaganda than other nations. The British, on the other hand, are keener to restrict racially motivated speech due to its colonial past and its concern to keep its diverse population in harmony.[7] In that regard, as Boyle notes, "a society that respects freedom of expression is not one where there are no restrictions on that freedom. There are always restrictions. . . . [A] healthy society is to be measured . . . by noting whether there is open public debate and argument about the necessity of restriction in particular cases."[8] Indeed, a society that does not fight against the seeds of its own destruction cannot be deemed healthy. Yet, the main question is how to balance the competing interests, or rather how to restrict speech that incites

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4. Paul Mahoney & Lawrence Early, *Freedom of Expression and National Security: Judicial and Policy Approaches Under the European Convention on Human Rights and Other Council of Europe Instruments, in* SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION 109, 109 (Sandra Coliver et al. eds., Martinus Nijoff Pub. 1999).

5. *See* Handyside v. United Kingdom, 1 Eur. Ct. H.R. 737, ¶ 49 (1976).

6. Mordechai Kremnitzer & Khaled Ghanayim, *Incitement, Not Sedition, in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 48 (David Kretzmer and Francine Kershman Hazan eds., Kluwer L. Int'l. 2000).

7. *See* Conor Gearty, *Rethinking Civil Liberties in a Counter-Terrorism World,* EUR. HUM. RTS. L. REV. 111, 113 (2007).

8. Kevin Boyle, Freedom of Expression and Restriction on Freedom of Expression (2002) (unpublished manuscript, on file with the Tulsa Journal of Comparative & International Law) [hereinafter Boyle, Freedom].

hatred, violence or discrimination without harming the core of the right to freedom of expression.

A. Democracy, Freedoms and Limitations

Democracy is a struggle both for free speech and for the right to equality. Free speech therefore should not to be sacrificed for the protection of the *status quo*; yet destructive speech is also to be balanced against the requirements of the right to equality and non-discrimination, for as too many examples demonstrate, "hate speech can kill."[9] Catharine MacKinnon asserts:

> *Saying* 'kill' to a trained attack dog is only words. Yet it is not seen as expressing the viewpoint 'I want you dead'—which it usually does, in fact, express. It is seen as performing an act tantamount to someone's destruction, like saying 'ready, aim, fire' to a firing squad.[10]

Therefore, it is obvious that not all forms of speech can be protected; otherwise the basic tenets of criminal law would have to be discarded. Free speech, however, should be protected against arbitrary restrictions under the pretext of national security or the rights and reputation of others, etc. As many examples demonstrate, these elusive concepts might well be resorted to in order to silence dissidents against a political regime. Nevertheless, the presence and promotion of political and social equality and freedom from racial, social or sexual discrimination are also essential for properly functioning democracies, where these overlapping but sometimes conflicting values are to be balanced.

This paper attempts to illustrate the boundaries of freedom of speech in connection with the protection of other values. The burning question is how free speech can be discerned from hate speech. In other words, is there a reliable yardstick against which the concrete boundaries of the right to freedom of speech can be measured? In order to answer these questions this study examines the regulation of free speech under the First Amendment to the United States Constitution, and in light of the international standards, namely under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights and Fundamental Freedoms (European Convention). The purpose of this study is to illustrate how elusive the endeavour of striking a balance between the right to freedom of expression and other vital interests could be, and that legal approach alone falls short of addressing the root causes of the problems encountered in free speech discourse.

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9. Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World,* 53 ME. L. REV. 488, 501-02 (2001) [hereinafter Boyle, *Hate Speech*].

10. CATHARINE A. MACKINNON, ONLY WORDS 12 (Harv. U. Press, 1993) (emphasis in original).

B. What is Hate Speech?

Hate speech is an elusive concept, which is not easy to define. It covers abusive, denigrating, harassing speech targeting a group's or individual's national, racial, religious or ethnic identity.[11] Yet there is no universally acknowledged definition. "Human Rights Watch defines hate speech as 'any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women."[12] Some scholars define it as a "generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion, and sexual orientation or preference."[13]

The lack of an agreed definition causes difficulty in determining when exactly an expression constitutes hate speech. Indeed, some speech might be so offensive that it may foster a climate of prejudice or discrimination against minority groups; yet it might not constitute hate speech. Similarly, the media may include disparaging news about minorities or religious groups,[14] or may portray members of religious or ethic minority groups through clichéd and stereotyped images, which might be offensive, but not hate speech.[15] In this regard, a wide definition of hate speech would include group libel, or an attack on the dignity or reputation of a given group or individual. This would cover speech that is considered offensive regardless of whether it would lead to harmful results. A narrower definition of hate speech, however, would limit speech "that is intended to incite hatred or violence" against certain groups or individuals.[16] The difficulty of having no universally acknowledged criteria for the determination of hate speech might be remedied by the further development of case law at the national and international level.

C. The Damage Done by Hate Speech

Hate speech, the "words that are used as weapons to ambush, terrorize, wound, humiliate, and degrade," damages "not only the targeted group or

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11. HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS 749 (Oxford U. Press, 2d ed. 2000).

12. SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 8 (U. of Neb. Press, 1995) (1994).

13. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 152 (Vintage 1993).

14. *See* Debbi Schlussel, *Suspected VA Tech shooter might be a 'Paki' Part of 'Terrorist Attack'*, MEDIA MATTERS FOR AMERICA, Apr. 17, 2007, http://mediamatters.org/items/200704170006.

15. *See* Clarke, *supra* note 3, at 104 n. 38 (the incidents following the publication of cartoons of Muhammad in the Danish newspaper *Jyllands-Posten* showed how elusive the demarcation between freedom of speech/press and hate speech could be); *see also* Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad,* 14 CONSTELLATIONS 72 (2007); Eric Heinze, *Viewpoint Absolutism and Hate Speech,* 69 MOD. L. REV. 543 (2006).

16. Boyle, Freedom, *supra* note 8, at 6-7.

individual's physiological and emotional state, but also personal freedom, dignity, and personhood" and society at large.[17] On an individual scale, it is established that, "[t]he immediate, short-term harms of hate speech include rapid breathing, headaches, raised blood pressure, dizziness, rapid pulse rate, drug-taking, risk-taking behavior, and even suicide."[18] In fact, some scientists suspect that the high blood pressure of many African Americans may possibly be linked to repressed or suppressed anger in addition to genetic factors.[19] The psychological harm of hate speech also includes fear, nightmares, and withdrawal of the targeted individual or group from society. Scientists, who have studied the effects of racial slurs or hate speech, believe that such speech affects children and youthful targets more than adults. In this respect, Richard Delgado notes that, "[c]hildren as young as three develop consciousness of race; they know, furthermore, that race makes a difference, and that it is better to be of some races than others."[20]

Hate speech also affects society as a whole. Indeed, not only do individuals exposed to hate speech suffer a loss of dignity, self-esteem and sense of belonging to the community, but the targeted group also suffers estrangement from society, a loss of cultural identity, and group reputation. Thus, society, in a general sense, becomes fragile because intolerance and divisiveness hinder the equal and healthy participation of everyone in the democratic process.[21] "Worst of all," notes Nicholas Wolfson, "such speech degrades the objects of abuse, silences them through fear, does them psychological damage, and creates a smarmy and nauseating culture that harms women and minorities."[22]

Such speech thus fosters inequality by playing a major role in the construction of social reality from the demonization of minority groups or immigrants, objectification of women, denigration of homosexuals to genocide.[23] Indeed, the role of hate speech in the Holocaust is a fresh memory. Recent events have shown how the flow of information was manipulated by mass media and controlled by the ruling party to increase ethnic antagonisms in the former

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17. Gloria Cowan et al., *Hate Speech and Constitutional Protection: Priming Values of Equality and Freedom,* 58 J. OF SOC. ISSUES 247, 248 (2002).

18. RICHARD DELGADO AND JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 13 (Westview Press 2004).

19. *Id.*

20. *Id.* at 14. The detrimental affects of hate speech are not limited to physical and psychological harm, but also extend to the economic prospects of the victim's life. Studies show that victims of hate speech or racial slurs tend to be timid, bitter, tense, or defensive and they perform poorly in employment, and other environments at large. *Id.* at 11-17.

21. *See* N. Kathleen Sam Banks, *Could Mom be Wrong? The Hurt of Names and Words: Hate Propaganda and Freedom of Expression,* 6 MURDOCH U. ELEC. L. J. ¶ 24, 26 (1999).

22. NICHOLAS WOLFSON, HATE SPEECH, SEX SPEECH, FREE SPEECH 2 (Praeger Pub. 1997).

23. MACKINNON, *supra* note 10, at 30-31.

Yugoslavia.[24] Similarly, U.N. reports proved the deadly influence of a radio station, Radis Mille Collines, in the Rwandan genocide of 1994.[25] The then U.N. special rapporteur vividly illustrated how radio transmissions played a central role in inciting ethnic hatred and mass murder: "the generally illiterate Rwandese rural population listens very attentively to broadcasts in Kinyarwanda; they hold their radio sets in one hand and their machetes in the other, ready to go into action."[26]

D. The Escalation of Racism

Until the 1920s, it was widely and reasonably accepted that racial prejudices were inherited. Similarly, white supremacy as an ideology had been employed to justify the political and economic domination by the Western World over the "others."[27] This ideology was also employed in connection with anti-black racism, anti-Semitism, or to justify discrimination against Native Americans, Chinese, Irish, Southeast Asians, and Arabs, among others.[28]

Until recent times the advocacy of white supremacy, expressions of prejudice and hatred against Jews and blacks, namely what today is called hate speech, was mainstream speech. This phenomenon was central to European culture and there were no hate groups advocating racism or white superiority as

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24. *See* Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana,* 21 AM. U. INT'L L. REV. 557, 579 (2006).

25. Yet, well before the genocide, the U.N. officials and NGOs pinpointed the central role of the radio transmissions in provoking the ethno-political violence. When the genocide began, international media also identified the sinister role of radio broadcasts, which led to calls for the United States and other powerful states to jam the broadcast, but to no avail. The international community has failed to prevent the Rwanda genocide due to political considerations and lack of will; it is now failing with the ongoing massacres in Darfur. *See* Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming,* 91 AM. J. INT'L L. 628, 628-29 (1997); Alexander C. Dale, *Countering Hate Messages that Lead to Violence: The United Nations' Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts,* 11 DUKE J. COMP. & INT'L L. 109 (2001). For a detailed analysis of the Rwandan Genocide, *see* Stephen R. Shalom, *The Rwanda Genocide: The Nightmare that Happened,* Z MAGAZINE, Apr. 1996, at 25; Marko Milanovic, *State Responsibility for Genocide,* 17 EUR. J. INT'L L. 553, 604 (2006).

26. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda,* ¶ 59, U.N. Doc. E/CN.4/1995/7 (June 28, 1994) (prepared by R. Degni-Ségui). *See generally* Henri Zukier, *The Essential "Other" and the Jew: From Antisemitism to Genocide,* 63 SOC. RES. 1110, 1118 (1996).

27. The mission of civilizing the "other" has a long historical lineage, which was frequently employed to subjugate other nations for imperialistic purposes. *See, e.g.*, Francisci De Victoria, *De Indis Et De Ivre Belli Reflectiones, in* REFLECTIONES THEOLOGICAE XII 150, 155-56 (Ernest Nys ed., John Pawley Bate trans., Oceana Publications, 1964) (1917).

28. *See* James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective,* 22 CRIME & JUST. 1, 4-5, 21-24 (1997); Josh Adams, & Vincent J. Roscigno, *White Supremacists, Oppositional Culture and the World Wide Web,* 84 SOC. FORCES 759, 770-75 (2005).

it was the official ideology itself.[29] In this respect, the Holocaust was, in a sense, the culmination of the appalling prejudice against Jews, which later gave birth to the initiatives at the international level to create the United Nations and today's human rights discourse.

Today, hate-mongers seek ways to protest the abandonment of these age-old prejudices against Jews, blacks, minority groups, Muslims,[30] or other members of society.[31] As Kevin Boyle notes:

> Hate speech in that sense is political speech; it seeks to restore theories and ideas that were defeated by democratic struggle . . . and their hatred is directed at the beneficiaries of those struggles . . . Hate speech is also about power and economic competition . . .
>
> It is a struggle of ideas, the ideas of restoring white supremacy—the exclusion of Jews and other hated minorities—versus the idea of equal human dignity for all.[32]

Thus, an effective war against hate speech cannot achieve victory without focusing on the root causes of discrimination, which, among other things, includes socioeconomic and political injustice, lack of strong civil societies and firmly rooted democracies, the existence of which can foster peace and tolerance in a community.

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29. Boyle, Freedom, *supra* note 8, at 2.

30. The "war on terror" and its accompanying rhetoric have not only served to justify encroachments on civil liberties, they also gave rise to the increase in the usage of sweeping and disparaging language against the Muslim community. For instance Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, known as the "Patriot Act," provides for the "mandatory detention of suspected terrorists." USA PATRIOT Act, § 412, 8 U.S.C. § 1226a. This section empowers the Attorney General to detain any alien whom he certifies as a terrorist. The detainee may be kept in custody indefinitely, as long as the Attorney General determines, in his sole discretion, that the release of the alien would threaten national security or the safety of general public or any individual. The Patriot Act resembles the Emergency Detention Act of 1950, which was enacted during the McCarthy era in reaction to the Communist hysteria. *See* Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib,* 37 CASE W. RES. J. INT'L L. 449, 451-52 (2005-06); Jens Meierhenrich, *Analogies at War,* 11 J. CONFLICT & SEC. L. 1, 28-29 (2006).

31. For a comprehensive analysis of the rise of racism in Europe following the collapse of socialist regimes *see* Paul Gordon, *Racist Violence: The Expression of Hate in Europe, in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 9, 9-17 (Sandra Coliver et al. eds., 1992).

32. Boyle, *Hate Speech*, *supra* note 9, at 493.

III. SHOULD WE RESTRICT HATE SPEECH?

The right to freedom of expression is not only of vital importance for democratic societies, but it is also crucial for the enjoyment of many other rights[33] and freedoms.[34] The importance of this right was colourfully illustrated by Amartya Sen:

> [N]o substantial famine has ever occurred in any independent country with a democratic form of government and a relatively free press. Famines have occurred in ancient kingdoms and contemporary authoritarian societies, in primitive tribal communities and in modern technocratic dictatorships, in colonial economies run by imperialists from the north and in newly independent countries of the south run by despotic national leaders or by intolerant single parties. But they have never materialized in any country that is independent, that goes to elections regularly, that has opposition parties to voice criticisms and that permits newspapers to report freely and question the wisdom of government policies without extensive censorship.[35]

Those who oppose hate speech thus do not deny the importance of free speech, yet they are well aware of the potential dangers that might emerge out of its unleashed and irresponsible practice.[36] In the face of serious and continuing ethnic, religious, and sexual discrimination and its violent consequences, any viable solution to eliminate hate speech must take into account the delicate balance between free speech and other competing values in each individual case. Therefore, on the one hand, there is no denial that freedom of expression is essential to defeat discrimination, bigotry and intolerance;[37] on the other, free speech cannot always be preferred over other equally important values, such as non-discrimination and equality.

The problem lies in the necessity of constant struggle, in every individual case, to determine which value(s) is to be preferred over the other(s). There is a consensus over the need to eliminate racism, bigotry, and discrimination in all its forms that trigger hate speech and hate crimes. As noted earlier, the main controversy lies in how to achieve this goal. In a speech, delivered by

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33. In a General Assembly resolution it was stated that "[f]reedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated . . . ." G.A. Res. 59 (I), ¶ 1, U.N. Doc. A/RES/59/1 (Dec. 14, 1946).

34. DONNA GOMIEN, SHORT GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 78 (2d ed., Council of Europe 1998).

35. AMARTYA SEN, DEVELOPMENT AS FREEDOM 152-53 (Alfred A. Knopf, Inc 1999).

36. Kevin Boyle, *Overview of a Dilemma: Censorship Versus Racism, in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 1 (Sandra Coliver et al. eds., 1992) [hereinafter Boyle, *Dilemma*].

37. *See id.*

Singapore's Prime Minister Lee Hsein Loong, the rejection of the publication of the Danish cartoons and Salman Rushdie's *The Satanic Verses* was rationalized as follows: "[p]eople say, 'where is freedom of expression?', we say maintaining harmony, peace, that's the first requirement. . . . This episode will deepen the gulf between Muslims and non-Muslims in Europe. But in Singapore, we have to maintain our social harmony and religious harmony at all costs."[38] The delicate question here is whether or not peace and harmony can be established without suffocating the voice of dissidents and minority groups. In order to answer this question it is now necessary to briefly assess the arguments presented on behalf of free speech in a critical fashion.

A. Free Speech Versus Hate Speech

The first argument put forward on behalf of unlimited free speech is based on the assumption that free speech contributes to the self-fulfilment of the individual. This premise mainly derives from Western thought according to which the proper end of man is the realization and fulfilment of his potential as a human being. Thought and exchange of opinions in a free manner is *sine qua non* for achieving this goal.[39]

There is no doubt that government interference in the exercise of free speech would inevitably affect individual autonomy and liberty, which might constitute a grave hindrance to individual development. This view, however, omits to evaluate the damaging impacts of hate speech on its victims. Hate speech can easily silence and demoralize its victims, discouraging them from participating in many activities of civil society, including public debate, which prevents them from realizing themselves.[40] In this context, Owen Fiss notes that, "[e]ven when [those] victims speak, their words lack authority; it is as though they said nothing. . . . [Hate speech also] impairs their credibility and makes them feel as though they have nothing to contribute to public discussion."[41] The argument of individual self-fulfilment thus should also take the victims of hate speech and their personal development and self-realization into account. It can well be argued that the individual self-fulfilment argument might also justify legitimate restrictions of hate speech to protect the safety, honour or reputation of the potential targets of hate speech; since self realization cannot be separated from the concepts of safety, equality, non-discrimination or self-esteem.

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38. Kent Roach, *National Security, Multiculturalism and Muslim Minorities,* 12 SING. J. LEGAL STUD. 405, 433-34 (2006).

39. *See* FRANKLYN S. HAIMAN, FREEDOM OF SPEECH 205 (Nat'l Textbook Co. 1979); Larry Alexander, *Freedom of Speech, in* FREEDOM OF SPEECH VOLUME I: FOUNDATIONS 5 (Larry Alexander ed., Ashgate 2000).

40. DELGADO & STEFANCIC, *supra* note 18, at 154.

41. OWEN M. FISS, THE IRONY OF FREE SPEECH 16 (Harv. U. Press 1998).

The second justification is based on the notion of attainment of truth, i.e., suppression of information or free discussion not only prevents one from reaching better conclusions, but blocks the whole society, and perpetuates error. The collective nature of free speech is linked with the interchange of ideas and information among individuals to construct better ideas or establish the truth.[42] The rationale for this argument is best expressed by John Stuart Mill:

> He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side . . . he has no ground for preferring either opinion.
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> . . . .
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> Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth . . . it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.
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> Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will . . . be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.[43]

This hypothesis, however, would have been much stronger had it taken into consideration that in a society not everybody has equal access to speech and is able to voice their concerns. In fact, hate speech targets the most vulnerable sections of society, namely ethnic or religious minorities, immigrants or women, who have limited access to speech channels. As Kent Greenawalt argues:

> Acquiring confidence that truth will advance in a regime of freedom would be simple if people rather quickly understood the truth when it was presented to them and if competing ideas had an equal claim on people's attention. Two claims undermine such confidence: the gross inequality among communicators in the marketplace of ideas and the inclination of people to believe messages that are already dominant socially or that serve unconscious, irrational needs.[44]

Admittedly, in a democratic society, where theoretically people have the chance to challenge ideas on equal footing, the existence of governmental control would be fruitless, or rather dangerous and might lead to mind-control of individuals. Nevertheless, in an unequal society in which the balance of power

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42. NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 666 (Cambridge U. Press 2002).

43. JOHN STUART MILL, ON LIBERTY 53, 76 (George Routledge & Sons, Ltd 1915) (1885).

44. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 134 (1989).

determines the flow of information, the state machine, without being unduly intrusive, might regulate the flow of information, and create communication channels for the vulnerable, thus creating equal opportunities to eliminate the domination of the powerful in the marketplace of ideas.

It is arguable that once the state starts regulating or restricting speech, this would "eventuate in restricting more or all speech: [which is known as] the 'slippery slope' hazard."[45] Defenders of this argument claim that restricting speech might be tempting for totalitarian states: "if we restrict this bad thing now, we will not be able to stop ourselves from restricting this good thing later."[46] However, restriction of speech is not the only thing that a totalitarian or undemocratic state can do; such a state can blur the marketplace of ideas with valueless, false ideas (where it would be impossible to discern bad ideas from the good), foster inequality by other means, create obstacles for certain segments of society to participate in the democratic process or access to education, etc.[47] James Jacobs, quoting Professor Abraham S. Goldstein states, "[t]hose who see efforts to regulate group libel as taking us down a 'slippery slope' to censorship pay too little attention to a second 'slippery slope'—one which can produce a swift slide into a 'marketplace of ideas' in which bad ideas flourish and good ones die."[48]

The third argument is related to the concept of participation in the democratic decision-making process. Once the assumption that governments derive their power and legitimacy from the consent of the governed is accepted, the necessity of free speech can reasonably be deduced. Indeed, the participation of informed citizenry in the democratic process requires the existence of free speech and vigorous discussion.[49] Admittedly, free speech is of vital importance particularly for the minorities, blacks, homosexuals and women; in short, for those who are potential targets of discrimination and hate speech. By democratic process these segments of society would find ways to affect public policy and voice their concerns and thereby, to a certain extent, find ways to remedy the silencing, destructive effects of discrimination and hate speech. Free speech, however, is not the sole condition for effective democratic participation; indeed other elements, such as fair distribution of income, equal access to education, free media, effective social policies, free elections, multiparty democracy, fair representation of minority groups, that is, the requirements of a pluralist

45. MACKINNON, *supra* note 10, at 76.

46. *Id.*

47. *But see* WOLFSON, *supra* note 22, at 83-100.

48. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 111 (Oxford U. Press 1998) (quoting Professor Abraham S. Goldstein, Yale Law School).

49. Alexander, *supra* note 39, at 6; *see* Greenawalt, *supra* note 44, at 274.

democracy should accompany the right to free speech. Otherwise, democratic participation would only be a theoretical possibility, rather than a reality.

Fourthly, it is asserted that suppression of expression would conceal the real problems that lie beneath the surface. Suppression of speech, accordingly, not only diverts public attention from the real causes of a crisis that affects a society as a whole, but it might also cause social stagnation, which may, in the long run, result in dissatisfaction with the governing body of a given organization. Open discussion, therefore, is considered as "a method . . . of maintaining the precarious balance between healthy cleavage and necessary consensus."[50] This position was defended under the First Amendment by Justice Douglas:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[51]

Similarly, Stephen A. Smith convincingly argues that:

> [H]ate speech can serve an important social and political function. Irrational expressions of hate based on the status of the targets can alert us to the fact that something is wrong—in the body politic, in ourselves, or in the speakers. It might suggest that some change is necessary, or it might only warn us against the potential for demagogues.[52]

This view, however, overlooks the destructive and sometimes irrevocable effects of hate speech, which might seriously damage the reputation of the targeted group, thereby triggering violent attacks against them.[53] The Rwanda

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50. HAIMAN, *supra* note 39, at 205.

51. Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949) (citations omitted).

52. Stephan A. Smith, *There's Such a Thing as Free Speech: And It's a Good Thing, Too, in* HATE SPEECH, 226, 260 (Rita Kirk Whillock & David Slayden eds. Sage Publications 1995).

53. In *Jersild v. Denmark*, this point was examined by Judge Golcuklu, Russo, and Valticos. In their dissenting opinion they emphasized the responsibilities of the media while broadcasting a TV programme which contained crude racist remarks:

> [Freedom of speech] should [not] extend to encouraging racial hatred, contempt for races other than the one to which we belong, and defending violence against those who belong to the races in question. . . . Large numbers of young people

genocide is a textbook illustration of how hate speech causes heinous results within a very short period of time. In other words, particularly in times of crisis, be it economic, social, or political, hate speech can destroy a community.[54]

Moreover, the above-mentioned argument assumes a society where well-informed individuals, in the end, would discern the good from the evil in speech. Since hate speech was mainstream until recent times, it was only the heavy cost of historical experience which triggered change. While it may well be argued that free speech can lead to a better understanding of the problems prevailing in a society, the protection of human life, equality, non-discrimination, namely the fundamental values that enable people to exist together, should also be protected. This protection will, at times, require certain restrictions on freedom of expression.

IV. HATE SPEECH IN THE UNITED STATES

A. The Regulation of Hate Speech

Societies take different measures to respond to hate speech in accordance with their historical experiences. For instance, as a result of the second World War and its bitter memories, the European approach to free speech and its limitations is considerably different from the United States' approach. Following the horrors of the Holocaust, European States have been more vigilant against the harm that might emerge from an unleashed form of speech. For instance, denial of the Holocaust has been an important problem in Europe. Consequently, certain European countries have enacted legislation prohibiting

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> today, and even of the population at large, finding themselves overwhelmed by the difficulties of life, unemployment and poverty, are only too willing to seek scapegoats who are held up to them without any real word of caution . . . .

Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 31 (1994).

54. Laura Lederer shows how propaganda influences the minds of its targeted audience:

> [H]ate propagandists do not attempt to convince people of their views by rational argument. They are, instead, concerned first and foremost with action, with a *concerted mass psychological reflexive response*, and "seek to short circuit all thought and decision. . . . [The individual] must not know that he is being shaped by outside forces, [yet] some central core in him must be reached in order to achieve the cooperation and appropriate action the propaganda desires.

Laura J. Lederer, *Pornography and Racist Speech as Hate Propaganda, in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 131, 134-35 (quoting Jacques Ellul) (emphasis in original) (alterations in original) (Laura J. Lederer & Richard Delgado eds., Hill & Wang 1995).

and criminalizing such speech;[55] the legitimacy of which was accepted by the Strasbourg organs.[56]

A society that respects freedom of speech does not have to be one where there are no restrictions upon the said right. There have always been restrictions upon free speech, the degree of which is often dependent upon the socio-political climate of a given period.[57] During the period of the Cold War, there were three main positions with respect to freedom of expression: (a) that of the Soviet Union and its allies who generally had little enthusiasm for civil and political rights; (b) the United States who privileged free speech including the category of hate speech over other values, and (c) Western democracies and developing countries that tried to keep the balance between liberties and restrictions. Today's democracies, however, are characterized by two positions: the U.S. position and the rest of the world.[58] Let us now focus on the United States' approach.

B. The Justification of Free Speech under the First Amendment: The Marketplace of Ideas

In the United States hate speech is regarded as the price society has to pay to safeguard freedom of expression. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[59] Although the First Amendment in principle protects hate speech, as will be elaborated below, its protection of speech is not unqualified and does not extend to all forms of expression.[60]

While there are various theories behind the protection of free speech, as the Supreme Court case law demonstrates, judges are reluctant to commit themselves to any one of the theories.[61] The Supreme Court, nonetheless, mostly relies upon the Millian "marketplace of ideas" theory.[62] In *Abrams v. United*

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55. Adrian Marshall Williams & Jonathan Cooper, *Hate Speech, Holocaust Denial and International Human Rights Law,* 6 EUR. HUM. RTS. L. REV. 593, 595-96 (1999).

56. In Europe, trivializing or denying the historical facts of the Holocaust, as well as justification of National Socialist policy, has been criminalized by various models of legislation in five countries: Belgium, Germany, France, Spain and Switzerland. Boyle, *Hate Speech, supra* note 9, at 498.

57. *See* WALKER, *supra* note 12, at 1.

58. Boyle, *Hate Speech, supra* note 9, at 488-89.

59. U.S. CONST. amend. I.

60. Stephen L. Newman, *Liberty, Community, and Censorship: Hate Speech and Freedom of Expression in Canada and the United States,* 32 AM. REV. CANADIAN STUD. 369, 369 (2002).

61. *See generally* ERIC BARENDT, FREEDOM OF SPEECH, (2d ed., Oxford U. Press, Inc. 2005) (1987), at 31-32.

62. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. REV. 964, 964 *reprinted in* Alexander, *supra* note 39, at 75, 78-79 (claiming the idea that truth is best determined through debate, proposed by John Stuart Mills in ON LIBERTY).

States, where the defendant distributed leaflets in favour of the Russian revolution, urging workers to strike, so that the arms produced would not be used against Russian revolutionaries, Justice Holmes, in his dissenting opinion, expressed this view very eloquently:

> [W]hen men have realized that time has upset many fighting faiths, they 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 . . . That at any rate is the theory of our Constitution. . . . Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . .[63]

C. Justifications to Limit Free Speech under the First Amendment:

1. "Clear and Present Danger" Test

In *Schenck v. United States,*[64] Justice Holmes formulated the famous 'clear and present danger' test to determine if a certain form of speech should be restricted. In *Schenck*, the defendants were convicted of conspiring to violate the Espionage Act of 1917 by circulating a leaflet that urged resistance to military recruitment and insubordination in the military. Holmes noted that the character of every act depends on the circumstances, and that utterances tolerable in peacetimes can be punishable in wartime. He declared that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[65]

2. The New Test: Imminent Lawless Action

In *Brandenburg v. Ohio,*[66] the Supreme Court modified the "clear and present danger" test. In that case, Mr. Brandenburg had given a speech at a Ku Klux Klan rally denouncing Blacks and Jews, and declared the necessity of terrorism and lawlessness. He was convicted under an Ohio criminal syndicalism law that made it illegal to advocate "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political

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63. 250 U.S. 616, 621-22, 630 (1919) (Holmes, J., dissenting).

64. 249 U.S. 47 (1919).

65. *Id.* at 52.

66. 395 U.S. 444 (1969).

reform."[67] The Supreme Court unanimously reversed the conviction and held that the said law violated Brandenburg's right to freedom of expression by replacing the test of "clear and present danger" with a more protective formula. The Court held that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[68]

This is the current position on freedom of expression in the context of hate speech.[69] As Anthony Lewis notes, not many utterances would meet the difficult threshold that the speaker aimed at inciting lawlessness imminently and was likely to succeed. He further notes that there has been no case since 1969 where the Supreme Court found that speech should be punished since it satisfied the test in question.[70]

The infamous case of *Planned Parenthood v. American Coalition of Life Activists*[71] is also of relevance to assess how this test was employed in borderline cases. In this case, a group called the American Coalition of Life Activists (ACLA) distributed posters, names and addresses of doctors who performed abortions and posted the information on an internet site called the "Nuremberg Files"; then crossed out those who had been killed or injured. The site did not contain any explicit threat or direct encouragement of violence against the doctors. Yet the doctors sued the ACLA on the ground that the site robbed the doctors of their anonymity, and the speech hurt them in the sense that it constituted genuine threats against their security.

The U.S. Court of Appeals for the Ninth Circuit noted that ACLA's speech did not contain the danger of imminent lawless action, for the speech was "made in the context of public discourse, not in direct personal communication."[72] The Court recalled that, although the First Amendment does not protect all forms of public speech, it protects speech that encourages others to commit violence,

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67. *Id.* at 445.

68. *Id.* at 447-48 (footnote omitted) (quoting Noto v. U.S., 367 U.S. 290 (1961)).

69. For the other tests employed by the Supreme Court, such as "the probability test" or "bad tendency test" etc., *see* Kremnitzer & Ghanayim, *supra* note 6, at 187-90.

70. Anthony Lewis, *Freedom of Speech and Incitement against Democracy, in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 7, 8 (David Kretzmer and Francine Kershman Hazan eds., Kluwer L. Int'l. 2000).

71. 244 F.3d 1007 (9th Cir. 2001).

72. *Id.* at 1018.

unless the speech is capable of producing imminent lawless action. It does not thus "matter if the speech makes future violence more likely; advocating 'illegal action at some indefinite future time' is protected."[73] The Court concluded that "[u]nless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech."[74]

This interpretation of the "imminent lawless action" test has brought the fundamental principles of criminal law into question. If this conclusion is accepted then the duty of crime prevention, that is, the necessity of state institutions to prevent potentially violent situations[75] from erupting into actual violence, would be omitted for the one value of free speech. Moreover, the vagueness of the concepts: imminence, lawless action, or indefinite future time, appears to be at odds with the demands of legal certainty. Indeed, what are the criteria that will determine whether an utterance will lead to imminent lawless action? Again, what is meant by indefinite future, or rather, when does indefinite future become definite and who will determine it? In this context, should the members of society suffer or lose their lives before the state apparatus takes action?

3. Freedom of Expression: Beyond the Words

The *Skokie*[76] case is of crucial importance to comprehend the contours of the hate speech discourse in the United States. In 1977, the National Socialist Party of America planned to march to Skokie, where the majority of the residents were Jewish and some 5,000 of them had survived the Holocaust. The demonstrators were planning to wear facsimiles of German Nazi Party uniforms, brandishing swastikas and carrying placards with the message "white free speech." The village of Skokie had asked for a ban arguing that the swastika represented "fighting words" to the residents of Skokie who are predominantly of Jewish religion or ancestry. The case worked its way up to the Illinois Supreme Court where it was held that the swastika was a symbolic form of free speech that was entitled to protection under the First Amendment:

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73. *Id.* at 1015.

74. *Id.*

75. Although the site did not contain explicit threats to the doctors, restriction still might have been placed for the purpose of crime prevention. In this context, in *Beauharnais v. Illinois* the Supreme Court stated that

> if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

343 U.S. 250, 258 (1951).

76. Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

> The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not . . . fall within the definition of "fighting words" . . .
>
> Nor can we find that the swastika, while not representing fighting words, is nevertheless so offensive and peace threatening to the public that its display can be enjoined. We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech.[77]

The *Skokie* case attracted serious criticisms on the ground that free speech is not an aim in itself; but a means of realization for the individual, and promotion of a tolerant and democratic culture. Social inequality is a human creation, which is created and enforced through power balances, ideologies, words and images. Social hierarchy thus cannot be maintained without force (be it legitimate or not), but more importantly not without ideological and linguistic tools designed to sanction and fortify it.[78] If social inequality is not a god-given phenomenon, but a reality created through acts and words, then the state, hypothetically being a neutral apparatus between social classes, or ethnic/racial groups, has a responsibility to diminish the conditions that create inequality in general and antagonism in particular.

The protection of hate speech hence might at times conflict with the right to equality, which is protected by the Fourteenth Amendment to the United States Constitution. Free speech, therefore, should not automatically be given priority over equality. Particularly in borderline cases the First Amendment should be balanced by the Fourteenth Amendment, for open debate does not necessarily constitute a precondition for achieving substantive equality.[79]

4. Is Burning a Cross an Expression?

The question whether freedom of expression should include hate speech as an expressive act that deserves legal protection became a central issue in the

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77. *Id.* at 24.

78. *See* MACKINNON, *supra* note 10, at 15; *see also* Lisa H. Schwartzman, *Hate Speech, Illocution, and Social Context: A Critique of Judith Butler,* 33 J. SOC. PHIL. 421, 437 (2002) (for an argument that resignification of speech can realistically be materialized within the broader context of social change).

79. *See* FISS, *supra* note 41, at 12-13; Scott J. Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights,* 69 NOTRE DAME L. REV. 771, 791-93 (1994).

R.A.V. v. City of St. Paul case,[80] where the boundaries of free speech were redefined. This case involved an African American family that moved into a neighbourhood which predominantly consisted of "white residents." Three months after their settlement they experienced slashed tires and broken tail-lights and became the target of racial insults. One day, a cross was set on fire in their garden. The prime suspect was convicted of trespass and vandalism. The suspect was convicted of violating the city ordinance that banned

> plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender . . . .[81]

However, the Supreme Court quashed the conviction, asserting that the ordinance violated the right to free speech that is protected under the First Amendment. It held that the ordinance was invalid because it was both "overbroad and impermissibly content based and therefore . . . invalid under the First Amendment."[82] The Court concluded that (a) it was overbroad in the sense that any such speech used by "proponents of all views," regardless of its content, could be prohibited; and that (b) it was under inclusive in that it did not include all fighting words that could also have been punished under the ordinance.[83]

Cowan asserts that this decision has affected and jeopardized all state laws that punish or deter hate speech or hate crimes.[84] Indeed, the argument that the ordinance was too overbroad or under inclusive can be employed for any legal code, because legal codes are bound to be deficient or imperfect, sometimes too narrow, sometimes too broad, which might not correspond to all possible scenarios. This, however, brings the concept of legal interpretation; a necessary tool to penetrate the spirit of a given law in concrete cases, into play. The rationale of the said ordinance was to prevent anger, alarm or frustration on the basis of race, colour, creed, religion, or gender; i.e., this rationale could have been employed in interpreting whether a given form of speech or act would cause such feelings. Above all, it should be remembered that the wording of the First Amendment is also open to criticism for being too broad: "Congress shall make no law . . . abridging the freedom of speech . . . ."[85] As noted earlier, this provision is not read as an absolute bar to state regulation of speech but as a

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80. 505 U.S. 377 (1992).

81. *Id.* at 380 (quoting Minn. Legis. Code § 292.02 (1990)).

82. *Id.*

83. *Id.* at 377-78.

84. Cowan, *supra* note 17, at 248.

85. U.S. CONST. amend. I.

narrow boundary that surrounds the state's authority to prevent potential arbitrariness.[86]

D. The Accepted Limitations

U.S. legislative history is replete with initiatives to prohibit expressions that the majority considers odious, such as speech that advocates communism, radical ideas or flag burning, sexually explicit art, group libel, etc.[87] There have also been attempts to restrict and punish hate speech in the universities since the 1980s as a consequence of growing racism on campuses.[88] However, attempts to restrict free speech, except for certain restrictions carried out in the name of national security, did not receive much support in the U.S. jurisprudence.

The First Amendment thus protects free speech to an extent that many people might find it disturbing. The robust approach of the First Amendment is perhaps best summarized by the defence lawyer in a case against the leader of the Aryan Nations, where he noted that: "[D]emonizing Jews is still legal under the First Amendment. It is still legal in this country to be a bigot. It is still legal to hate."[89] Similarly, in *Texas v. Johnson*, Justice Brennan stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[90]

1. Fighting Words and Obscenity: Words of No Value

One of the most important exceptions to free speech was formulated in *Chaplinsky v. New Hampshire*, where a Jehovah's Witness called a city marshal a "God damned racketeer" and "a damned Fascist" in a public place.[91] He was convicted of violating a New Hampshire law that made it a crime to "address any offensive, derisive or annoying word to any[one] . . . who is lawfully in any street or other public place, nor call him by an offensive or derisive name . . . ."[92] The U.S. Supreme Court found the conviction justifiable:

> [T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of

86. BARENDT, *supra* note 61, at 31.

87. JACOBS & POTTER, *supra* note 48, at 113.

88. *See id.* at 128-29. However, such hate speech codes when challenged in the Court were mostly found unconstitutional due to their 'vagueness' or overbroad character. *See* John Doe v. Univ. of Mi., 721 F. Supp. 852, 866-67 (E.D. Mich. 1989).

89. Boyle, *Hate Speech, supra* note 9, at 489 (alteration in original); *see also* Jo Thomas, *Courthouse Klan-Fighter Takes on Aryan Nations,* N.Y. TIMES, Aug. 29, 2000, at A14.

90. 491 U.S. 397, 414 (1989).

91. 315 U.S. 568, 569 (1941).

92. *Id.*

> speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.'[93]

The restriction of the so-called "fighting words," or obscenity[94] is mainly based on two assumptions that (a) such words by their very utterance are capable of causing injury or inciting a breach of public peace; and (b) that their utterance is of no intellectual value in the sense that they do not contribute to the establishment of truth. If these hypotheses are accepted, then it is arguable that pornography[95] and racial or religious insults might also fall in this category, since they might also, by their very utterance, cause resentment or breach public peace.

However, in *Gooding v. Wilson* the Court narrowed the definition of "fighting" words, and stated that not all offensive words fall under *Chaplinsky's* "fighting" words doctrine; "fighting" words are those that have "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[96] The new standard of causing acts of violence by an individual, rather than a group, to whom the offensive remark is addressed establishes a high threshold. It is difficult to comprehend why a group to whom an offensive remark is addressed should be excluded from this category, and that

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93. *Id.* at 571-72 (quoting Cantwell v. Conn., 310 U.S. 296, 309-10 (1940)).

94. In *Roth v. United States,* it was held "that obscenity is not within the area of constitutionally protected speech or press," either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment. 354 U.S. 476, 485 (1957). Obscenity is a vague term which is difficult to define. Although *Miller v. California* sets out basic guidelines to determine what can be considered obscenity, the difficulty of defining the term remains. Justice Steward's famous formula is meaningful in this respect: "I know it when I see it . . ." Jocobellis v. Ohio, 378 U.S. 184, 197 (1964); Miller v. California, 413 U.S. 15 (1973).

95. Child Pornography is another category of speech that is not protected under the First Amendment. *See generally* New York v. Ferber, 458 U.S. 747 (1982). Since it is not the focus of this article to discuss thoroughly all the limitations in detail, it should merely be noted that the reasons that were given in *Ferber* for the prohibition of child pornography can also be employed for banning adult pornography. It appears that the sensitivity towards child abuse, high degree of vulnerability for the victims of abuse, and fundamental moral or religious values played a major role in arriving at such a conclusion.

96. 405 U.S. 518, 523 (1971); JACOBS & POTTER, *supra* note 48, at 113.

there should be the requirement of possible ensuing violent result. Sometimes words can cause irreversible harm by their mere utterance. After this higher threshold, the Supreme Court has not upheld "a conviction under the fighting words doctrine."[97] Rather, the Court, reversing the fighting words doctrine of *Chaplinsky* even further, held that "sometimes [fighting words] are quite expressive indeed."[98]

2. Group Libel

In the United States there have also been attempts to restrict speech that vilify racial or religious groups, known as group libel.[99] The group libel doctrine was employed in the well-known case of *Beauharnais v. Illinois*,[100] where the Court upheld a 1917 Illinois law that made it a crime to defame a race or class of people.[101] The defendant was the president of the White Circle League of America, who had been convicted under the said law for distributing a leaflet "calling on the Mayor and City Council of Chicago 'to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . [and urging] white people in Chicago to unite . . . to prevent the white race from becoming mongrelized by the negro . . . .'"[102] The Court, rather than handling the case under the "fighting words" doctrine, invoked the group libel doctrine as an exception to the First Amendment and held that the civil unrest and riots in Chicago necessitated such criminal penalties since offensive literature had posed a serious threat to public peace and order.

However, the *Beauharnais* case, although not overruled, has little continuing vitality. Indeed, in the landmark case of *New York Times v. Sullivan*,[103] the Court held that the First Amendment protects the publication of all statements about the conduct of public officials even though they might be false; and that in order to prevail in a suit, the plaintiff must prove the statement involved "was made with 'actual malice'—that is, with knowledge that it was

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97. JACOBS & POTTER, *supra* note 48, at 113-14. Professor Gerald Gunther, the eminent constitutional scholar, rightly points out that "one must wonder about the strength of an exception which, while theoretically recognized, has ever since 1942 not been found to be apt in practice. *Id.* at 114.

98. R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992); *see also* Edward J. Cleary, *Beyond the Burning Cross: The First Amendment and the Landmark R.A.V. Case,* 108 HARV. L. REV. 757 (1995).

99. JACOBS & POTTER, *supra* note 48, at 114.

100. 343 U.S. 250 (1951).

101. *See* Joseph Tanenhaus, *Group Libel and Free Speech,* 13 PHYLON 215, 215-16 (1952); *see also Crime Comics and the Constitution,* 7 STAN. L. REV. 237, 240-42 (1995).

102. *Beauharnais*, 343 U.S. at 252.

103. 376 U.S. 254 (1964).

false or with reckless disregard of whether it was false or not."[104] Moreover, the Court stated that to be successful in a case, any libelous statement had to be directed at the individual, rather than a group. Consequently, it appears that the "knowingly false" test along with the individual grievance requirement simply rendered the group libel exception ineffective.[105]

3. Sedition

National security has been the most important exception to the free speech doctrine under the First Amendment. Indeed, not until *Brandenburg*[106] was the tension between national security and free speech resolved to a certain extent. As Justice William Brennan notes, although the United States has been "adamant . . . about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened. . . . After each perceived security crisis ended the United States has remorsefully realized that the abrogation of civil liberties was unnecessary."[107]

The first exception made under this heading was the Alien and Sedition Act of 1798, which was enacted under the threat of war with France for security reasons. The act, in practice, was employed to quell any political opposition from the Republicans. Yet, the act was never ruled upon in the Supreme Court.[108] The second important exception to free speech came with the Espionage Act of 1917, which made it a crime, inter alia, to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces."[109] Under this act more than two thousand people were prosecuted. The majority of the convictions were based on nonconformist opinions about the war which were treated as false statements of fact because they conflicted with Congress resolutions or the statements made by President Wilson. The Sedition Act of 1918 went further, making it illegal "also to 'wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about' the U.S . [sic] form of government . . . ."[110] The above-mentioned cases of *Schenck* [111]

104. *Id.* at 279-80.

105. JACOBS & POTTER, *supra* note 48, at 116.

106. Bradenburg v. Ohio, 395 U.S. 444 (1969).

107. William J. Brennan, *The American Experience: Free Speech and National Security, in* FREE SPEECH AND NATIONAL SECURITY 10 (Shimon Shetreet ed., Martinus Nijhoff Pub. 1991).

108. *Id.* at 11-14.

109. Espionage Act of 1917 Paul Hoffman & Kate Martin, *Safeguarding Liberty: National Security, Freedom of Expression and Access to Information: United States of America, in* SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION 477, 477 (Sandra Coliver et al. eds., Martinus Nijoff Pub. 1999).

110. Brennan, *supra* note 107, at 14.

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

and *Abrams*[112] belong to this period where the scope of the "clear and present danger" test was at times forcefully extended. For instance, in *Debs v. United States*, a leader of the American Socialist Party was convicted of violating the draft law by merely uttering the following words: "You have your lives to lose . . . you need to know that you are fit for something better than slavery and cannon fodder."[113] Justice Holmes noted that his speech had a natural tendency to obstruct the draft.[114] This period thus witnessed severe restrictions of speech in the name of national security.[115]

4. Cold War and Free Speech

The free speech discourse was also affected by the reality of the Cold War. During this period, exaggerated security concerns resulted in prosecuting communists under the Smith Act, which along with others made it a crime

> to become a member of or "to organize any society . . . advocat[ing] . . . the overthrow or destruction of any government of the United States by force or violence" or "to print . . . any written or printed material advocating . . . the . . . propriety" of such overthrow or destruction with the intent to cause it to come about.[116]

The McCarthy era was punctuated with a witch-hunt for communists or "subversives." A landmark case representing this period is *Dennis v. United States*,[117] where the conviction of the Communist Party leaders was affirmed by the Court thereby broadening the scope of the "clear and present danger" test. The Court noted that the words clear and present danger "cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited."[118] Thus, as Brennan notes, the Court reinterpreted, "the 'clear and present danger' test in a way that emasculated it and effectively upheld a limitation on speech where the danger was neither clear nor present."[119]

The hysteria as to the communist threat ended with the realization that the threat in question was not of a grave nature. As noted above, with the *Brandenburg* case, which swept away the *Dennis* decision, the Court acknowledged the right to speak freely about violent action and even revolution unless this poses an immediate threat.

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

113. 249 U.S. 211, 214 (1919).

114. *Id.* at 211.

115. *See* Hoffman & Martin, *supra* note 109, at 478-79.

116. Brennan, *supra* note 107, at 17.

117. 341 U.S. 494 (1951).

118. *Id.* at 509 (emphasis in original).

119. Brennan, *supra* note 107, at 17.

5. September 11 Attacks and Restrictions on Civil Liberties

It is arguable that in the United States the vigorous emphasis over civil rights, sometimes at the expense of other rights, has a pattern of losing its significance during national security crises. As Justice Brennan rightly posits, the main problem in the United States does not lie in the recognition of civil liberties during times of warfare or national crisis, but rather the inability of questioning the alleged dangers purportedly threatening the nation during such a period.[120]

Likewise, following September 11 attacks, exaggerated security concerns led to the imposition of serious restrictions on civil liberties, such as civil protests,[121] speech that is considered to be inflammatory for terrorist activities, and the right to privacy with the introduction of surveillance techniques without checks. Furthermore, discriminatory treatment of non-citizens and tightened immigration policies, particularly curbing the entrance of Arab or Afghan Muslims,[122] and policies aiming at the exclusion of immigrants lacking proper papers, has become quite widespread as a trade-off between liberties and security.[123] During this period not only freedom of expression and anti-discrimination laws were breached,[124] but also, arbitrary killings,[125] torture,[126]

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120. *Id.* at 15.

121. *See* United for Peace and Justice v. City of N.Y., 323 F.3d 175, 176 (2d Cir. 2003) (denying the allocation of any location other than a restricted area to a group opposing to the policies of the Bush Administration was not found to be an unnecessary burden to the group's right to free speech).

122. As some commentators suggest, the exclusion of liberal Muslim leaders from entering the U.S. due to their religion might also curb alternative and tolerant views from circulating in the marketplace of ideas. Laura K. Donohue, *Terrorist Speech and the Future of Free Expression,* 27 CARDOZO L. REV. 233, 328 (2005-06).

123. *See* MICHAEL R. RONCZKOWSKI, TERRORISM AND ORGANIZED HATE CRIME: INTELLIGENCE GATHERING, ANALYSIS, AND INVESTIGATIONS 60 (CRC Press 2004).

124. Also the security hysteria has led severe restrictions, arrests, surveillance and violence against those that have marched and demonstrated against the current government policies particularly concerning the war on terror, and drastic restrictions on civil liberties. *See* Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places,* 8 D.C.L. REV. 53, 75 (2004).

125. For information as to the indiscriminate killing of innocent Iraqi people by an American private military company (Blackwater), *see Blackwater in Hot Water,* THE ECONOMIST, Oct. 11, 2007 at 51.

126. One of the most effective coercive techniques used by the U.S. is waterboarding, which consists of immobilizing an individual and pouring water over his face to stimulate drowning, making the subject to believe that his death in imminent. "[T]he threat that another person will imminently be subjected to death . . . ." constitutes, among other things, torture under U.S. law. *See* 18 U.S.C. § 2340(2)(D) (2004). Also the U.N. Convention against Torture prohibits the infliction of severe physical and mental suffering. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc.

secret detentions, denial of fair trial rights,[127] spiriting prisoners to CIA's ghost prisons,[128] kidnapping terror suspects for delivery to other countries for purposes of interrogation, (a practice known as "extraordinary rendition") became widespread.[129] Space does not allow us to elaborate further on this point, thus it is merely to be reiterated that the United States follows a pattern of restricting civil liberties in times of national crisis. It is thus proper to quote Justice Brandeis, who wisely noted that "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[130]

A/39/51 (Dec. 10, 1984), *entered into force* June 26, 1987. Although the Bush Administration has never formally acknowledged the existence of torture, (which includes other techniques such as the so-called "attention grab," "attention slap," "belly slap," "long time standing," and "cold cell,") Vice President Cheney "famously responded to a question about a 'dunk in the water' for terrorism suspects by saying that to him 'it was a no-brainer that it was an acceptable interrogation technique.'" Massimo Calabresi, *Squeezing Mukasey on Torture,* TIME, Oct. 30, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1677612,00.html; Michael Cooper & Marc Santora, *McCain Rebukes Giuliani on Waterboarding Remark,* N.Y. TIMES, Oct. 26, 2007, at A23, *available at* http://www.nytimes.com/2007/10/26/us/politics/26giuliani.html; Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described,* ABC NEWS, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866. It is reported that "[f]alse evidence of links between Saddam Hussein and Al-Qaeda was provided by a terror suspect who was handed over by the United States to Egypt" where he was subjected to an enhanced interrogation. *A Noble Vision Lost,* SUNDAY TIMES (London), Dec. 11, 2005, at 16, *available at* http://www.timesonline.co.uk/tol/comment/article757265.ece.

127. For instance, Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, known as the Patriot Act, provides for the mandatory detention of suspected terrorists. This section empowers the Attorney General to detain any alien whom he certifies as a terrorist. The detainee may be kept in custody indefinitely, as long as the Attorney General determines, in his sole discretion that the release of the alien would threaten national security or the safety of general public or any individual. U.S.A. Patriot Act § 412, 8 U.S.C. § 1226a (2006). The Patriot Act resembles the Emergency Detention Act of 1950, which was enacted during the McCarthy era in reaction to the Communist hysteria. Van Bergen & Valentine, *supra* note 30, at 451-452; *see also* Jens Meierhenrich, *Analogies at War,* 11 J. CONFLICT & SEC. L. 1, 28-29 (2006).

128. The very purpose of such secret prisons, sometimes referred to as "black sites," is to evade legal responsibility. These prisons are located overseas, including several countries in Eastern Europe, for they are illegal in the United States. Doug Cassel, *Washington's "War against Terrorism" and Human Rights: The View from Abroad,* 33 HUM. RTS. 11, 11 (2006). In 2004, a ghost prison in Guantanamo was shut down as the Supreme Court concluded that the US exercised "'complete jurisdiction and control' over the Guantanamo Bay Naval Base . . . ." Rasul v. Bush, 542 U.S. 466, 501 (2004) (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16-Feb. 23, 1903, T.S. No. 418).

129. Extraordinary rendition is used for taking the suspected individuals into gray areas where there exist harsher conditions to extract information. Cassel, *supra* note 128, at 112.

130. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

E. Does the U.S. Comply with its International Obligations?

As shown below, hate speech is strictly restricted under the current frame of international law. The United States, however, has put reservations on the relevant articles of international instruments on the ground that such measures do not comply with the U.S. constitution, thus refusing to take affirmative action to eliminate hate speech. Irrespective of the controversy as to whether any restriction on free speech is constructive, it is to be emphasized that the U.S. does not comply with international standards. Instead, the U.S. depends on its solid civil rights tradition, which sometimes results in the omission of the protection of other values, of particular importance is the right to be free from discrimination and the principle of equality. Most importantly, the U.S. does not have a perfect record of protecting political speech in times of national crisis.[131] "A jurisprudence," as Justice Brennan correctly points out, "that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger."[132]

V. HATE SPEECH UNDER CERD, ICCPR, AND EUROPEAN CONVENTION

A. The Prohibition of Hate Speech under the CERD

International law encourages states to introduce legislation that limits or penalizes hate speech, particularly when it incites criminal behaviour. International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[133] is the most comprehensive codification concerning the prohibition of hate speech and the eradication of racial discrimination at the international level. States under CERD are required to condemn all forms of racial discrimination and to adopt necessary measures to eradicate it.[134] The

131. Indeed, following 9/11 security concerns tightened the restrictions on "inflammatory language or potential hidden messages" that might incite terrorist activities. Donahue, *supra* note 122, at 327 n.534. Also by widespread detention of terror suspects, and exclusion of liberal Muslim leaders from entering the U.S. on the basis of their religion, the free speech discourse is restricted and alternative views as to the concept of *Jihad* is prevented to from development. *See id.* at 328.

132. William J. Brennan, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. ON HUM. RTS. 11, 14 (1988).

133. *See generally* International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), at 47, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter ICERD].

134. The notion of the elimination of racial discrimination is also covered by Articles 1 (2) and 55(c) of the United Nations Charter, Article 2 of the Universal Declaration of Human Rights and common Article 2 of both International Covenants on Human Rights. Karl Josef Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-

Contracting Parties are also required to guarantee everyone's right to equality before the law, along with various civil, political, economic, social and cultural rights.

Article 4 of the Convention is highly detailed and specific, which, *inter alia*, provides that States Parties "[s]hall declare an offence punishable by law 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 . . . ."[135] It also places a duty on states to prohibit racial organizations and to declare it an offence to participate in such associations.

To date, 173 states have become party to the Convention, which demonstrates the international consensus on the notion of the elimination of racism in general and hate speech in particular. However, there are some problematic areas that jeopardize the effectiveness of the Convention. First, the introductory paragraph of article 4 envisages that "States Parties . . . undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of . . . discrimination and, to this end, *with due regard* to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention . . . ."[136]

There exists a dispute over the meaning of the so-called 'with due regard' clause. The first school of thought, advocated by the United States, argues that States Parties are not authorized to adopt any measure which would in any way impair or limit the rights envisaged in the above-mentioned human rights instruments. The second perspective, which is mainly adopted by Canada, Austria, Italy and France, takes the position that States Parties must strike a balance between the fundamental freedoms and the duties enshrined in the Convention. Accordingly, the guarantees are not absolute, but they are subject to the limitations authorized in the relevant instruments. According to the third interpretation, which was adopted by UN Human Rights Division in Geneva 1979, States Parties may not avoid enacting legislation to implement the Convention in the name of protecting civil rights. In other words, this approach denies that the "with due regard" clause has any influence on the obligations of Contracting Parties. This view was rightly criticized on the ground that it did not take account of Article 30 of the Universal Declaration, where nothing in the declaration may be interpreted as implying for any state, group or person any

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DISCRIMINATION 21, 21 (Sandra Coliver et al., eds., 1992). It is argued that ICERD's strongly preventive and vigorous mode came as a response to the revival of anti-semitism and the then growing concern of apartheid. *See generally* Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. REV. 239 (2005).

135. ICERD, *supra* note 133, at art. 4(a).

136. *Id.* art. 4 (emphasis added).

right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.[137]

It is important to note that the effectiveness of the Convention had been weakened by a number of reservations[138] limiting the obligations of states under Article 4 by reference to the right to freedom of expression. It is arguable that while in the international sphere there is a strong will to eliminate the phenomena of discrimination and hate speech, the means to achieve this goal varies. Certain states do not want to adopt the radical solution that Article 4 provides; instead they wish to retain the discretion to determine exactly how they will implement their obligations under the Convention,[139] which to a certain extent renders the Convention toothless.

1. The Committee on the Elimination of Racial Discrimination

In order to clarify the scope and requirements of Article 4, the Committee issued General Comment VII and General Recommendation XV after the examination of country reports, declarations and the above-mentioned reservations. In General Recommendation VII, the Committee emphasized the mandatory character of article 4 and recommended States Parties to satisfy the requirements stipulated therein.[140] In General Recommendation XV, the Committee went further by noting that "States Parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response."[141]

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137. *See* Partsch, *supra* note 134, at 23-25.

138. *See* David Kretzmer, *Freedom of Speech and Racism,* 8 CARDOZO L. REV. 445, 449 (1987).

139. The United States, for instance, declared that:

> The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.

LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 254 (Oxford U. Press 1986). Likewise, the United Kingdom declared that "[i]t interprets Article 4 as requiring a party to the Convention to adopt further legislative measures . . . only in so far as it may consider . . . necessary for the attainment of the end specified in the earlier part of Article 4." NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 53 (Sijthoff & Noordhoff 2d ed. 1980).

140. Comm. on the Elimination of Racial Discrimination, Gen. Rec. 7, *Measures to Eradicate Incitement to or Acts of Discrimination*, ¶ 120, U.N. Doc. A/40/18 (1985).

141. Comm. on the Elimination of Racial Discrimination, Gen. Rec. 15, *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 2, U.N.Doc. A/48/18 (Mar. 17, 1993).

The Committee went on to note that:

> Article 4 (a) requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.[142]

The Committee, as a response to the opposition of some States Parties, very clearly emphasized "that article 4 (b) places a greater burden upon" States Parties to declare racist organizations illegal and punish participation in such organizations.[143] The Committee further pointed out that "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. . . . The citizen's exercise of this right carries special duties and responsibilities . . . ."[144]

The Committee gave strong indications that in case of a dilemma between the exercise of free speech and the right to equality and non-discrimination the balance would likely be tilted towards the latter rights.[145] The Committee reiterated this strong position in its recent and quite significant opinion concerning a communication (*The Jewish community of Oslo et al. v. Norway*)[146] submitted by the Jewish community of Oslo and Trondheim and the Norwegian Antiracist Centre. On August 19, 2000, a group, called the Bootboys, organized "a march in commemoration of the Nazi leader Rudolf Hess . . . ."[147] The march was headed by Mr. Sjolie who made the following statement: "[w]e are gathered here to honor our great hero, Rudolf Hess, for his brave attempt to save Germany and Europe from Bolshevism and Jewry during the Second World War." He went on to state that "[e]very day immigrants rob, rape and kill Norwegians, . . . our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian [values]."[148]

Mr. Sjolie was convicted under 135a of the Norwegian Penal Code, which "prohibits a person from threatening, insulting, or subjecting to hatred, persecution or contempt, any person or group of persons because of their creed, race, color or national or ethnic origin."[149] However, his conviction was

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142. *Id.* ¶ 3.

143. *Id.* ¶ 6.

144. *Id.* ¶ 4.

145. *See* Comm. on the Elimination of Racial Discrimination, Gen. Rec. 30, *Discrimination against Non-Citizens*, ¶ 2, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004).

146. Comm. on the Elimination of Racial Discrimination, Comm'n No. 30/2003, ¶ 1, U.N. Doc. CERD/C/67/D/30/2003 (Aug. 22, 2005) [hereinafter CERD No. 30].

147. *Id.* ¶ 2.1.

148. *Id.* (emphasis omitted).

149. *Id.* ¶ 2.5.

overturned by the Supreme Court on the ground that penalizing the "approval of Nazism would involve prohibiting Nazi organizations, which" then would "be incompatible with the right to freedom of speech."[150] The majority of the Court concluded that the speech "did not amount to approval of the persecution and mass extermination of the Jews, . . . " but it merely expressed support for National Socialist ideology. [151]

The Committee, in contrast, observed that while the contents of the speech were absurd, this was not relevant for assessment under Article 4. It "considers these statements to contain ideas on racial superiority or hatred" that amounted to "incitement at least to racial discrimination, if not to violence."[152] The Committee also noted that:

> [T]he principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, . . . the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. . . . '[D]ue regard' clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning . . . .[153]

The Committee concluded that the acquittal of Mr. Sjolie by the Supreme Court of Norway gave rise to violations of Articles 4 and 6 of the CERD. This opinion provides concrete guidelines for assessing whether a given speech would be compatible with article 4 of the CERD. However, the answer is not yet given as to whether criminal punishment is an appropriate way to prevent, or rather eliminate racial discrimination. It is widely held that criminal punishment or suppression of ideas may help in the short term, but it is unrealistic to expect to eliminate racism by punishing those who advocate it.[154] This question will be examined further below.

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150. *Id.* ¶ 2.7 (footnote omitted).

151. *Id.*

152. CERD No. 30, *supra* note 146, at ¶ 10.4.

153. *Id.* ¶ 10.5.

154. Partsch claims, "[t]he danger exists that the offender found guilty of a discriminatory act, far from changing his attitudes, may become even more stubborn and confirmed in his convictions. Public proceedings in a court may also, inadvertently, provide the offender with the opportunity to publicize his racist views." Partsch, *supra* note 134, at 27-8.

B. Hate Speech under the ICCPR

The right to freedom of expression is set forth in Article 19 of the International Covenant on Civil and Political Rights (ICCPR),[155] which, among other things, provides that "[e]veryone shall have the right to hold opinions without interference."[156] The articulation of the right by the United Nations is different from the expression of the European Convention; unlike the European Convention, the right, independent of the right to freedom of expression, contains the concept of holding opinions without interference. The Committee, in its General Comment 10, also highlighted that unlike the right to freedom of expression, "the right to hold opinions without interference" is not subject to any exception or restriction.[157]

Article 19 (2) protects the right to freedom of expression that includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[158] The concept of freedom of expression, in this respect, is considered to be inseparably linked with the right to freedom of information and wider than mere speech including non-verbal forms of expression.[159] The right to information, no doubt, is not only indispensable for equipping the citizen with necessary tools to participate in the democratic process of self government; but also for the effective control of public administration.[160]

1. Limitations on the Right to Freedom of Expression

Under the ICCPR the exercise of free speech is not absolute, for it "carries with it special duties and responsibilities."[161] As the Committee stressed, the scope of the individual's right is determined by the interplay between freedom of expression and legitimate limitations or restrictions.[162]

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155. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

156. *Id.* art. 19.

157. Hum. Rts. Comm., *General Comment No. 10: Freedom of Expression (Art. 19)*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (Jun. 29, 1983) [hereinafter *Expression*].

158. ICCPR, *supra* note 155, at art. 19(2).

159. *See* David Feldman, *Freedom of Expression*, *in* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 391, 394 (David Harris & Sarah Joseph eds., Clarendon Press 1995).

160. LOUKIS G. LOUCAIDES, *The Right to Information*, *in* ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS 3, 20 (Martinus Nijhoff Pub. 1995); *see also* JAMES MADISON, THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., Harper & Bros. 1988).

161. ICCPR, *supra* note 155, at art. 19(3).

162. *See Expression*, *supra* note 157, at ¶ 2.

As stated earlier, national authorities, under the pretext of restricting the extreme forms of speech, might abuse their authority to suppress political dissidents. Having this consideration in mind, the Committee also expressed the view that

> when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. . . . [T]he restrictions must be "provided by law"; they may only be imposed for one of the purposes set out . . . and they must be justified as being "necessary" for that State party for one of those purposes.[163]

The enumerated restrictions should thus be read narrowly. For instance, in *Tae Hoon Park v. the Republic of Korea,* the Committee rejected the vaguely formulated defence of national security, holding that the State Party had failed to specify the precise nature of the threat. The Committee noted that "freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification."[164]

2. Article 20 of the ICCPR: A Specific Restriction

Under the ICCPR, freedom of expression may also be limited by invoking Article 20 of the Covenant, which requires States Parties to prohibit by law any "propaganda for war" and "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence . . . ."[165] The necessity for implementing this article was subjected to controversy by States Parties. Indeed, during the drafting of this article some states expressed their concern about the adoption of such an article on the ground that it may lead to abuse and have a detrimental impact upon the right to freedom of expression. They argued that legislation would not be an effective method of dealing with the problem of national, racial, religious hostility, and that if propaganda for war or advocacy of hatred posed a serious threat to public peace, Article 19 (3) could be invoked. Advocates of the article particularly emphasized the detrimental effect of propaganda and hate speech that played an important role in the escalation of fascist ideology.[166]

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163. *Id.* ¶ 4.

164. Tae Hoon Park v. Rep. of Korea, Comm'n No. 628/1995, ¶ 10.3, U.N. Doc. CCPR/C/64/D/628/1995 (Nov. 3, 1998).

165. ICCPR, *supra* note 155, at art. 20.

166. Ineke Boerefijn and Joana Oyediran, *Article 20 of the international Covenant on Civil and Political Rights, in* STRIKING A BALANCE, HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 29, 29 (Sandra Coliver et al., eds., 1992); *see* Dominic McGoldrick & Thérèse O'Donnell, *Hate-speech Laws: Consistency with National and International Human Rights Law,* 18 LEGAL STUD. 453, 471 (1998).

The Committee, in this regard, declared that the "prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities."[167] The Committee further noted that the "provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter."[168]

The jurisprudence of the Committee, nevertheless, provides only limited clarification as to the relationship between Articles 19 and 20. The case of *Faurisson v. France*[169] is an important example wherein the Committee clarified its position with respect to speech that involves Holocaust-denial. In this case, the author (Mr. Faurisson) in an interview expressed his personal conviction that there had been no homicidal gas chambers for the extermination of Jews in Nazi concentration camps. The conviction of the author was based on the Gayssot Act, which made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter. The Committee firstly examined the legitimacy of the restriction and concluded that the restriction satisfied the principle of legality.[170] The next step was to determine whether or not the restriction was imposed for a legitimate purpose. The Committee observed that the author's statements, when read in their full context, "were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear in an atmosphere of anti-semitism."[171] The final test was whether the restriction was necessary for the aim. The argument of the French government, that the revisionist discourse was a vehicle for the dissemination of anti-Semitic views and that the restriction was adapted as a measure against racism and anti-Semitism was ultimately upheld by the Committee. The Committee accordingly held that the restriction on the applicant's right to freedom of expression was necessary within the meaning of the Covenant. The Committee unfortunately neither elaborated upon the difficult relationship between freedom of expression and the need to protect society from racism, anti-Semitism, xenophobia and other ills, nor discussed whether or not

167. Hum. Rts. Comm., Gen. Comment 11, *Article 20*, ¶ 2, U.N. Doc. HRI/GEN/Rev. 3 (1983).

168. *Id.* Today, the right to self-determination is asserted by Palestinians, Tibetans and Kashmiri, East Timorese, Puerto Ricans, Zulus, Kurds and by many other indigenous and racial groups. The exclusion of the advocacy of self-determination from the prohibition requirement does not carry a practical value, particularly given that the scope and implications of the right to self-determination is vague and controversial in international law. *See* Robert McCorquodale, *Self-Determination: a Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 857-885 (1994).

169. Faurisson v. France, 115 I.L.R. 356, ¶ 9.5 (U.N. Hum. Rts. Comm. 1996).

170. *Id.*

171. *Id.* ¶ 9.6.

Mr. Faurisson's statements could have been considered as "incitement" within the meaning of article 20 (2).[172]

In the case of *J.R.T. and the W.G. Party v. Canada*,[173] in which Article 20 was directly invoked, a political party (W.G. Party) wanted to attract membership and promote the party's policies via tape-recorded messages that anybody could listen to simply by dialing a number. The messages were meant to warn any caller of "the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles."[174] Although the author claimed that his right to freedom of expression was curtailed, the Human Rights Committee found the application inadmissible on the ground that the opinions that the applicant sought to disseminate through the telephone system obviously constituted the advocacy of racial or religious hatred, which Canada had an obligation under Article 20 (2) of the Covenant to prohibit.[175] The decision of the Committee, although clearly indicating that Article 20 can legitimately be invoked for restricting the right to freedom of expression and that states are obliged to ban speech that incites hatred, does not provide a solid rationale for the justification as to how Article 20 is to be invoked in the face of hate speech.

Similarly, in *Ross v. Canada*,[176] a teacher, who published anti-Semitic tracts outside the classroom, was disciplined by being transferred to a non-teaching position. The restrictions imposed were held not to violate Article 19, as they were grounded upon the "purpose of protecting the 'rights or reputations' of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance."[177] The Committee, citing its *Faurisson* decision, briefly touched upon the nexus between Articles 19 and 20, noting that "[s]uch restrictions also derive support from the principles reflected in art 20(2) of the covenant."[178] It is yet to be seen whether the Committee will further elaborate upon the said nexus in a concrete fashion.

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172. *Id.* For such a discussion, though not in detail, *see* the concurring opinion of Elizabeth Evatt, David Kretzmer, Eckart Klein and Rajsoomer Lallah.

173. Hum. Rts. Comm., Comm'n No. 104/1981, *J.R.T. & the W.G. Party v. Canada*, ¶ 1, U.N. Doc. CCPR/C/OP/2 at 25 (Apr. 6, 1983).

174. *Id.* ¶ 2.

175. *Id.* ¶ 8(b).

176. Hum. Rts. Comm., Comm'n No. 736/1997, *Ross v. Canada*, ¶ 11.5, U.N. Doc. CCPR/C/70/D/736/1997 (Oct. 18, 2000).

177. *Id.*

178. *Id.*

C. Hate Speech under the European Convention

1. The Right to Freedom of Expression & its Limitations under the European Convention

Unlike the approach adopted by the drafters of the First Amendment to the US Constitution, the European tradition does not regard freedom of expression as an absolute value. As can be observed from the case law, the system acknowledges certain limitations to the right of freedom of expression as envisaged under Article 10 (2).[179] Yet, within the limitations hate speech is not enlisted as a specific category.[180] It is therefore important to understand the underlying principles of the Convention system to determine how and when speech can be restricted. The Convention[181] sets out restrictions for the interests of national security, territorial integrity, for the protection of public order, health, morals, or for the protection of the rights and freedoms of others. Restrictions should be imposed for specific aims that are provided by law; and they should be proportionate and necessary in a democratic society.[182]

In the *Observer and Guardian v. United Kingdom,* the Court held that, "Freedom of expression . . . is subject to a number of exceptions which . . . must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[183] Similarly, in the *Sunday Times* case, the court emphasized that the right to freedom of expression is the rule and its limitations are the exceptions.[184] Also the right was not to be balanced with the competing principles, but merely to be subjected to narrowly construed limitations.[185] To this end, the Court examines whether national authorities limited the right reasonably, carefully and in good faith; and whether a given restriction was proportionate and justified by convincing reasons.[186] Strasbourg organs established certain criteria for determining the legitimacy of a limitation imposed by national authorities. For instance, the expression "prescribed by law" meant

179. *See* Mahoney & Early, *supra* note 4, at 109.

180. DONNA GOMIEN, DAVID HARRIS & LEO ZWAAK, LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 273 (Council of Eur. Pub. 1999).

181. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1 *et seq.*, Nov. 4, 1950, 213 U.N.T.S. 222.

182. CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS 278 (Oxford U. Press 3d ed., 2002).

183. Observer and Guardian v. United Kingdom, 14 Eur. Ct. H.R. 153, ¶ 59 (1992).

184. Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, ¶ 65 (1979).

185. *Id.*; *see also* Boyle, Freedom, *supra* note 8, at 2.

186. STEVEN GREER, THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14 (Council of Eur. Pub 1997).

that the interference should have a legal basis[187] and that domestic law should also be compatible with the minimum requirements of the rule of law.[188] The quality that any legal norm should possess, be it in a written or unwritten form, was specified in the *Sunday Times*[189] judgment:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct . . . .[190]

As to the legitimate aim requirement, the list of legitimate aims set forth in Article 10(2) is exhaustive, not illustrative. State Parties must not only restrict the right for the enumerated purposes, but must also take concrete steps directed towards the realization of the aim for which the right to freedom of expression was limited.[191] Likewise, the concept of democratic necessity implies that the interference with the exercise of freedom of expression corresponds to a pressing social need and is proportionate to the legitimate aim pursued.[192]

2. The Doctrine of Margin of Appreciation

The role of the European Court is subsidiary to that of States Parties to identify a given threat and consequently restrict a right. This implies that the national authorities, "[b]y reason of their direct and continuous contact with the pressing needs of the moment, . . . "[193] enjoy certain discretion in determining a need for the restriction of a convention right. This discretion is termed as "margin of appreciation," a doctrine that was established by the Strasbourg organs, the application of which will differ depending on the category of speech and protected interests.[194] The doctrine of margin of appreciation, however, does

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187. As noted earlier, Strasbourg Organs accept the legitimacy of the Holocaust denial laws. Indeed, although there have been a number of challenges to Holocaust denial laws before the European Court, they were rejected and not granted protection under Article 10 of the Convention. *See* Case of Lehideux and Isorni v. France, Eur. Ct. H.R. 55/1997/839/1045 art. I(B) (1998).

188. Mahoney & Early, *supra* note 4, at 113.

189. Sunday Times, 2 Eur. Ct. H.R. 245, ¶ 49.

190. *Id.*

191. *See* GOMIEN, *supra* note 180, at 115.

192. Olsson v. Sweden, 17 Eur. Ct. H.R. 134, ¶¶ 67-68 (1988).

193. Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (ser. A) ¶ 207 (1978).

194. For a comprehensive analysis of the doctrine *see* HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 1 (Martinus Nijhoff Pub. 1996). For the evolution and specific applications of the doctrine *see* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 1 (Intersentia 2002); Onder Bakircioglu,

not grant the national authorities an uncontrolled power, i.e., despite the subsidiary role of the Court, margin of appreciation goes hand in hand with European supervision.[195] The European Court, in other words, "is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a 'restriction' . . . " is compatible with the rights guaranteed by the Convention.[196] Such an evaluation unquestionably considers whether national authorities exercised their discretion in good faith and in accordance with the letter and spirit of the Convention.[197]

It must be stressed that international supervision over national discretion provides a valuable tool in preventing undue suppression of free speech. At the European level, the doctrine of margin of appreciation, although not free from problems,[198] serves an important purpose. On the one hand, the system is based on the assumption that the needs of a given country can best be known by its national authorities, on the other, it takes into account the potential dangers of an unlimited domestic margin.

3. Limitations Based on Hate Speech

As noted earlier, the European Convention does not specifically prohibit hate speech. The victims of hate speech cannot invoke the non-discrimination clause prescribed in Article 14 of the Convention either; for unlike the ICCPR, the non-discrimination clause under the European Convention is not free standing. In other words, Article 14 prohibits discrimination in connection with the enjoyment of other substantive rights set forth in the Convention. Although Protocol 12 to the Convention is not parasitic and does not require claims of discrimination attached to other substantive rights, it does not prohibit discrimination by private parties. Therefore, this clause does not provide sufficient means to challenge hate speech effectively.

The European Commission in a number of decisions invoked Article 17 and Article 14 of the Convention to allow governments to prohibit and prosecute people who exercise their right to freedom of expression or association with the aim of destroying other rights. For instance, in *Glimmerveen & Hagenbeek*,[199] the distribution of racist leaflets was considered to be beyond the final limit of the protected expression, and hence the application was declared manifestly ill-

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The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases, 8 GERMAN L.J. 711 (2007).

195. Handyside v. United Kingdom, 1 Eur. Ct. H.R. 737, ¶ 49 (1976).

196. *Id.* (footnote omitted); *see also* OVEY & WHITE, *supra* note 182, at 285-86.

197. Bakircioglu, *supra* note 194, at 718.

198. For the complications of the doctrine *see id.*; *see also* Yves Winisdoerffer, *Margin of Appreciation and Article 1 of Protocol No.1*, 19 HUM. RTS. J. 18, 20 (1998).

199. 4 Eur. Ct. H.R. 260 (1979).

founded. Similarly, in *H., W., P. and K.*[200] it was held that "National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17."[201]

The case of *Garaudy*[202] is also quite illustrative of the strict approach of the European Court towards the revisionist theories that deny the existence of crimes against humanity. In that case, the applicant, who was the writer of the book, *The Founding Myths of Modern Israel*, was convicted of disputing the existence of crimes against humanity, racial defamation of a group of people, the Jewish community, and inciting racial hatred. The applicant, *inter alia*, complained under Article 10 of the European Convention that his right to freedom of expression was violated. The Court, however, decided that the case was inadmissible, for it fell into the category of prohibited aims under Article 17 of the Convention. The Court noted that:

> [D]enying the reality of clearly established historical facts, such as the Holocaust . . . does not constitute historical research akin to a quest for the truth. . . . [T]he real purpose [is] to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.[203]

This judgment clearly reflects the underlying philosophy of the European system in which free speech is not regarded as an end in itself, but one of the important tools for the establishment of democratic societies. Perhaps the most significant case highlighting such philosophy is *Jersild v. Denmark*,[204] where the conviction of a journalist, for aiding and abetting the dissemination of racist views in a televised interview that was conducted with the members of an extreme right-wing group called the Greenjackets, was considered to violate the right to freedom of expression. In the interview the members of the racist group made abusive and derogatory remarks about immigrants and ethnic groups. While the interview was edited down to a few minutes, some of these racist remarks were retained and broadcasted. The programme was introduced by addressing a discussion about racism in the country and the motives behind such

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200. B.H., M.W., H.P. and G.K. v. Austria, App. No. 12774/87, Eur. Comm'n H.R. Dec. & Rep. 62 (1989).

201. *Id.* at 216 (parenthetical omitted).

202. Garaudy v. France, App. No. 65831/01 (2003).

203. *Id.* at 23.

204. Jersild v. Denmark, App. No. 15890/89 (1994).

a reality. Consequently, three members of the group were convicted of making racist statements that violated the Danish Penal Code and the journalist and editor of the programme were convicted for complicity in making the statements public.

The Court firstly determined that the interference with the applicant's freedom of expression had the legitimate aim of protecting the rights and reputations of others. Furthermore, it held among others: (a) that although it was not within its mandate to determine the nature of Denmark's responsibilities under Article 4 of CERD to punish the dissemination of racist views, Article 10 did not run counter to Denmark's obligations under CERD; (b) that it was not for the courts to determine what technique of reporting should be adopted by journalists and that the programme in fact did not intend to disseminate racist views, rather it sought to address the problem of racism which was of great public concern at the time; (c) that the programme was a part of a serious news programme aimed at a well-educated audience; (d) that the press is vital for the proper functioning of democratic societies, which should be allowed to play its role as a "public watchdog;" (f) that although the crude statements did not enjoy the protection of Article 10, the conviction of the journalist was not justified, since it was not his intention to disseminate racist views, but to inform the public about a matter of great importance; (g) that the national authorities had not convincingly established that the interference with the applicant's right to freedom of expression was necessary in a democratic society, nor were the means employed proportionate to the aim pursued; there had thus been a violation of Article 10.[205]

The decision is important for several reasons. First, it provides a general guideline, although it is not within the Court's mandate and therefore not authoritative, as to how to interpret Article 4 of CERD. The Court is very clear in not granting protection for the members of the Greenjackets group for their degrading racist remarks with no value in content; on the other hand, the Court emphasizes the importance of free media in democratic societies and grants wide protection for its contribution to discussion on matters of public concern. In doing this, the Court takes account of the surrounding circumstances as a whole, including the nature of the programme and its audience, the intention of the journalists and the role of the media in democratic societies. In other words, the Court, rather than applying a formalistic approach, takes a contextual approach in handling the matter, which is of crucial importance in striking a proper balance between the competing interests.

Following the said decision, the Danish Parliament amended the law concerning media liability, which brought the national legislation in line with the

205. *Id.* ¶¶ 30-36.

requirements of the European Convention.[206] This example highlights the role and strength of supranational authorities in affecting the legislation of States Parties as well as in fighting undue encroachments on the right to freedom of expression.

The recent case of *Norwood v. UK*[207] is another important case, where a member of the British National Party was convicted of an offence under the Public Order Act 1986 for displaying a poster that contained a photograph of the Twin Towers in flames, a crescent and star in a prohibition sign. The poster carried the words "Islam out of Britain – Protect the British People."[208] The European Court observed that making hostile comments about somebody's race or ethnicity is tantamount to criticising a person for what he or she is, which might also hold true as regards to one's religion. The Court therefore declared that the words and images contained in the poster amounted to a public attack on the entire Muslim population in the United Kingdom:

> Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.[209]

The Court's decision prudently responds to the challenges and sweeping prejudices[210] that emerged in post-September 11 era where civil liberties of minority groups are seriously threatened.[211] In sum, the European Court has so far taken a robust approach against all forms of expression that spread, promote,

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206. *See* Eur. Comm'n against Racism and Intolerance [ECRI], *Second Report on Denmark*, Strasbourg: Council of Eur. (Apr. 3, 2001).

207. Norwood v. United Kingdom, App. No. 23131/03 (2004).

208. *Id.* at 2.

209. *Id.* at 4 (citation ommitted).

210. *See* Mathew Hickley, *Most Britons Feel Threatened by Islam*, MAIL ONLINE, Aug. 25, 2006, http://www.dailymail.co.uk/news/article-402234/Most-Britons-feel-threatened-Islam.html; Lord John Stevens, *If You're a Muslim It's Your Problem*, NEWS OF THE WORLD, AUG. 13, 2006, http://notwats.blogspot.com/2006/08/if-youre-muslim-its-your-problem.html; *see also* Alison Little, *Europe Tells Britain: Don't Say 'Muslims,'* DAILY EXPRESS, July 5, 2007, http://www.express.co.uk/posts/view/12236.

211. *See* Van Bergen & Valentine, *supra* note 30, at 451-52; *see also* Cassel, *supra* note 128, at 11; Ivan Hare, *Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred*, P.L. 2006, 521 (2006).

encourage or justify hatred based on intolerance (including religious intolerance), discrimination or racism.[212]

VI. THE POTENTIAL DANGERS OF LIMITATIONS ON THE RIGHT TO FREEDOM OF EXPRESSION

Every right becomes controversial when it clashes with other interests or threatens, in one way or another, other important individual or communal interests.[213] The practical question here is not related to the necessity of restrictions, but to the nature of the restriction involved. In other words, the questions that are to be answered include to what extent a right should be restricted in a concrete case, what right should prevail over the other, and whether arbitrariness can be prevented.

There should be no doubt that exerting too much control over free speech might render the right meaningless, which could eventually lead to thought-control. In a democratic society the potential conflict between rights and freedoms should be resolved in a reasonable manner. Nevertheless, there is no ready-made or pre-defined solution to the problem at hand; in other words the exact boundaries of a limitation cannot be conclusively set beforehand. Even though judicial bodies can set certain tests, such as clear and present danger,[214] or "'imminent lawless action,"[215] these criteria are generally applied according to the political atmosphere of a given historical period. This is because in the domain of free speech, particularly when the vital interests of states are at stake, there hardly exists a strict coherence and consistency in case-law; thus one can readily observe that in politically sensitive climates courts tend to "demonstrate the least independence and greatest deference to the claims of government when national security is invoked."[216]

For instance, in *Mpaka-Nsusu v. Zaire*,[217] the Human Rights Committee found that the applicant was arbitrarily arrested and held for nearly one and a half year without trial, banished to his village of origin for an indefinite period

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212. This was reaffirmed in a recent case, where it was noted that expressions that fall into the domain of hate speech discourse do not enjoy the protection of Article 10 of the Convention. *See* Erdogan v. Turkey, App. No. 59405/00, ¶¶ 56-57 (July 6, 2006).

213. Ronald Dworkin, *We Do Not Have a Right to Liberty, in* READINGS IN SOCIAL AND POLITICAL PHILOSOPHY 184 (2d ed., Robert M. Stewart ed., Oxford U. Press 1996).

214. Schenck v. United States, 249 U.S. 47, 52 (1919).

215. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

216. Sandra Coliver, *Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 20 HUM. RTS. Q. 12, 14 (1998).

217. Hum. Rts. Comm., Comm'n No. 132/1982, *Mpaka-Nsusu v. Zaire*, at 142, U.N. Doc. Supp. No. 40 (A/41/40) (Sept. 5, 1986).

and had suffered merely for his political opinions.[218] Similarly, in *Monja Jaona v. Madagascar*,[219] the applicant, who was a candidate in the presidential elections against the incumbent president, during his campaign condemned the allegedly corrupt policies of the government, after which he was arrested and held for an unlimited period of time without any reasons being given for his arrest. The Committee again observed that the applicant merely "suffered persecution on account of his political opinions."[220]

A. Borderline Cases

Admittedly, "it is sometimes extremely difficult to draw a clear line between criticism and advocacy, or incitement, against democracy."[221] For example, in the case of *Castells v. Spain*[222] where an elected representative of an opposition party, which was generally considered to be the political branch of ETA, the Basque terrorist organization, published an article which clearly suggested that special police units were murdering people in the Basque territories with impunity. The European Court noted that while freedom of expression was not an absolute right in nature, it is of particular importance for an elected representative of the people as "[h]e represents his electorate, draws attention to their preoccupations and defends their interests."[223] The Court stated that:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[224]

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218. *Id.* ¶ 10.

219. Hum. Rts. Comm., Comm'n No. 132/1982, *Monja Jaona v. Madagascar*, ¶ 14, U.N. Doc. Supp. No. 40 (A/40/40) (Apr. 1, 1985).

220. *Id.*

221. *See* Jochen Abr. Frowein, *Incitement against Democracy as a Limitation of Freedom of Speech, in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 33, 36 (David Kretzmer et al. eds., Kluer Law Int'l. 2000).

222. Castells v. Spain, 14 Eur. Ct. H.R. 445 (ser. A) (Apr. 23, 1992).

223. *Id.* ¶ 42.

224. *Id.* ¶ 46.

Similarly, *Zana v. Turkey*[225] can also be classified as a borderline case, where the applicant, the former mayor of Diyarbakir and a principal Kurdish political leader, was convicted on the basis of a statement published in a newspaper in which he stated that: "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake . . . ."[226]

The Court reasoned that the statement could not be looked at in isolation and therefore it was necessary to take into account the context in which the statement was made. It observed that "the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time, . . . " so the interview "had to be regarded as likely to exacerbate an already explosive situation in that region."[227] Consequently, the Court, among other things, held that the penalty imposed on the applicant could reasonably be regarded as answering a pressing social need and that the reasons adduced by the national authorities are relevant and sufficient;[228] thus there had been no violation of the right to freedom of expression.

B. Proposed Solutions: The Necessity to Depend on the State and Civil Society

Freedom of speech is undoubtedly a great achievement of democratic revolutions; therefore it should never be taken for granted,[229] that is, any restriction on free speech should follow certain legal principles and safeguards.[230] Broad and vague limitations not only remove the ability of the individual to decide whether a particular course of action falls within the ambit of criminal responsibility, but it may also discourage him to carry out legally

225. Zana v. Turkey, App. No. 00018954/91, Eur. Ct. H.R. 69/1996/688/880 (Nov. 25, 1997).

226. *Id.* ¶ 12.

227. *Id.* ¶¶ 59-60.

228. *Id.* ¶¶ 58-62.

229. Chaim Herzog, *Introductory Remarks: Public Interest and Free Speech*, *in* FREE SPEECH AND NATIONAL SECURITY 3, 3 (Shimon Shetreet ed., 1990).

230. As the European Court held in *Malone*:

> [I]t would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

Malone v. The United Kingdom, App. No. 8691/79, 82 Eur. Ct. H.R. (ser. A) ¶ 68 (Aug. 2, 1984).

permitted activities. This might eventually lead to stagnation in society where citizens can no longer avail of the right to criticise their own governments.[231]

Abuse of power has always been a danger within the exercise of state power, yet in the absence of checks and balances over free speech, other crucial and competing values might be overshadowed or even destroyed. The state, therefore, should neither be merely an indifferent observer nor too intrusive over individual liberties, but should be an effective body to protect the vulnerable. Such a role can be maintained through constant checks and balances carried out by national/international judiciaries along with civil society. This argument is also consistent with the theoretical role of the state, which is, by placing itself above the conflicting parties, to secure security and peace in society.[232] This role is crucial, particularly with respect to hate speech that disrupts the targeted group's lives and violates their right to security and peaceful co-existence, which in turn might lead them to take the law into their own hands to implement their own justice against hate-mongers.[233]

Throughout history violence towards a certain group has usually predicated upon prior ideological justifications, be it in the form of hate speech or public incitement. Therefore, a responsible government that claims to be democratic should act vigilantly against the potential dangers of unleashed speech. This position not only defends the necessity to uphold the right to freedom of expression, but it further stresses the preservation of peaceful unity in society by balancing the conflicting interests properly.

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231. Kremnitzer & Ghanayim, *supra* note 6, at 154.

232. Marxist theory puts forward a challenging argument with respect to the emergence and the role of the state:

> The state . . . is by no means a power forced on society from outside: neither is it the "realization of the ethical idea," "the image and the realization of reason," as Hegel maintains. It is simply a product of society at a certain stage of evolution. It is the confession that this society has become hopelessly divided against itself, has entangled itself in irreconcilable contradictions which it is powerless to banish. In order that these contradictions, these classes with conflicting economic interests, may not annihilate themselves and society in a useless struggle, a power becomes necessary that stands apparently above society and has the function of keeping down the conflicts and maintaining "order." And this power, the outgrowth of society, but assuming supremacy over it and becoming more and more divorced from it, is the state.

See FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE 206 (Ernest Untermann trans., 1902). *Cf.* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 4-7 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1960); THOMAS HOBBES, LEVIATHAN: OR, THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL 81, 115 (A. R. Waller ed., Cambridge U. Press 1904).

233. *See* Kremnitzer & Ghanayim, *supra* note 6, at 164.

C. The "Broken Window" Theory

It is established that most hate crimes are opportunistic, that is, not everyone who bears animus against a segment of society or individual will say or do something in confrontational situations. The circumstances of each case determine the deed or speech; i.e., it depends on the quantity and/or identity of the perpetrator(s) and the vulnerability of the victim in a given scenario.[234] It is therefore arguable that the state should take positive measures to reduce the opportunities for both hate speech and crimes from being committed.

The "broken window theory," which was formulated within the discipline of criminology to create safer neighbourhoods, is quite relevant in this context. Researchers studying urban decay and crime attempted to discover why the rate of crime is noticeably lower in some neighbourhoods than in others, even though the economic or demographic characteristics of the neighbourhoods were similar. To this end, they conducted an experiment in the South Bronx, New York where an expensive and undamaged car was parked and left unguarded for a long period of time. It was later observed that the car remained fully intact, yet when researchers broke a little window on the side, the car had been turned upside down and utterly destroyed within a few hours.[235]

Following further research the "broken window theory" was developed and recognized to suggest that evidence of decay, such as broken windows, accumulated trash, undeleted graffiti in the neighbourhood, encourages the criminals to commit further acts of vandalism within the community. This makes the inhabitants more vulnerable to such acts and therefore unwilling to take necessary measures to maintain or restore order, which in turn increases the level of crime considerably. The "broken window" theory implies that when the maintenance of law and order is neglected, not only criminal opportunities increase, but society becomes feeble and noticeably fearful and indifferent to the deterioration.[236]

From this perspective, the state apparatus should interfere with speech that contains the seeds of crime or serious violations of the right to equality and non-discrimination. Governments must not only change the environment where racial hatred is rooted, but they must also aim to encourage respect for the human rights and dignity of those who are regarded as the "others."[237] As much overall

234. DELGADO & STEFANCIC, *supra* note 18, at 21.

235. *See* J. Wilson and G. Kelling, *Broken Windows: The Police and Neighbourhood Safety*, 249 ATLANTIC MONTHLY 29, 32-33 (1982).

236. As one of the founders of this theory notes: "'Broken Windows' is a metaphor. It argues that just as a broken window left untended is a sign that nobody cares and leads to more damage, so disorder left untended also signifies that nobody cares and leads to fear of crime, more serious crime and urban flight and decay." Julie Samia Mair & Michael Mair, *Violence Prevention and Control Through Environmental Modifications*, 24 ANN. REV. PUB. HEALTH 209, 214 (2003).

237. Gordon, *supra* note 31, at 17.

responsibility that the government undertakes, it must be highlighted that civil society also plays a crucial role in the prevention of hate speech and crime. A society in which citizens act responsibly in order to preserve the standards that enables them to live together in peace and harmony can be seen as a society where the amount of hate speech and hate crimes are reduced dramatically.

VII. CONCLUSION

Hate-mongers do not promote liberty; rather they advocate the oppression of weaker groups, which include homosexuals, national/racial minorities and immigrants over whom they claim superiority. The content of hate speech is thus not liberating; in contrast it is oppressive and alarming given that such speech usually targets the weak that do not have proper access channels to voice their grievances or seek remedies. Experience shows that these often powerless segments of society resort to violence when they are severely deprived of the means to challenge such verbal violence. Further, hate speech might also produce its devastating effects within a very short period of time –as the Yugoslavian and Rwandan experience illustrates– where there is no possibility or time to counterbalance the speech which may imminently lead to hate crimes. It is therefore too simplistic to claim that the best cure for hate speech is more speech.

Admittedly, the restriction of hate speech does not extinguish its root causes beneath the surface; none the less one of the main functions of the law to regulate individual behaviour by attaching sanctions to untoward acts.[238] Law, in this sense, shapes the boundaries of our liberties and limits by envisaging a rule of human conduct that is deemed obligatory and binding upon all citizens. It is thus an established and accepted set of human conduct to govern the relationships between individuals with the promise of a suitable sanction for the disobedient.[239] Consider the following hypothetical case in which a man wants to kill his wife, yet avoids doing so due to his fear of criminal punishment. Perhaps on the subconscious level he harboured such a desire for many years, but the apprehension of punishment deterred him from carrying it out. In here, although the law did not cure his dreadful desire, it effectively prevented him from committing the *actus reus* element of the offence. In this vein, law is needed not to eliminate the underlying causes of hate speech, but to prevent its destructive consequences.

Similarly, slavery was abolished only a century ago. Perhaps, this ban did not extinguish the desire of some to reinstitute slavery; yet it, at least, legally eradicated such an inhuman institution. The same holds true for child

238. *See* HANS KELSEN, PURE THEORY OF LAW 320 (Max Knight trans., Univ. Ca. Press 1967).

239. *See* J. M. Coady, *Morality and the Law*, 1 UNIV. BRIT. COLUM. L. REV. 442, 442-42 (1959).

pornography, which is prohibited in most countries, including the United States. It might well be argued that some people wish to watch child pornography (which might be regarded as a form of expression), and its suppression will not eradicate the inherent problem; in contrast its banishment might hinder us from seeing what goes wrong in the society. However, a choice must be made between the conflicting values. As Baer rightly observes:

> [E]quality does not mean a formal distribution of equal weight to different perspectives regardless of their content. In speech law, the right of equality forces the law to differentiate between speech that targets powerless individuals and speech that targets powerful social groups. Equality embodies the right against disadvantage, against dominance, it is not a right based on false "neutrality". Therefore, equality requires the law to intervene when speech produces hierarchy. This stands in contrast to much liberal law, in which there exists no test of potential justifications for unequal law.[240]

Of course, it can well be argued that unless the conditions, which give rise to inequality, racism or discrimination in all its forms, are not addressed at the root, the problem would not be solved but be triggered as soon as the conditions would permit.[241] As noted earlier, this long but worthwhile process should no doubt involve serious economic, social, cultural, educational and democratic reforms as well as the promotion of responsible civil societies on the global level.

Thus, the solution does not lie in allowing any opinion, regardless of its intellectual value, in the "marketplace of ideas" where the powerful can easily "sell" their ideas at the expense of the vulnerable; but it lies in a comprehensive analysis of what causes inequality, unfair distribution of economic resources, historical grievances or other circumstances that give rise to hate and injustice. Hate speech or hate crimes are merely symptoms of a disease; thus legal regulation or control cannot cure it; however, it can be of crucial help in streamlining speech, and, to a certain extent, preventing discrimination or manifestations of racism and hate crimes. Unfortunately, today's civilization has

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240. Susanne Baer, *Violence: Dilemmas of Democracy and Law*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMORACY 92 (David Kretzmer et al. eds., 2000).

241. As Sidney Hook points out:

> I believe any people in the world, when roused to a fury of nationalistic sentiment, and convinced that some individual or group is responsible for their continued and extreme misfortune can be led to do or countenance the same things the Germans did. I believe that if conditions in the U.S. were ever to become as bad psychologically and economically as they were in Germany in the 1920s and 1930s, systematic racial persecution might break out. It could happen to the blacks, but it could happen to the Jews, or any targeted group.

DELGADO & STEFANIC, *supra* note 18, at 1.

not yet created a cure for crime, disorder, hate, wars, inequality or other major problems. We must therefore rely on the law as a tool to regulate human conduct, including speech, which might at times be a deadly weapon.