THE LIMITS OF THE FIRST AMENDMENT: PROTECTING AMERICAN CITIZENS' FREE SPEECH IN THE ERA OF THE INTERNET & THE GLOBAL MARKETPLACE OF IDEAS

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ABSTRACT

The number of countries that limit speech that would likely be protected under the US First Amendment has recently increased. On the other hand new information technology is making speech made in the United States by an American citizen accessible outside the United States, exposing the speaker to consequences for violating the free speech limitations set in international law or the domestic laws of other countries. These Americans are therefore often forced to make a difficult choice: exercise their free speech as guaranteed by the US First Amendment and expose themselves to prosecution and other legal consequences while abroad, or accept those free speech limitations to avoid the consequences of violating them.

This Article argues that the US recourse to reservation and refusal to ratify treaties that limit free speech may not be enough in today's era of globalization, information technology, and free movement of people. This approach may shelter the United States from its international human rights obligations, but it does not provide US citizens protection in countries that have incorporated these treaties into their domestic law. Also, the use of diplomacy to free American victims of such limitations is not sustainable. The Article advocates rather for the United States to adopt an international relations free speech strategy that starts from the recognition that free speech is not absolute, rather than focusing on the slippery slope argument of free speech limitation. From this recognition, the United States could lead other countries in developing better standards in defining protected and unprotected speech, and thus ensure her citizens better free speech protection overseas.

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INTRODUCTION

Today we live in an era of globalization, information technology, and free movement of people. While this era has brought many benefits, it has also, to some extent, challenged the constitutional guarantees and protection States have promised to their citizens. One of these promises is the free speech protection the US First Amendment guarantees to Americans. Today, more than ever before, Americans traveling or doing business around the world are realizing that there are limits on the extent to which they can claim protection for speech that would normally be guaranteed by the First Amendment.

Examples of this situation are numerous and diverse. The most recent case is the one of Nakoula Basseley Nakoula. In July 2012, Nakoula posted a short video on YouTube called "*The Innocence of Muslims*," which was perceived as an insult to the Prophet Muhammad.[1] This video caused violent revolt around the world,[2] and a number of countries issued arrest warrants against both Nakoula and an American Pastor, Terry Jones, for "insulting the Islamic religion, insulting the Prophet and inciting sectarian strife,"[3] all of which are punishable in countries such as Egypt by the death penalty.[4] US officials and First Amendment advocates, while condemning the message in this video, mostly agree that the First Amendment nevertheless protects it.[5] The same argument was used when YouTube and its parent company,

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[1] Michael Isikoff, *Man Behind Anti-Islam Film Reportedly is Egyptian-born Ex-con*, NBC NEWS (Sept. 13, 2012), http://worldnews.nbcnews.com/_news/2012/09/13/13842406-man-behind-anti-islam-film-reportedly-is-egyptian-born-ex-con.

[2] Rick Gladstone, *Anti-American Protests Flare Beyond the Mideast*, N.Y. TIMES (Sept. 14, 2012), http://www.nytimes.com/2012/09/15/world/middleeast/anti-american-protests-over-film-enter-4th-day.html?r=2&hp&pagewanted=all&.

[3] Eyder Peralta, *Egypt Issues Arrest Warrant for Americans Behind Muhammad Film*, NAT'L PUB. RADIO (Sept. 18, 2012), http://www.npr.org/blogs/thetwo-way/2012/09/18/161350640/egypt-issues-arrest-warrant-for-americans-behind-muhammad-film accessed.

[4] Sarah El Deeb, *"Innocence of Muslims" Protests: Egypt Issues Arrest Warrants for Terry Jones, 7 Coptic Christians*, HUFFINGTON POST (Sept. 18, 2012), http://www.huffingtonpost.com/2012/09/18/innocence-of-muslims-egypt-terry-jones_n_1893315.html.

[5] *See Calif. Man Behind Anti-Muslim Video Ordered Jailed*, FIRST AMENDMENT CENTER (Sept. 28, 2012), http://www.firstamendmentcenter.org/calif-man-behind-anti-muslim-video-ordered-jailed; Rich Lowry, *The Benghazi patsy*, POLITICO (May 9, 2013), http://www.politico.com/story/2013/05/the-benghazi-patsy-91101.html. President Obama spoke before UN General Assembly, where he agreed that Nakoula's video "must be rejected by all who respect our common humanity," but also emphasized that Nakoula's speech is protected in the US:

> We do not do so because we support hateful speech, but because our Founders understood that without such protections, the capacity of each individual to express their own views, and practice their own faith, may be threatened. We do so because in a diverse society, efforts to restrict speech can become a tool to silence critics, or oppress minorities. We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression, it is more speech – the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.

Barack Obama, President of the United States, Remarks by the President to the UN General Assembly (Sept. 25, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly.

Google, refused to take down this video on the request of the White House and other foreign governments.[6]

In May 2010, Peter Erlinder, an American law professor, was arrested in Rwanda for publications and presentations he had made in the United States, which, according to Rwandan law, constituted the crime of genocide denial.[7] In 2003, a British court condemned Rachel Ehrenfeld for libel. In her book "Funding Evil," Ehrenfeld, a US citizen based in New York, had alleged that Khalid Bin Mahfouz had financed al Qaeda. Although this book had been published in the United States and never been released or marketed internationally, Khalid Bin Mahfouz sued her in the United Kingdom for libel. Her refusal to acknowledge the jurisdiction of the British court resulted in the latter awarding a default judgment against her.[8]

In 2001, an American company, Yahoo! Inc., unsuccessfully refused to implement the Tribunal de Grande Instance de Paris' order to eliminate French citizens' access to its Nazi memorabilia online auction site.[9] What do all these cases have in common? In each, the parties involved unsuccessfully claimed that the First Amendment protected their speech

The above cases are more than just a problem of jurisdiction: they illustrate the growing challenge that American free speech exceptionalism is facing today.[10] This challenge results from a combination of two key factors. The first factor is an increase in both international law and the domestic law of different countries around the world limiting speech that would likely be protected under the US First Amendment. Second, new information technology is making speech made in the United States by an American citizen accessible outside the United States, and therefore, is exposing the speaker to consequences for

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[6] *See* ANDREW MURRAY, INFORMATION TECHNOLOGY LAW: THE LAW AND SOCIETY 161 (2d ed. 2010).

[7] Josh Kron & Jeffrey Gettleman, *American Lawyer for Opposition Figure Is Arrested in Rwanda*, N.Y. TIMES (May 28, 2010), http://www.nytimes.com/2010/05/29/world/africa/29rwanda.html; *see also* Peter Erlinder, Statement before the Rwandan High Court of Gasabo, Prosecutor v. Erlinder, (June 7, 2010) (No. RPGR0678/10/Kgl/NM), *available at* http://www.genocidewatch.org/images/Rwanda_10_06_07_Court_Decision_for_Carl_Peter_Erlinder.doc. ("The prosecution must prove that his publications constitute any crime because all of them are protected by free speech guarantees under the U.S. constitution. . . .").

[8] Ehrenfeld v. Mahfouz, 489 F.3d 542, 545 (2d Cir. 2007).

[9] Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1202 (9th Cir. 2006).

[10] *See* Frederick Schauer, *The Exceptional First Amendment* (Harvard University Kennedy School of Government, Working Paper No. RWP05-021, 2005).

violating the free speech limitations set in international law or the domestic laws of other countries. Americans traveling or doing business around the world are therefore forced to make a difficult choice: exercise their free speech as guaranteed by the US First Amendment and expose themselves to prosecution and other legal consequences while abroad, or accept those free speech limitations to avoid the consequences of violating them.

This Article tries to highlight this problem by explaining its origins and proposing solutions to limit its impact. In highlighting this problem, this Article attempts to show how the United States is surrounded by countries and international treaties that not only limit free speech beyond the parameters accepted by the US Constitution but also punish some speech that the US Constitution protects. In explaining the origins of this problem, this Article explores how the US cultural symbolism surrounding free speech, as well as its argument that free speech limitations are a slippery slope, have been hard to sell to other liberal democracies, especially in Europe, because of Europe's traumatizing experience with Nazi propaganda during the Holocaust.

Finally, in trying to find a solution to this problem, this Article argues that the US recourse to reservation and refusal to ratify treaties that limit free speech may not be enough in today's era of globalization, information technology, and free movement of people. This approach may shelter the United States from its international human rights obligations, but it does not provide US citizens protection in countries that have incorporated these treaties into their domestic law. This Article further advocates for the United States to adopt a free speech international relations strategy that starts from the recognition that free speech is not absolute, rather than focusing on the slippery slope argument of free speech limitation. From this recognition, the United States could lead other countries in developing better standards in defining protected and unprotected speech, and thus ensure its citizens better free speech protection overseas.

I. THE WORLD AROUND THE UNITED STATES: LIMITATIONS ON FREE SPEECH & THE CRIMINALIZATION OF HATE & EXTREMIST SPEECH

The United States' commitment to the First Amendment protects some forms of speech that may be punishable in other countries. For example, in the United States, extremist or hate speech that triggers an incitement to violence, as well as speech that falls short of "fighting

words," is tolerated.[11] However, the majority of countries around the world, and even international law, seem to be unanimous in criminalizing such speech. This section will examine some national and international laws criminalizing hate and extremist speech, and national and international courts' rejections of America's First Amendment arguments.

A. NATIONAL & INTERNATIONAL LAWS CRIMINALIZING HATE & EXTREMIST SPEECH

1. National Laws

A number of countries around the world punish hate and extremist speech. These are not simply non-democratic countries that do not care about the freedoms and human rights of their citizens. These actually include liberal democracies such as Canada, France, Germany, Denmark, South Africa, and many others.

In Canada, the Criminal Code, the federal Canadian Human Rights Act,[12] and human rights legislation in all provincial jurisdictions[13] prohibit hate speech. The Criminal Code of Canada punishes any speech that advocates or promotes genocide,[14] incites hatred against any identifiable group,[15] or communicates or promotes hatred against any identifiable group.[16] Under Canadian law, the offence of inciting or promoting hatred does not require proof that the communication caused actual hatred. As the Canadian Supreme Court has acknowledged:

> Proving a causal link between the communicated message and hatred of an identifiable group is difficult. The intention of Parliament was

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[11] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); Brandenburg v. Ohio, 395 U. S. 446, 447 (1969).

[12] *See* Canadian Human Rights Act, 1977, *reprinted in* R.S.C. 1985, c. H-6.

[13] In Alberta, Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14 § 3; in British Columbia, Human Rights Code, R.S.B.C. 1996, c. 210 art. 7; in in the Northwest Territories, Consolidation of Human Rights Act, R.S.N.W.T. 2002, c. 18, art. 13; in Saskatchewan, Saskatchewan Human Rights Code, R.S.S. 1979, c. S-24.1, art. 14.

[14] "Everyone who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." Canadian Criminal Code, R.S.C. 1985, c. C-46, art. 318(1).

[15] "Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of. . . ." *Id.* at art. 319(1).

[16] "Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of. . . ." *Id.* at art. 319(2).

> to prevent the risk of serious harm and not merely to target actual harm caused. The risk of hatred caused by hate propaganda is very real. This is the harm that justifies prosecuting individuals under this section of the Criminal Code.[17]

Canadian criminal law also does not require that the message be offensive. In determining whether the speech conveyed hatred, the judge takes into consideration the speech's audience and its social and historical context,[18] the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed.[19]

For hate and extremist speech that is posted on the Internet, Canadian law requires the person who posted it to appear, or be represented, before the Canadian court. "If the person who posted the material does not appear for the proceedings, the court may proceed ex parte to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared."[20] This means that an American citizen who distributes online hate speech in Canada can still be punished by a Canadian court even if he or she does not appear before the Canadian court.

In Germany, section 130 of Penal Code (*Strafgesetzbuch*) criminalizes four categories of speech. Criminalized speech is speech that (1) "incites hatred against segments of the population or call for violent or arbitrary measures against them;"[21] (2) "assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population;"[22] (3) produces or disseminates hate speech;[23] and (4) "publicly or in a meeting approves of, denies or renders

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[17] Mugesera v. Canada [2005], 2 S.C.R. 100, 102 (Can.).

[18] *Id.* at para. 103.

[19] *Id.* at para. 106.

[20] Canadian Criminal Code, R.S.C. 1985, c. C-46, art. 320.1(4).

[21] STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, REICHGESETZBLATT [RGBL.] 1, § 130, para. 3322, sentence 1 (Ger.).

[22] *Id.*

[23] Whoever: 1) with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group: a) disseminates them; b) publicly displays, posts, presents, or otherwise makes them accessible; c) offers, gives or makes accessible to a person under eighteen years; or (d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or 2) disseminates a

harmless" the Holocaust, or other acts committed by the Nazi regime during World War II.[24]

The German Federal Court of Justice (*Bundesgerichtshof*) ruled in the *Fredrick Töben* case that German law on hate speech applies even to foreigners who post extremist and hate speech on the Internet.[25] Although Töben was of Australian citizenship and information posted on his revisionist website was written in English and hosted by the Australian Adelaide Institute, he was arrested while traveling in Germany and tried there for spreading "Auschwitz lies," a crime punishable under the German Penal Code.[26] In the first instance, the lower court found that German law could not be applied to electronic publications on the Internet when the web server was located outside Germany, even though the hate speech was accessible in Germany. The *Bundesgerichtshof*, however, overturned this decision by ruling that the places where the consequences of a criminal act have taken effect should also be considered part of the *locus delicti*. For the *Bundesgerichtshof*, although the publications concerned were placed on a foreign web server by a foreigner, the criminal act of inciting the public nevertheless had consequences in Germany because the contents were available to the German public.[27]

In France also, criminal law punishes public speech, or any form of writing, pictures, or drawing, that incites hatred or discrimination based on ethnicity, nationality, or religion.[28] Distribution of such speech

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presentation of the content indicated in number 1 by radio, shall be punished with imprisonment for not more than three years or a fine.

Id. at sentence 2.

[24] *Id.* at sentence 3.

[25] Bundesgerichthof [BGH] [Federal Court of Justice] Dec. 12, 2000, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 184, 2000 (Ger.), *available at* http://www.jurpc.de/rechtspr/20010038.htm.

[26] *See* Yulia A. Timofeeva, *Worldwide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis*, 20 CONN. J. INT'L L. 199, 206–07, n. 54 (2005).

[27] ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] [Federal High Court] Dec. 12, 2000, 46 BGHST 212 (Ger.), *available at* http://www.servat.unibe.ch/dfr/bs046212.html#Rn039; *see also* Tom Scheirs, *German Court Outlaws Foreign Nazi Websites*, INT'L ENFORCEMENT LAW REPORTER (Vol. 17, Issue 3, Mar. 2001).

[28] Seront punis comme complices d'une action qualifiée crime ou délit ceux qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au

regard du public, soit par tout moyen de communication au public par voie électronique . . . .

Loi 2000-916 du 29 juillet 1881 sur la liberté de la presse [Law 2000-916 of July 29, 1881 on the Freedom of the Press] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 29, 2014, art. 23.

Ceux qui, par l'un des moyens énoncés à l'article 23, auront provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, seront punis d'un an d'emprisonnement et de 45000 euros d'amende ou de l'une de ces deux peines seulement. Seront punis des peines prévues à l'alinéa précédent ceux qui, par ces mêmes moyens, auront provoqué à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap ou auront provoqué, à l'égard des mêmes personnes, aux discriminations prévues par les articles 225-2 et 432-7 du code pénal . . . .

Id. at art. 24.

La diffamation commise envers les particuliers par l'un des moyens énoncés en l'article 23 sera punie d'une amende de 12000 euros. La diffamation commise par les mêmes moyens envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée sera punie . . . .

Id. at art. 31.

L'injure commise par les mêmes moyens envers les corps ou les personnes désignés par les articles 30 et 31 de la présente loi sera punie d'une amende de 12.000 euros. L'injure commise de la même manière envers les particuliers, lorsqu'elle n'aura pas été précédée de provocations, sera punie d'une amende de 12.000 euros. Sera punie de six mois d'emprisonnement et de 22.500 euros d'amende l'injure commise, dans les conditions prévues à l'alinéa précédent, envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée. Sera punie des peines prévues à l'alinéa précédent l'injure commise dans les mêmes conditions envers une personne ou un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap.

Id. at art. 33.

La diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l'amende prévue pour les contraventions de la 4e classe.

CODE PÉNAL [C. PÉN.] art. R624-3 (Fr.).

L'injure non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l'amende prévue pour les contraventions de la 4e classe.

Id. at art. R624-4.

La provocation non publique à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l'amende prévue pour les contraventions de la 5e classe.

or materials is also punishable.[29] Denying the Holocaust and other crimes committed by the Nazi regime during World War II, as well as wearing or exhibiting uniforms, insignia, or emblems similar to those used by organizations or persons responsible for crimes against humanity, are punishable under French criminal law.[30] French criminal law also extends to hate speech on websites that, although not hosted in France, can still be accessed in France.[31]

The United Kingdom follows the Canadian, French, and German approach. UK law punishes:

> (1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby . . . [or] (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.[32]

Id. at art. R625-7.

[29] CODE PÉNAL [C. PÉN.] art. R624 (Fr.)

[30] Seront punis des peines prévues par le sixième alinéa de l'article 24 ceux qui auront contesté, par un des moyens énoncés à l'article 23, l'existence d'un ou plusieurs crimes contre l'humanité tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale . . . .

Loi 2000-916 du 29 juillet 1881 sur la liberté de la presse [Law 2000-916 of July 29, 1881 on the Freedom of the Press] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 29, 2014, art. 24.

> Est puni de l'amende prévue pour les contraventions de la 5e classe le fait, sauf pour les besoins d'un film, d'un spectacle ou d'une exposition comportant une évocation historique, de porter ou d'exhiber en public un uniforme, un insigne ou un emblème rappelant les uniformes, les insignes ou les emblèmes qui ont été portés ou exhibés soit par les membres d'une organisation déclarée criminelle en application de l'article 9 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945, soit par une personne reconnue coupable par une juridiction française ou internationale d'un ou plusieurs crimes contre l'humanité prévus par les articles 211-1 à 212-3 ou mentionnés par la loi n° 64-1326 du 26 décembre 1964.

CODE PÉNAL [C. PÉN.] art. R645-1 (Fr.).

[31] Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisémitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001).

[32] Public Order Act, 1986, c. 64 (Eng.)

UK law also punishes the publication or distribution of written material; public performance of a play; distribution, showing, or playing of a recording; broadcasting or including a program of hate materials in cable program service; and possession of racially inflammatory material.[33] Like France and Canada, the United Kingdom also punishes hate speech and extremist speech published on the Internet as long as it is accessible in the United Kingdom.[34]

In addition to the countries studied above, a significant number of countries around the world also criminalize defamation and hate speech; these include Australia,[35] Belgium,[36] Bosnia-Herzegovina,[37] Brazil,[38] Cuba,[39] Ecuador,[40] Croatia,[41] Denmark,[42] Iceland,[43] Israel,[44] Jordan,[45] Rwanda,[46] Singapore,[47] and South Africa.[48]

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[33] *Id.*

[34] *See* Regina v. Sheppard & Whittle, [2010] EWCA (Crim) 65, 1 W.L.R. 2279, [22] (Eng.).

[35] *Racial Discrimination Act 1975*, (Cth) pt II.A s 18B (Austl.).

[36] Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie. [Law on the Punishment of Certain Acts Inspired by Racism or Xenophobia] of July 30, 1981, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], August 8, 1981; Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale [Law on Punishing the Denial, Minimization, Justification, or Approval of the Genocide Perpetrated by the German National Socialist Regime During the Second World War] of Mar. 23, 1995, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], May 7, 1999.

[37] (1) Whoever incites and inflames national, racial or religious hatred, discord or hostility, or spreads ideas of superiority of one race or nation over another, shall be punished by a fine or imprisonment for a term not exceeding two years. (2) Whoever commits the offence referred to in Paragraph 1 of this Article by employing coercion, abuse, endangering the safety , exposing national, ethnic or religious symbols to derision, damaging other people's belongings, desecrating monuments or graves, shall be punished by imprisonment for a term between six months and five years. (3) If the offence referred to in Paragraphs 1 and 2 of this Article resulted in riots, violence or any other serious consequence to the joined life of the constituent peoples and others who live in Republika Srpska, the perpetrator shall be punished by imprisonment for a term between one and eight years. (4) Materials and items containing messages referred to in Paragraph 1 of this Article and equipment for their production, duplication or distribution shall be forfeited.

Criminal Code of the Federation of Bosnia and Herzegovina, OG 43/98 [General Part] Art. 390 (Bos. & Herg.).

[38] *See* Tanya Kateri Hernandez, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. J. INT'L L. 805, 828–29 (2011).

[39] *See id.*

[40] *See id.*

[41] The Criminal Code of Croatia provides that:

[w]hoever publicly states or disseminates ideas on the superiority or subordination of one race, ethnic or religious community, gender, ethnicity or ideas on superiority or subordination on the basis of color for the purpose of spreading racial, religious,

The above list illustrates how many countries criminalize a freedom that is not only protected but also encouraged in the United States. It also reveals a challenge to the US free speech exceptionalism and the threats to which American citizens are exposed in this era of free movement of people and easy access to published materials and speeches.

> sexual, national and ethnic hatred or hatred based on color or for the purpose of disparagement shall be punished by imprisonment for three months to three years.

Criminal Code of Croatia, art. 174 (3).

[42] *See Jersild v. Denmark*, App. No. 15890/89, 19 Eur. H.R. Rep. 1 (1994); the Staffeloven (Penal Code) of Denmark provides that:

> (1) Any person who publicly or with the intention of dissemination to a wide circle of people makes a statement or imparts other information threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin, belief or sexual orientation, shall be liable to a fine, simple detention or imprisonment for a term not exceeding two years. (2) When handing down the punishment, it is to be considered as an aggravating circumstance that the statement is in the nature of propaganda.

Staffeloven (Penal Code) § 266 B (Den.).

[43] General Penal Code, Act No. 19, art. 233, February 12, 1940 (Ice.) provides: "Anyone who does by means of ridicule, calumniation, insult, threat or otherwise assault [a person or group of persons] on account of their nationality, colour, [race, religion or sexual inclination] shall be subject to fine or imprisonment for up to 2 years."

[44] *See* Raphael Cohen-Almagor, *Regulating Hate and Racial Speech in Israel*, 17 CARDOZO J. INT'L & COMP. L., 405 (2009).

[45] *See* Committee on Elimination of All Forms of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination*, ¶¶ 59-63, U.N. Doc. CERD/C/JOR/13-17 (Sept. 21, 2011).

[46] *See* Organic Law 01/2012/OL, May 2, 2012 (instituting the penal code of the Republic of Rwanda Article 116 (Punishment of the crime of negationism and minimization of the genocide against the Tutsi), Article 136 (Punishment of the crime of discrimination and sectarian practices), Article 290 (Defaming and insulting a person in a private area), Article 289 (Public insult), Article 463 (Inciting insurrection or trouble amongst the population)).

[47] *See* U.N. Office of the High Commissioner for Human Rights, *Study on the Prohibition of Incitement to national, Racial or Religious Hatred: Lessons from the Asia Pacific Region* (July 6-7, 2011) *available at* http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/StudyBangkok_en.pdf. Other countries in Asia and the Pacific Region that prohibit hate speech include: Afghanistan, Armenia, Australia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei, Cambodia, Fiji, India, Indonesia, Iraq, Iran, Israel, Japan, Kazakhstan, Kiribati, Kyrgyzstan, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, New Zealand, Pakistan, People's Republic of China, Philippines, Qatar, Republic of Korea, Saudi Arabia, Singapore, Sri Lanka, Syria, Tajikistan, Thailand, Timor Leste, Tonga, Turkmenistan, Tuvalu, United Arab Emirate, Uzbekistan, Vanuatu, Vietnam and Yemen. *Id.*

[48] *See* The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.), as amended, *available at* http://www.justice.gov.za/legislation/acts/2000-004.pdf.

2. International Law

International law guarantees freedom of expression but also provides for its limitation. Like all rights guaranteed under the Universal Declaration of Human Rights ("Declaration"), this right can be limited "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."[49] Furthermore, Article 7 of the Declaration guarantees everyone protection "against any incitement" to discrimination forbidden therein.

A number of international human rights treaties have called their signatories to prohibit hate and extremist speech. Article 20(2) of the International Covenant on Civil and Political Rights ("ICCPR") provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[50] The Human Rights Committee ("Committee"), which is a treaty body of independent experts that monitors the implementation of the ICCPR by its State parties,[51] has on numerous occasions confirmed that prohibition of hate speech is not in violation of free speech. For example, the Committee sided with the Government of Italy on its decision to convict the right-wing Italian militant and publicist who was reorganizing the dissolved Fascist Party.[52] The Committee ruled in favor of Canada when the Canadian government was attacked for forbidding a political party to use telephone services to convey messages of hatred against Jews[53] and when it took disciplinary action against a teacher who

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[49] Universal Declaration of Human Rights, art. 29, Dec. 10, 1948, G.A. Res. 217 A (II), U.N. Doc. A/8 10, at 71.

[50] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (Dec. 16, 1966).

[51] *Id.* at art. 28.

[52] The execution of a sentence of imprisonment imposed prior to the entry into force of the Covenant is not in itself a violation of the Covenant. Moreover, it would appear to the Committee that the acts of which M.A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant.

M.A. v. Italy, Communication No. 117/1981 (21 Sept. 1981), U.N. Doc. Supp. No. 40 (A/39/40), at 190 ¶ 13.3 (1984).

[53] "[T]he opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit." J. R. T. and the W. G. Party v. Canada, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 ¶ 8(b) (1984).

was publishing anti-Semitic tracts outside his classroom.[54] The Committee has also ruled that France's punishment of Robert Faurisson for his speech denying the existence of certain extermination tactics used in the Holocaust was in conformity with Article 20(2) of the ICCPR.[55]

At the regional level, although the European Convention on Human Rights and the African Charter on Human and Peoples' Rights do not include hate speech provisions, they both agree that freedom of expression can be limited.[56] The African Court on Human and Peoples' Rights has not yet had the opportunity to rule on a hate or extremist speech case.[57] It is, however, likely that if such a case is brought before this court, it will follow the anti-hate speech jurisprudence of international human rights law. This observation results from the fact that Article 7 of the Protocol establishing the African Court on Human and Peoples' Rights provides that "the Court shall apply the provisions

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[54] In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for 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.

Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 ¶ 11.5 (Oct.18, 2000).

[55] Since the statements made by the author, 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 of an atmosphere of anti-Semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.

Robert Faurisson v. France, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 ¶ 9.6 (Nov. 8, 1996).

[56] *See* African [Banjul] Charter on Human and Peoples' Rights, art. 27.2, June 27, 1981 (S. Afr.). "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest"; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that:

> [t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10.2, Nov. 4, 1950, 213 U.N.T.S. 221.

[57] As of December 2013, the African Court on Human and Peoples' Rights had only received 28 cases. *See Cases & Decisions*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions (last visited Feb. 15, 2014).

of the Charter and any other relevant human rights instruments ratified by the States concerned."[58] Given the fact that most African countries have ratified the ICCPR,[59] it is evident that the African Court on Human and Peoples' Rights will follow the ICCPR Committee, which, as illustrated above, has consistently found that extremist and hate speech is not protected.

The European Court of Human Rights has been consistent in refusing protection to hate and extremist speech as well. In *Jersild v. Denmark*, the Court, ruling on the case of a Danish journalist who had produced and broadcast a radio program in which a hate group called the "Greenjackets" praised the Ku Klux Klan and used hate language to insult blacks, held that "there can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10."[60] Before this ruling, the European Commission on Human Rights had already found, inter alia, that the Netherlands' conviction of Glimmerveen and Hagenbeek for distributing racist leaflets;[61] France's conviction of Garaudy for his revisionist theories denying the existence of crimes against humanity;[62] and Austria's conviction of B.H. for

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[58] *See* Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, art. 12(2), June 9, 1998, *available at* http://www.achpr.org/instruments/achpr/.

[59] As of November 2012, South Sudan and Western Sahara are the only two countries that have not yet ratified the ICCPR. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (Dec. 16, 1966).

[60] *See* Jersild v. Denmark, 298 Eur. Ct. H.R., at para. 35; the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since they carry with them duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

[61] *See* Glimmerveen and Hagenbeek v. Netherlands, 18 Eur. Comm'n H.R. Dec. & Rep. 187, 197 (1979).

[62] Garaudy v. France, 2003 Eur. Ct. H.R. (IX) at 24, (2003), *available at* http://www.echr.coe.int/Documents/Reports_Recueil_Index_2003.pdf.

adhering to Nazi National Socialist doctrine[63] were justified under Article 10 of the European Convention on Human Rights.

To make sure that its member states criminalize hate and extremist speech in their domestic jurisdictions, the European Union has adopted a supranational law obliging them to take the necessary measures to ensure that authors and those aiding and abetting in the commission of hate and extremist speech are punished "by effective, proportionate and dissuasive criminal penalties."[64]Unlike the European Convention on Human Rights and the African Charter on Human and Peoples' Rights, which were timid in calling for the prosecution of hate speech, the American Convention on Human Rights clearly provides that:

> [a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.[65]

Other international treaties that require their member states to punish hate and extremist speech are the Convention on the Prevention

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[63] Nachtmann v. Austria, App. No. 36773/97, 27 Eur. Comm'n H.R. Dec. & Rep. 281, 284, *available* at http://cmiskp.echr.coe.int/tkpl97/view.asp?item=1&portal=hbkm&action-html&highight-12774&sessionid=57968116&skin=hudoc-en.

[64] *See* Council Framework Decision (EC) No. 2008/913/JHA of 29 Nov. 2008, art. 1, 2008 O.J. (L 328) 56, which provides that punishable acts include:

> (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin; (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material; (c) publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group; (d) publicly condoning, denying or grossly trivializing the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.
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> Council Framework Decision (EC) No. 2008/913/JHA of 29 Nov. 2008, art. 1, 2008 O.J. (L 328) 56, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:EN:PDF.

[65] *See* Organization of American States, American Convention on Human Rights art. 13(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

and Punishment of the Crime of Genocide ("Genocide Convention")[66] and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[67] Like the American Convention on Human Rights, the CERD goes beyond calling for the prohibition of hate speech; it makes it a criminal offense. Article 4 of the CERD requires that:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such 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, inter alia: (a) Shall 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 color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof[.][68]

The same article also places a duty on state parties to "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law[.]"[69]

Article 3(c) of the Genocide Convention makes "direct and public incitement" to commit genocide punishable.[70] The International Criminal Tribunal for Rwanda ("ICTR") has defined this act as:

> [d]irectly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at

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[66] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[67] *See* International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965).

[68] *Id.* at art. 4(a).

[69] *Id.* at art. 4(b).

[70] *See* Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 66, at art. III(c).

> public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[71]

The above list of countries and treaties criminalizing hate and extremist speech is clear evidence that the trend both in national laws and international law is to criminalize hate and extremist speech. This trend is also illustrated by following positions of different courts, both at the national and international level, which have not only ruled in favor of punishing hate and extremist speech, but have also rejected the American approach that protects such speech.

B. NATIONAL & INTERNATIONAL COURTS' POSITIONS ON THE UNITED STATES' FREE SPEECH APPROACH

1. The Case of Canada

The Supreme Court of Canada has on numerous occasions stated that when it comes to hate and extremist speech, it is not ready to follow the path of the US First Amendment.[72] This was illustrated in the following important cases on this issue: *R. v. Keegstra*[73] and *Mugesera v. Canada*.[74] The first is still considered the leading case on the issue of hate and extremist speech in Canada, and the second is considered important because it connects hate speech to genocide and crimes against humanity.

The *Keegstra* case concerns Mr. Keegstra, a high school teacher in Eckville, Alberta who described Jews to his students as "subversive," "sadistic," "money-loving," "power-hungry," and "child killer[s]," and accused them of "creating the Holocaust to gain sympathy."[75] Mr. Keegstra was charged under section 319(2) of the Criminal Code, which

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[71] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 559 (Int'l Crim. Trib. For Rwanda Sept. 2, 1998), http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf.

[72] *See* R. v. Keegstra [1990] 3 S.C.R. 697, § VII(B) (Can.); Mugesera v. Canada, [2005] 2 S.C.R. 100 (Can.); Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 137 (Can.) (stating that Court will not adopt Sullivan standard in Canada); *see also* Grant v. Torstar Corp., [2009] 3 S.C.R. 640 (Can.) (modifying Canadian defamation law while still rejecting First Amendment standards); RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:9.75 (2d ed. 2013), at 1–17 (describing differences between United States law and "the more plaintiff-friendly" Canadian defamation law).

[73] *Keegstra*, [1990] 3 S.C.R. at 738–44 (Can.).

[74] *Mugesera*, [2005] 2 S.C.R. at 105–07 (Can.).

[75] *Keegstra*, [1990] 3 S.C.R. at 714 (Can.).

punishes unlawfully promoting hatred against an identifiable group.[76] Mr. Keegstra challenged the constitutionality of section 319(2), arguing that it violated his right to freedom of expression guaranteed under section 2 of the Canadian Charter of Rights and Freedoms.[77] The Supreme Court of Canada rejected his argument, saying that section 319(2) of the code constitutes a reasonable limit upon freedom of expression.[78] The Court argued, "Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom."[79] For the Court, hate speech causes "real harm" both to the victim and to society in general. In reaching this conclusion, the Court was convinced of two points. First, speech has psychological and social consequences on the members of the target group, particularly because it has a severe negative impact on the "individual's sense of self-worth and acceptance."[80] Second, hate speech affects the society at large. The Court disagreed with the long-held belief that "man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil."[81] The Court opined, "The active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord among various cultural groups in society."[82] It is, therefore, this harm to society at large that the Canadian Criminal Code aims to prevent.

In reaching the above conclusion in the *Keegstra* case, Chief Justice Dickson started by rejecting the relevance of American cultural symbolism and US Supreme Court cases on hate and extremist speech. First, he argued that Canada and the United States are not alike in every way, and noted that the documents entrenching human rights in these two countries did not arise in the same context.[83] Rejecting American support of hate and extremist speech because of their contribution to the "marketplace of ideas," "self-governance," and creating a "tolerant society," Chief Justice Dickson argued that "there is very little chance that statements intended to promote hatred against an identifiable group

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[76] *Id.* at 713.
[77] *Id.* at 714.
[78] *Id.* at 787–88.
[79] *Id.* at 699.
[80] *Id.* at 746.
[81] *Keegstra*, [1990] 3 S.C.R. at 747 (Can.).
[82] *Id.*
[83] *Id.* at 740.

are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided."[84] Second, after examining different US Supreme Court cases through which the US Supreme Court developed a number of tests and theories by which protected speech can be identified and the legitimacy of government regulation assessed, Chief Justice Dickson observed that "not only are the precedents somewhat mixed, but the relaxation of the prohibition against content-based regulation of expression in certain areas indicates that American courts are not loath to permit the suppression of ideas in some circumstances."[85] For him, therefore, since the US Supreme Court had been developing its own standards on when "the suppression of ideas in some circumstances" is permissible, there is nothing wrong with Canada developing its own standards, including a standard limiting hate speech.[86]

Not only did Chief Justice Dickson reject the American standard on hate and extremist speech, he also espoused the international standard of intolerance for hate and extremist speech. In this regard, he stressed that in his view, "the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression."[87]

The second Canadian case that rejects the American standard is the *Mugesera* case.[88] This case concerned a Rwandan citizen, Mugesera, who immigrated to Canada in 1993 after making a speech considered hateful, incendiary, and inciting to genocide and crimes against humanity during a political rally. He had made this speech in 1992, two years after the beginning of the civil war in which the Hutu-dominated government opposed the Tutsi-dominated rebel group, the Rwanda Patriotic Front, and less than two years before the 1994 Rwandan genocide. During his speech, Mugesera, referring to the Tutsi, stated: "the mistake we made in

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[84] *Id.* at 763.

[85] *Id.* at 744.

[86] *Id.* at 745.

[87] *Id.* at 743.

[88] *See* Mugesera v. Canada, [2005] 2 S.C.R. 100 (Can.).

1959, when I was still a child, is to let you leave."[89] He went on to say, again referring to Tutsi: "[s]o don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo [river] [sic] so you can get there quickly."[90] During this speech, Mugesera also used words such as "cockroaches" and "exterminate," which were later used as a form of de-individualization and dehumanization during the genocide.[91] After going through a number of Canadian lower-level courts that ruled against Mugesera, the case was appealed to the Canadian Federal Court of Appeal which sided with Mugesera, saying that the speech into question was made:

> by a political figure before a partisan meeting in a context of armed aggression. The speech was improvised and not based on any notes, and the various speakers were not consulted before beginning to speak [. . .] The speaker spoke fluently, used clear and colorful language, sometimes even brutal language. This speaker was a fervent support of democracy, patriotic pride and resistance to invading foreign forces. The themes of his speeches were elections, courage and love. His family life, his personal and professional relationships, his past, did not indicate any tendency toward racism. Even though it is true some of his statements were misplaced or unfortunate, there is nothing in the evidence to indicate that Mr. Mugesera, under the cover of anecdotes or other imagery, deliberately incited to murder, hatred or genocide.[92]

The Canadian Supreme Court, however, disagreed with the Federal Court of Appeal's decision, and overturned the decision. In its decision, the Canadian Supreme Court ruled that given the context, the place, the audience, and the words used, Mugesera's speech constituted an incitement to murder, genocide, hatred, and crimes against humanity.[93] The key contribution of this Canadian Supreme Court decision is the idea that, in examining if a speech is proscribable, it is important to take into

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[89] Here Mugesera was referring to the Tutsi Massacre in 1959, which forced many Tutsi people to flee the country. Mugesera v. Canada, [2005] 2 S.C.R. 100, para. 90 (Can.).

[90] *Id.* Mugesera referred to the River Nyabarongo because most of the Tutsi people killed in 1959 were thrown into the River Nyabarongo. The River Nyabarongo flows to the Nile River, which passes through Ethiopia, a country, which is the origin of the Tutsi people, according to colonial teachings of the history of Rwanda. On this historical context, see John Lichfield, *Guide to the Zaire Crisis: The Difference Between a Hutu and a Tutsi*, INDEP. (Nov. 16, 1996), *available at* http://www.independent.co.uk/news/world/guide-to-the-zaire-crisis-the-difference-between-a-hutu-and-a-tutsi-1352558.html.

[91] *See* Russell Smith, *The Impact of Hate Media in Rwanda*, BBC NEWS (Dec. 3, 2003), *available at* http://news.bbc.co.uk/2/hi/africa/3257748.stm.

[92] Mugesera v. Canada, [2003] F.C.A. 325 at para. 240 (Can.).

[93] Mugesera v. Canada, [2005] 2 S.C.R. 100, para. 77, 80, 98, 111, 179 (Can.).

consideration the historical, political, social, and cultural context of the speaker and his or her audience. This means that some words may be considered hate speech in Rwanda, but not in Canada or the United States, because the history and sociopolitical situation of each country shapes what constitutes hate speech.

2. The Case of South Africa

The Constitutional Court of South Africa draws a considerable amount of inspiration from US Supreme Court cases.[94] Furthermore, the US First Amendment has inspired the Constitutional Court of South Africa in shaping its understanding of free speech. In *S v. Mamabolo*, in which the e.tv channel, Business Day, and the Freedom of Expression Institute intervened, it was said that in South Africa:

> [f]reedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression—the free and open exchange of ideas—is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way.[95]

This enthusiasm did not extend, however, to the constitutional protection of hate and extremist speech. The Constitutional Court explained that the departure from the US First Amendment protection of hate and extremist speech resulted from the different formulation and interpretation of each country's constitutional text. On this issue, the Constitutional Court of South Africa said:

> The United States approach is, at least in part, a reflection of the fact that the American bill of rights does not contain a limitations clause. Whereas in the case of our Constitution, the listing of rights is accompanied by a clause that provided for the limitation, on a principled and considered basis, of all enumerated rights, the better approach would seem to be to define the right generously, and to interpose any constitutionally justifiable limitations only at the

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[94] *See* Andrea Lollini, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 UTRECHT L. REV. 55 (2012).

[95] *S v. Mamabolo* 2001 (3) SA 409 (CC) at para. 37 (S. Afr.).

> second stage of the analysis. That, in fact, is the approach that this Court has adopted.[96]

Applying this reasoning in the hate speech case of *Islamic Unity Convention v. Independent Broadcasting Authority and Others*,[97] the Constitutional Court of South Africa ruled that Section 16 of the Constitution of South Africa should be understood in two parts: subsection (1), which is concerned with expression that is protected under the Constitution, and subsection (2), which deals with expression that is specifically excluded from the protection of the right:

> Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to. . . .[98]

> What is not protected by the Constitution is expression or speech that amounts to 'advocacy of hatred' that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to 'incitement to cause harm.' There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression. Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16.[99]

What is particularly interesting in the case of South Africa is how the Constitutional Court maintains that free market of ideas can still fulfill its mission without necessarily incorporating hate and extremist speech in the category of protected speech.

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[96] *Case and Another v. Minister of Safety and Security and Others, Curtis v. Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at para. 21 (S. Afr.).

[97] *See Islamic Unity Convention v. Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) (S. Afr.).

[98] *Id.* at para. 30.

[99] *Id.* at para. 31.

3. The Case of the United Kingdom

In addition to punishing defamation, the United Kingdom seems to have embarked on changing the common law on hate speech. *Regina v. Sheppard & Whittle* provides a glimpse into the future developments of the common law's handling of hate speech protection when the US First Amendment is involved.[100]

Sheppard and Whittle were British activists who ran a number of hate websites. Whittle composed materials that he submitted by e-mail to Sheppard.[101] Sheppard edited them on his computer and then uploaded them to a website called heretical.com, which was set up by him and hosted by a remote server located in Torrance, California.[102] When posted on the website, the material was available for access via the Internet by visitors to the website, including people within the jurisdiction of England and Wales.[103] In 2008, Sheppard and Whittle were convicted in the Leeds Crown Court for publishing racially inflammatory material.[104] Sheppard and Whittle managed to escape British justice, and came to the United States where they applied for asylum.[105] They were placed in detention while their asylum applications were pending.[106] In 2009, their asylum applications were rejected because they could not prove past or future persecution.[107] Sheppard and Whittle refused to appeal and returned to England, where they were detained.[108] They appealed the Crown Court decision arguing, among other points, that:

> a publication on the internet is only cognizable in the jurisdiction where the web server upon which it is hosted is located and since in this case the location was California the publication falls outside the jurisdiction of England and Wales. We would add that it is common

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[100] Regina v. Sheppard & Whittle, [2010] EWCA (Crim) 65, 1 W.L.R. 2279 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Crim/2010/65.html.

[101] *Id.* at [7].

[102] *Id.*

[103] *Id.*

[104] *Id.* at [2].

[105] *Id.* at [3].

[106] *Id.*

[107] "The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. § 1208.13(b) (2000).

[108] *See* Dana Parsons, *Men Bedeviled in Bid for Sanctuary*, L.A. TIMES (June 3, 2009), *available* at http://articles.latimes.com/2009/jun/03/local/me-brits-jailed3.

> ground that none of the material charged by the internet counts is illegal in the United States of America.[109]

The UK Court of Appeal (Criminal Division), however, rejected this argument, and aligned its jurisprudence with the new precedent developed in *Liangsiriprasert v. Government of United States of America*[110] by the Court of Appeal of Hong Kong. The Hong Kong court had ruled that a "conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong."[111] The UK Court ruled therefore that:

> [u]nfortunately in this Century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the criminal law must face this new reality. Their lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.[112]

Precluding any opportunity for Sheppard and Whittle to rely on First Amendment protection, the judge confirmed the lower court ruling that:

> even if the defence were correct that a novus actus occurred in California at the point at which the server was utilised (which the judge said he seriously doubted was the case), use of the server was merely a stage in the transmission of the material requiring no intervention once the website was activated. Any novus actus could only be regarded as that of an agent acting on behalf of Sheppard and thus the act in English law of the principal. It could not, the judge said, be seriously argued on a reasonable view of all the evidence that the appellants' activities should, on the basis of international comity, be dealt with by another country.[113]

If Sheppard and Whittle were to appeal this case before the European Court of Human Rights,[114] it would give the UK Court an opportunity to define its position on the conflict of jurisdiction and

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[109] Regina v. Sheppard & Whittle, [2010] EWCA (Crim) 65, [19], [2010] W.L.R. 2779 (Eng.).

[110] Liangsiriprasert v. Gov't of U.S., [1991] 1 A.C. 225 (P.C.), [244], *available at* http://uniset.ca/other/cs3/19911AC225.html.

[111] *Id.* at 251.

[112] Regina v. Sheppard & Whittle, [2010] EWCA (Crim) 65, [25], [2010] W.L.R. 2779 (Eng.).

[113] *Id.* at [22].

[114] VNN FORUM, http://vnnforum.com/showthread.php?t=66405&page=2 (last visited Dec. 16, 2012).

develop its own rule on hate speech and the Internet. The European Court of Human Rights has already ruled that denying crimes against humanity is one of the most serious forms of racial defamation and incitement to hatred against Jews, and such speech is, therefore, not protected under freedom of expression.[115] It has not yet ruled, however, on whether the places where the consequences of a criminal act have taken effect are also considered to be part of the *locus delicti* when it comes to hate and defamatory speech on the Internet, as countries such as Germany, Canada, France, and the United Kingdom have done.[116]

4. International Criminal Tribunals

The view of international criminal tribunals on the criminalization of hate speech has evolved as a result of the struggle between the US First Amendment perspective and other liberal democracies' views on the criminalization of hate speech.[117] This struggle started with the conflicting message the Nuremberg International Military Tribunal ("IMT") sent when it found that Julius Streicher's speech during the Holocaust constituted persecution and, therefore, a crime against humanity, but later acquitted Hans Fitzscher

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[115] The court in *Garaudy v. France* held:

> Regarding freedom of expression, the Court reiterates that, although its case-law has enshrined the overriding and essential nature of this freedom in a democratic society (see, among other authorities, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p.23, § 49, and *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p.26, § 41), it has also laid down the limits. The Court has held, among other things, that "[t]here is no doubt that, like any other remark directed against the Convention's underlying values . . . , the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10" and that there is "a category of clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 by Article 17."
>
> 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. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

Garaudy v. France, App. No. 65831/01, 2003-IX Eur. Ct. H.R. 1, 22-23.

[116] *See supra* Part I.A–B on defamatory, hate, and extremist speech around the world.

[117] *See* Jean-Marie Kamatali, *The U.S. First Amendment Versus Freedom of Expression in Other Liberal Democracies and How Each Influenced the Development of International Law on Hate Speech*, 36 OHIO N.U. L. REV. 721 (2010).

because, although "excerpts in evidence from his speeches show[ed] definite anti-Semitism on his part. . . ,"[118] his speeches "did not urge persecution or extermination of Jews."[119] The debate on this issue, however, quieted down until mid-1990s when the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were confronted with cases similar to those of Julius Streicher and Hans Fitzscher.

The debate that took place before these two tribunals divided those who saw Fitzscher's acquittal as a sign that hate speech short of incitement to violence cannot constitute persecution at international law,[120] and those who stuck to Streicher's condemnation and argued that the "Streicher Judgment does not preclude the criminalization of hate speech."[121] The latter group argued further that even if the first camp was right about Fitzscher, "international human rights law has developed since Nuremberg and the Tribunal should recognize that violation of the right to equality can constitute persecution."[122] These two opposing views were later reflected in *Prosecutor v. Kordić & Cerkez* before the International Criminal Tribunal for the former Yugoslavia ("ICTY") Trial Chamber,[123] and in *Prosecutor v. Nahimana, Barayagwiza & Ngeze* before the ICTR Trial Chamber.[124]

In *Prosecutor v. Kordić & Cerkez*, the Court found that hate speech "does not by itself constitute persecution as a crime against humanity" because:

> it is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus to convict the accused for

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[118] INT'L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL vol. I, 337-38 (1947).

[119] *See id.* at 338.

[120] *See* Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, & Hassan Ngeze, Case No. ICTR 99-52-A, Amicus Curaie supporting Prosecutor, at ¶ 979 (Nov. 28, 2007); *see also* INT'L MILITARY TRIBUNAL, *supra* note 118, at 338.

[121] *See* the prosecutor's argument in Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, & Hassan Ngeze, Case No. ICTR 99-52-A, ¶ 980.

[122] *Id.*

[123] Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-T, Judgement, (Feb. 26, 2001).

[124] Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, & Hassan Ngeze, Case No. ICTR 99-52-A (2003).

> such an act as is alleged as persecution would violate the principle of legality.[125]

The ICTR Trial Chamber, however, ignored the above reasoning when it was called to decide on a similar case and ruled:

> in light of well-established principles of international and domestic law, and the jurisprudence of the Streilher case in 1946 and the many European Court and domestic cases since then, that hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination. Within this norm of customary law, the prohibition of advocacy of discrimination and incitement to violence is increasingly important as the power of the media to harm is increasingly acknowledged.[126]

In reaching this conclusion, the ICTR Trial Chamber rejected the American interpretation of hate speech, saying:

> Counsel for Ngeze has argued that United States law, as the most speech protective, should be used as a standard, to ensure the universal acceptance and legitimacy of the Tribunal's jurisprudence. The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.[127]

It was not until the *Prosecutor v. Nahimana* case was appealed before the ICTR Appeal Chamber that these conflicting arguments on hate and extremist speech were balanced. While agreeing with the *Prosecutor v. Kordić & Cerkez* case in finding that it was "not satisfied that hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being,"[128] the ICTR Appeal Chamber did not rule out hate speech as a crime against humanity when combined with other elements. In this regard, it found that:

> [i]t is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in

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[125] *Kordić & Cerkez*, Case No. IT-95-14/2-T, ¶ 209.

[126] *Id.* at ¶ 1076.

[127] *Id.* at ¶ 1010.

[128] *Nahimana*, Case No. ICTR 99-52-A, at ¶ 986.

> which these underlying acts take place is particularly important for the purpose of assessing their gravity.[129]

It appears, therefore, that hate speech, accompanied by calls for genocide or crimes against humanity, and which takes place in the context of a massive campaign of persecution, can expose its author to prosecution for crimes against humanity.[130] The key contribution of the ICTR Appeal Chamber has been to keep international criminal law's interpretation of hate speech separate from that of international human rights law's, allowing each field to develop its own jurisprudence on hate speech.[131] Another contribution is that international criminal law insists, as the Canadian Supreme Court did, that context is the most important factor in defining whether speech is considered hate speech and therefore unprotected.[132]

II. US CULTURAL SYMBOLISM & HER FREE SPEECH SLIPPERY SLOPE ARGUMENT

In general there are two ways one can balance a scale: one can either reduce the excessive weight from the heavier weighing pan until the beam reaches its equilibrium, making the weight on both weighing pans equal. Or, one can place more weight on the weighing pan with less weight to counterbalance the weighting pan that was heavier, bringing

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[129] *Id.* at ¶ 987.

[130] This is the analysis the ICTR Appeal chamber followed to conclude that hate speech in Rwanda constituted a crime against humanity:

> In the present case, the hate speeches made after 6 April 1994 were accompanied by calls for genocide against the Tutsi group and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes . . .) and of destruction of property. In particular, the speeches broadcast by RTLM—all of them by subordinates of Appellant Nahimana—considered as a whole and in their context, were, in the view of the Appeals Chamber, of a gravity equivalent to other crimes against humanity. The Appeals Chamber accordingly finds that the hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution. In addition, as explained below, some speeches made after 6 April 1994 did in practice substantially contribute to the commission of other acts of persecution against the Tutsi; these speeches thus also instigated the commission of acts of persecution against the Tutsi.

Id. at ¶ 988.

[131] *See* Kamatali, *supra* note 117.

[132] *Id.* at 725.

the beam to equilibrium. While other liberal democracies seem to use the first approach, the US approach seems to fall more in the second category. This difference is mainly illustrated in the case of free speech in both camps: while in other liberal democracies there seems to be a consensus that the strongest weapon against hateful or any other unorthodox, controversial, and offensive speech is its limitation,[133] in the United States, the weapon against hate speech is more speech.[134]

The difference in approaches does not mean, however, that both sides disagree on the justification of free speech. Both parties agree that free speech is an important factor in the full realization of the individual human personality; the search for truth; the building of a tolerant, democratic and pluralistic society; and in the fulfillment of other human rights such as freedom of belief, religion, and association.[135] This difference in approach also does not mean that both sides disagree on the fact that free speech is not absolute.[136] Why, then, does this difference in approaches on how to balance the free speech scale exist? The answer can be found in the historical and cultural symbolism of free speech in both the United States and other liberal democracies.

As explained in the following section, while the history and culture of free speech in the United States has led to a cultural symbolism that sees free speech only from its positive justification, in Europe this positive justification was tainted by the traumatizing experience of Nazi propaganda and the Holocaust during World War II. Therefore, while other liberal democracies (led by Europe) do not observe a contradiction in the justifications of both free speech and its limitations, the US justification of free speech has evolved into a historical and cultural symbolism that sees free speech limitations as a slippery slope that inevitably threatens the "market place of ideas,"

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[133] *See supra* Part I.A–B on how other liberal democracies limit free speech.

[134] "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927); *see also* President Barack Obama, *Remarks by the President to the UN General Assembly* (Sept. 25, 2012), http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly.

[135] *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 750 (2d ed. 2000); *see also infra* Part II on US free-speech cultural symbolism.

[136] The Supreme Court determined in that "freedom of speech, though not absolute ... is nevertheless protected." Terminiello v. Chicago, 337 U.S. 1, 4 (1949); *see, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462-63 (1907); Schenck v. United States; 249 U.S. 47, 52 (1919); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

democratic principles, and "tolerant society."[137] This slippery slope approach results from the US cultural symbolism of free speech, which the United States has failed to sell in its international relations with the rest of the world.

A. THE US CULTURAL SYMBOLISM OF FREE SPEECH

Free speech has been considered one of the most important freedoms, if not the most important freedom, that the US Constitution grants to the American people.[138] It is considered "one of America's foremost cultural symbols, transcending both the express language of the first amendment and the original intent of its framers."[139] Free speech is not only a fundamental freedom under the US Constitution, it is also one of America's top cultural symbols. Its value results from the fact that it is "the matrix, the indispensable condition for nearly every other form of freedom"[140] and from its immeasurable contribution in advancing personal knowledge, facilitating self-development, promoting participatory decision-making, and checking and denouncing government abuses.[141] It is this cultural symbolism that inspired the framers of the First Amendment to prevent Congress from making laws "abridging the freedom of speech, or of the press;" an amendment that, in turn, continues to feed and perpetuate this cultural symbolism.[142]

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[137] *See* NIGEL WARBURTON, FREE SPEECH: A VERY SHORT INTRODUCTION 14–17 (2009); Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469 (1999).

[138] "Freedom of press [and] freedom of speech . . . are in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); "[T]he first Amendment's unequivocal command that there shall be no abridgement of the right of free speech . . . shows the men who drafted the Bill of Rights did all the 'balancing' that was to be done." Konigsberg v. State Bar of California, 366 U.S. 36, 61 (Black, J., dissenting); *see also* THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd et al. eds., 1950), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs8.html ("The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter").

[139] Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. L. REV. 1457, 1458 (1987) (book review).

[140] Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[141] *See, e.g.*, MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9 (1984); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

[142] *See* Rosenfeld, *supra* note 139, at 1458–59.

To understand the American cultural symbolism of free speech, one needs to understand the four key underlying justifications of free speech in America. These justifications are democracy, social contract, the pursuit of the truth, and individual autonomy.[143] From these justifications at least three key theories have been developed to explain contemporary American support for free speech and why it includes the protection of hate, extremist, and defamatory speech. These three theories are: the "marketplace of ideas" theory, the self-government free speech or "democratic" theory, and the "tolerant society" theory. Although these theories may be used to justify free speech in other societies,[144] they are more particular to the United States because of its political history as a country of immigrants with different national, religious, and cultural backgrounds.

The "marketplace of ideas" theory, developed by former US Supreme Court Justice Oliver Wendell Holmes, Jr. in the *Abrams* dissent,[145] has evolved into one of the central organizing principles for the contemporary American vision of free speech. To support his theory, Justice Holmes started from his observation that "wanting to believe in the truth of our beliefs is a natural aspect of condition that justifies the need to suppress views of others because they challenge views we hold to be true."[146] Justice Holmes believed it was normal for those who are

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[143] For more details on these four justifications, see *id.* at 1532–41.

[144] *See, e.g., South African National Defence Union v. Minister of Defence* 1999 (4) SA 469 (CC) at para. 7 (S. Afr.), which states:

> Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

South African National Defence Union v. Minister of Defence 1999 (4) SA 469 (CC) at para. 7 (S. Afr.). *See also* the Supreme Court of Canada in Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927, para. 54 (Can.), in which reasons for protecting freedom of expression were tersely stated as follows: "(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated." The European Court of Human Rights has held that freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb . . . Such are the demands of pluralism and broadmindedness without which there is no 'democratic society.'" Handyside v. The United Kingdom, App. No. 5493/72, 1 Eur. Ct. H.R. 737, ¶ 49 (1976).

[145] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

[146] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY, FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 161 (1986).

thoroughly convinced they are right to have the legal tools to protect their truths against outside challenges to use them.[147] This was reflected in his dissenting opinion in *Abrams v. United States*, where he observed that the logic behind governmental limitation on free speech is that:

> [i]f you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.[148]

Justice Holmes observed, however, that this approach was short sighted. Suppressing opposing views does not pay off because:

> [w]hen men have realized that time has upset many fighting faiths, they may come to believe even more that they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in idea-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[149]

Holmes observed that if intolerance is the product of certitude of one's belief, only self-doubt and incredulity in one's belief could lead to tolerance.[150] If, therefore, "the views invoked in support of censorship are as likely to prove false as the views sought to be censored,"[151] the potential harm of censoring some views because they are contrary to our beliefs, "clearly outweighs that of tolerating extremist speech."[152] For Holmes, therefore, only in a free marketplace of ideas can a belief, including an extreme belief be proven true or false. Actions must be guided by truth, and truth can only be achieved if individuals are allowed to express their views freely. It is through free trade of ideas where one's idea is subjected to the competition of others in a free market that truth is likely to be found. Only this tested truth can prevail against other views, including extremist and hated ones.[153] Such a truth does not need the

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[147] *Abrams*, 250 U.S. at 630.

[148] *Id.*

[149] *Id.*

[150] BOLLINGER, *supra* note 146, at 161–62.

[151] Rosenfeld, *supra* note 139, at 1467.

[152] *Id.*

[153] THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 249-50 (Michael Herz & Peter Molnar, 2012) (citing Michel Rosenfeld, *Hate Speech in*

force of the law to survive the attacks of weaker beliefs; accordingly, extremist and hate speech do not need to be silenced because they cannot defeat the prevailing truth if both are allowed in a free marketplace of ideas.

The connection between Holmes's "marketplace of ideas" theory and those of eminent authors and philosophers such as Judge Richard Posner, Richard Rorty, and John Stuart Mill[154] has brought some to criticize its analogy with the economic marketplace idea.[155] These critiques, among others, brought some free speech supporters to seek additional theories to support free speech. Among them are the "self-government"[156] theory and the "tolerant society" theory.[157]

The "self-government" free speech, or "democratic" speech, theory considers free speech an indispensable tool in the process of democratic self-government and in the discovery and preservation of truth.[158] Alexander Meiklejohn, the principal proponent of the relationship between free speech and self-government, critiqued Holmes's theory because of its focus on truth-seeking process.[159] For Meiklejohn, "the first Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won."[160] Meiklejohns's theory starts from the premise that in a self-government system, political equals rational, and fully participating citizens who take their civic duties seriously must be presented all viewpoints in order for them to make wise decisions on the issues before them. Meiklejohn insists, therefore, that in self-government, no idea, including extremist ones, should be suppressed. For him, the First Amendment:

Constitutional Jurisprudence: A Comprehensive Analysis, 24 CARDOZO L. REV. 1523 (2002–2003)).

[154] MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 180 (1998).

[155] FREEDOM OF EXPRESSION IN A DIVERSE WORLD 13-25 (Diedre Golash ed., 2010) (citing Steve P. Lee, *Hate Speech in the Marketplace of Ideas*); *see also id.* at 27–37 (citing Jonathan Schonsheck, *The 'Marketplace of Ideas:' A Siren Song for Freedom of Speech Theorists*).

[156] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948).

[157] *See* BOLLINGER, *supra* note 146.

[158] Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1303–04 (2009) (explaining that "'democratic' theories of the First Amendment posit that speech receives constitutional protection because it is essential to a functioning and legitimate democracy.").

[159] MEIKLEJOHN, *supra* note 156, at 88.

[160] *Id.*

> tells us that every plan of action must have a hearing, every relevant idea of fact or value must have full consideration, whatever may be the dangers which that activity involves. It makes no difference whether a man is advocating conscription or opposing it, speaking in favor of a war or against it, defending democracy or attacking it, planning a communist reconstruction of our economy or criticizing it.[161]

Whether the speech is extreme or not and whether its consequences are going to be positive or negative does not matter. Words should be listened to as long as they are part of participation in public discussion and public decision of matters of public policy.[162] If, at the end, the dominant forces of the community accept the beliefs expressed by extremists, so be it: "that is Americanism."[163] This means, however, that speeches that do not serve the necessities of self-government are not protected. In other words, under the self-government free speech theory, private speeches, speeches in the private sphere, or speeches of self-interest will not be protected.[164] Under this theory, then, hate speech that serves a public policy would be protected, but hate speech that serves a private interest will not be protected. For example, while picketing a military funeral to oppose a war would be protected, picketing on a military funeral because the picketer hated the particular soldier would not be protected.

Noted legal scholar of free speech Professor Lee Bollinger developed the "tolerant society" theory after he realized that both the "marketplace of ideas" and the "self-government" free speech theories seemed incomplete.[165] His theory starts from the premise that the American society has reached a stage of certain stability in which its core values are reasonably clear and widely accepted.[166] Bollinger argues that for societies that have reached this stage, "focus shifts importantly away from the form of behavior (speech) and toward the mental process behind the reaction to that behavior."[167] Free speech principally functions, therefore, to promote self-restraint and self-discipline. Extremist and hate speech promotes self-restraint even further because,

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[161] *Id.* at 46.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 94.

[165] *See* BOLLINGER, *supra* note 146, at 10–11 (explaining his rationale for choosing the term "tolerance").

[166] *Id.* at 161.

[167] *Id.* at 144.

in that context, the person exercising self-control derives "something of the same personal meaning and satisfaction of the religious fast, a self-initiated and extraordinary exposure to temptation that reaffirms the possibility of self-control over generally troublesome impulses."[168] Therefore, extremist speech is protected in the United States not for what it is (extreme) but for what it can promote (self-restraint and tolerance) in a society where diversity is more desirable than mere conformism or strict orthodox. In a society like this, free speech becomes, in large measure, symbolic and pedagogic: "Keeping our own intolerance in check through intolerance of others may be, under certain circumstances, quite salutary."[169]

The "marketplace of ideas" theory, the "self-government" free speech or "democratic" theory, and the "tolerant society" theory may have been developed in different times and by different theorists, but they all complement each other well to form a solid foundation and protection of free speech in the United States.[170] They illustrate how the protection of free speech in the United States is not just the result of a formal constitution: it is founded in cultural symbolism and values that developed and continue to exist both within and outside the letters of the US Constitution. It results, therefore, that the US protection of free speech (including hate and extremist speech) exists not only because it is a constitutional guarantee but also because it is grounded in the American foundation of democracy, tolerance and freedom.

B. CONSTITUTIONAL PROTECTION OF EXTREMIST & HATE SPEECH

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." In interpreting this

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[168] *Id.* at 143.

[169] Rosenfeld, *supra* note 139, at 1464.

[170] Meiklejohn criticized Holmes's marketplace of ideas theory, saying, "in our American public life, a fruitful source of intellectual irresponsibility and of the errors which irresponsibility brings." MEIKLEJOHN, *supra* note 156, at 86. He also argued, "[t]he First amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device of sharing of whatever truth has been won." *Id.* at 88. Bollinger, on his part, criticizes both Holmes and Meiklejohn for their focus on "preserving the activity of speech as the end to be secured." For him, this is not what matters the most; what matters is "the reformation of perceived undesirable intellectual tendencies and the substitution of other tendencies." BOLLINGER, *supra* note 146, at 164. However, Rosenfeld, who reviewed the Bollinger book, concluded, "the Tolerant Society fails to provide an acceptable model to replace the obsolete traditional models used to justify adherence to the free speech principle and toleration of extremist speech." Rosenfeld, *supra* note 139, at 1480.

amendment, the US Supreme Court has remained faithful to the strict interpretation of this text, refusing to distinguish protected from unprotected speech on the basis of the point of view espoused.[171] This is reflected in the Court's consistent protection of extremist and hate speech, as illustrated in the following key cases.

One of the earliest and most influential cases on extremist and hate speech examined by the Supreme Court is *Terminiello v. Chicago.*[172] Arthur Terminiello, a priest from Birmingham, Alabama, who was under suspension from his bishop for his frequent inflammatory and anti-Semitic and anti-black speeches, was convicted on the ground that the speech he gave to the Christian Veterans of America in Chicago criticized various racial groups and made a number of inflammatory comments, resulting in thousands of angry demonstrators in the streets of Chicago.[173] Both the Illinois Appellate Court and Illinois Supreme Court affirmed his conviction because his speech was of a kind that "stirs the public to anger, invites disputes, brings about a condition of unrest, or create a disturbance."[174] The US Supreme Court, however, overturned his conviction, stressing that:

> 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 ....[175]

Three years later, however, the US Supreme Court seemed to have moved away from *Terminiello* when it concluded in *Beauharnais v. Illinois* that racist speech was not protected speech and that states could regulate this type of speech to maintain the peace and order.[176]

Although *Beauharnais* has never been explicitly repudiated, many authors agree that it has been thoroughly undermined by

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[171] *See* Kamatali, *supra* note 117, at 722.

[172] Terminiello v. Chicago, 337 U.S. 1 (1949).

[173] DAVID SHULTZ, ENCYCLOPEDIA OF THE SUPREME COURT, 460 (2005).

[174] *Terminiello*, 337 U.S. at 3.

[175] *Id.* at 4.

[176] Beauharnais v. Illinois, 343 U.S. 250 (1952).

subsequent decisions,[177] starting with *Brandenburg v. Ohio* in 1969.[178] Ohio Ku Klux Klan member Clarence Brandenburg was charged with hate speech against blacks and Jews when he recommended overthrowing the government: "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[179] In reversing Brandenburg's sentence, the Supreme Court ruled that:

> the 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.[180]

Less than ten years later, the Supreme Court overturned an Illinois county decision prohibiting a Nazi group from wearing Swastikas and distributing "pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry" during a march in Skokie, a small Jewish town in Illinois where one in six Jewish families had survived the Holocaust.[181] In its ruling, the Supreme Court upheld the Federal Court of Appeal's holding that "the ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country."[182]

The protection of a certain category of groups against hate speech was again rejected in 1992 in *R.A.V. v. City of St. Paul.*[183] In this case, the Supreme Court rejected the City of St. Paul's argument justifying its "Bias-Motivated Crime Ordinance," which punished anyone who:

> places 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

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[177] Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1536 (2002).

[178] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[179] *Id.* at 446.

[180] *Id.* at 447.

[181] Village of Skokie v. National Socialist Party, 336 N.E.2d 347, 351 (1977).

[182] Collin v Smith, 447 F. Supp. 676, 702 (N.D. Ill, 1978). *See generally id.*

[183] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

> to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.[184]

The Supreme Court rejected the City of St Paul's argument that the ordinance was intended "not to impact on [sic] the right of free expression of the accused" but rather to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against."[185] The Court ruled that the "emotive impact of speech on its audience is not a 'secondary effect'"[186] except in the sense that it justifies the limitation of the First Amendment.[187]

The majority ruling in the *R.A.V. v. City of St. Paul* case left room for the US Supreme Court to rule in 2003 in *Virginia v. Black*[188] that a Virginia statute outlawing cross burning done with the intent to intimidate was in conformity with the First Amendment. Justice Sandra Day O'Connor, writing the majority opinion, argued that the Virginia Statute's "ban on cross burning carried out with the intent to intimidate is fully consistent with [the Court's] holding in R.A.V." mainly because, unlike the statute at issue in R.A.V., it did "not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'"[189] Unlike the Minnesota statute, the Virginia statute did not intend to protect a specific group of victims because of its race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality."[190] What the Virginia statute focused on was the intimidation that resulted from cross burning. For the US Supreme Court, "burning a cross is a particularly virulent form of intimidation,"[191] and, therefore, instead of prohibiting all intimidating messages, Virginia was constitutionally allowed "to regulate this subset

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[184] *Id.* at 380.

[185] *Id.* at 394.

[186] For details on the meaning of "secondary effect," see Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); *see also* David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, Fall (1997); Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175 (2002).

[187] Boos v. Barry, 485 U.S. 312, 321 (1987).

[188] Virginia v. Black, 538 U.S. 343 (2003).

[189] *Id.* at 344.

[190] *Id.* at 345 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

[191] *Black*, 538 U.S. at 344.

of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence."[192]

More recently, in 2011 the US Supreme Court in *Snyder v. Phelps*[193] reiterated the First Amendment commitment to protecting hate and extremist speech. This case concerned Westboro Baptist Church members who picketed the funeral of US Marines killed in a non-combat-related vehicle accident. Picketers displayed placards such as "America is doomed," "You're going to hell," "God hates you," "Fag troops," "Semper fi fags," and "Thank God for dead soldiers."[194] Ruling in favor of the picketers, Chief Justice Roberts recalled the significance of free speech in the United States:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[195]

As stated earlier, it is unsure how US Supreme Court rulings influence the American cultural symbolism of free speech leading to the protection of hate and extremist speech and vice versa. One can observe, however, that hate and extremist speech are intertwined with other forms of speech, making it difficult to separate hate and extremist speech without undermining the whole purpose of free speech, as reflected in American cultural symbolism and rulings of the US Supreme Court on First Amendment cases. It is this reasoning that seems to have guided the United States in its international negotiations on free speech.

C. SELLING THE US FREE SPEECH APPROACH TO THE WORLD: A DIFFICULT MISSION

From the early stages of the negotiation of international human rights treaties, the United States used the slippery slope argument to oppose any clauses restricting free speech.[196] Nothing better illustrates this approach than the US argument during the negotiation of the ICCPR.

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[192] *Id.*

[193] Snyder v. Phelps, 562 U.S. 443 (2011).

[194] *Id.* at 448.

[195] *Id.* at 460–61.

[196] *See* Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 14–16 (1996).

During these negotiations, the United States cautioned other countries against including "any provision likely to be exploited by totalitarian states for the purpose of rendering the other articles null and void" in the ICCPR.[197] Regarding the inclusion of specific provisions prohibiting incitement to hatred, Eleanor Roosevelt warned that this would be an "extremely dangerous" move, "since any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited."[198] While the majority of other liberal democracies shared the United States' view that including anti-hate provisions would be handing totalitarian regimes a tool to "silence free men,"[199] they were not comfortable with the "absolutist"[200] position of the United States, which was viewed as wishing "to permit full freedom of expression for the purpose of incitement to hatred and violence."[201] The same argument was used during the negotiations on the Genocide Convention and the CERD. In opposing the provision dealing with incitement in the Genocide Convention, for example, the United States expressed its concern that:

> [i]f it were admitted that incitement was an act of genocide, any newspaper article criticizing a political group, for example, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain States to claim that a Government... was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the Press.[202]

The US concerns did not, however, persuade the majority to drop the provision punishing incitement to genocide. As result, the final document of the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations included in the punishable acts: "direct and public incitement to commit genocide."

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[197] *Id.* at 27 (citing U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174, at 7 (May 8, 1950)).

[198] *Id.* at 27 (citing U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174, at 6 (May 8, 1950)).

[199] *Id.* at 30 (citing U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174, at 9 (May 8, 1950)).

[200] *Id.* at 30 (citing U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.320, at 13-14 (June 18, 1952)).

[201] *Id.* (citing U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174, at 9) (May 8, 1950)).

[202] U.N. GAOR, 3d Sess., 84th mtg. at 213, U.N. Doc. A/C.6/SR.84 (Oct. 26, 1948) (statement of Mr. Maktos, United States).

III. THE US REACTION TO A WORLD THAT DOES NOT ESPOUSE ITS FREE SPEECH PERSPECTIVE

A. TREATY RESERVATIONS & NON-RATIFICATION

The US approach to negotiating international treaties that impact the First Amendment has been to influence the negotiations first and then if that does not work, to make reservations on the provisions that contradict the First Amendment or to refuse to ratify the concerned treaty all together. This attitude can be illustrated by the US reaction during and after the drafting of the Genocide Convention, the ICCPR, and the CERD.[203]

The Genocide Convention was the first to test the US First Amendment's influence on international treaties.[204] Given the influence that people like Joseph Goebbels, Julius Streicher, and Hans Fitzscher had had in making the Holocaust possible, it was not a surprise that the original Draft Convention on the Crime of Genocide contained provisions that prohibited "direct public incitement to any act of genocide whether the incitement be successful or not"[205] and "all forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act[.]"[206]

Obviously, the United States was not willing to allow any limitations of free speech beyond what was acceptable under the First Amendment as detailed in the 1919 *Schenck v. United States* case.[207] That is why, in opposing these provisions, the United States argued that "free speech is not to be interfered with unless there is a clear and present

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[203] *See supra* notes 177–202 and accompanying text.

[204] Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L. J. 87, 87-90 (2001).

[205] Draft Convention on Genocide, G.A. Res 180 (II), U.N. Doc A/RES/180 (Nov. 21, 1947).

[206] *Id.* at art. III.

[207] The free speech limitation test of that period was the "clear and present danger" test, as developed in *Schenck v. United States*:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

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

danger that the utterance might interfere with a right of others."[208] When the UN General Assembly Sixth Committee was revising the Ad Hoc Committee's draft of the Genocide Convention, the United States warned about the slippery slope consequences of such an approach.[209]

The United States' attempts to defeat these two provisions were successful only with regard to the provision prohibiting genocide propaganda;[210] its amendment aimed at deleting the provision dealing with incitement was defeated.[211] Still determined not to betray its First Amendment commitment, the United States declared that it reserved its position on the subject of incitement to commit genocide.[212] Instead of voting against this article, however, the United States preferred to abstain,[213] giving a chance to countries and international law to make "direct and public incitement to commit genocide" punishable.[214] Although no specific reservation on this article was made during the United States' ratification of this treaty, an inclusion in the general reservation of this treaty says that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[215]

The ICCPR, particularly Articles 19 and 20, also challenged the United States' effort to project its First Amendment concept of free speech internationally.[216] While a significant number of countries supported the inclusion of an anti-hate clause during the Covenant's negotiations, the United States was determined not to give in.[217] As one

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[208] William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 150 (2000).

[209] *Supra* note 202.

[210] *See* U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Comm. on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, at 6, U.N. Doc. E/794 (May 24, 1948) (prepared by Karim Azkoul).

[211] There were twenty-seven votes against the amendment, sixteen in favor, and five abstentions. U.N. GAOR, 3d Sess., 85th mtg. at 229, U.N. Doc. A/C.6/SR.85 (Oct. 27, 1948).

[212] *Id.*

[213] U.N. GAOR, 3d Sess., 91st mtg. at 301, U.N. Doc. A/C.6/SR.91 (Nov. 4, 1948).

[214] G.A. Res. 260 (III), U.N. GAOR, 3d Sess., 179 plen. mtg. at 174-75, U.N. Doc. A/260 (Dec. 9, 1948).

[215] United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations, Dec. 9, 1948, 78 U.N.T.S. 277.

[216] *See generally* Scott J. Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant of Civil and Political Rights*, 69 NOTRE DAME L. REV. (1994).

[217] For details on the negotiation and positions of the United States, see Farrior, *supra* note 196, at 15–16.

author has observed: "from 1947 through 1953, anti-hate provisions were added to the draft Covenant, then deleted upon motion by the United States, then added again, then deleted, and finally added for good."[218] Although a number of liberal states shared some of the United States' worries about including anti-hate provision in the ICCPR,[219] they were disappointed that the United States made very little concession in allowing at least some limitation of hate speech.[220] Furthermore, unlike these countries, which despite their opposition to Article 20(2) made no reservation to this article when they ratified the ICCPR, only the United States and Malta did.[221] The US reservation stated that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."[222]

The CERD is the third on the list of treaties that rejected the US First Amendment approach to free speech. As said earlier, Article 4 of this Convention, which has been qualified as a "central" part of this Convention, goes beyond limiting hate speech to call for its criminalization.[223] The CERD has reiterated that the "provisions of article 4 are of a mandatory character."[224] With such a qualification, one may wonder whether making a reservation to this article violates the Vienna Convention on the Law of Treaties ("VCLT"), which forbids reservations "incompatible with the object and purpose of the treaty."[225] Luckily, the CERD has developed its own rules for making reservations;

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[218] Farrior, *supra* note 196, at 31.

[219] Farrior, *supra* note 196, at 28 (citing U.N. Commission on Human Rights, U.N. Doc. E/CN.4/SR.174, at 7 (May 8, 1950)).

[220] Rene Cassin of France agreed that while the USSR proposal would "silence free men," the US proposal "wished to permit full freedom of expression for the purpose of incitement to hatred and violence." U.N. ESCOR, 6th Sess., 174th mtg. at 9, U.N. Doc. E/CN.4/SR.174 (May 8, 1950).

[221] For a list of countries that have ratified this treaty without making any reservation to Article 20, see International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *entered into force* March 23, 1976, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

[222] 102 CONG. REC. S4781 (Apr. 2, 1992); *see also supra* note 221, at 13.

[223] *See supra* note 68. *See also supra* note 69.

[224] Comm. on the Elimination of Racial Discrimination, 42nd Sess., Gen. Rec. XV, U.N. Doc. A/48/18 at 115 (Mar. 17, 1993).

[225] Vienna Convention on the Law of Treaties, art. 19(c), May 23, 1969, 1151 U.N.T.S. 331.

therefore, according to the *lex specialis derogat generalis* principle, it is better to look at the CERD rules instead of focusing on the VCLT.[226]

Article 20 of the CERD, while providing that a "reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed," also provides that "a reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."[227] This has allowed the United States to formulate reservations, stating that it:

> does not accept any obligation under this Convention, in particular under [A]rticles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.[228]

This reservation does not violate the VCLT as a matter of fact. The United States joined the rest of the world in unanimously adopting this article,[229] and in its reports it has consistently argued that it:

> believes its reservations, understandings and declarations, which are an essential element of its consent to be bound by this instrument, are compatible with its object and purpose; they also do not inhibit the operation of any bodies established by the Convention. The United States fully supports the goals of the Convention. In any event, paragraph 2 of article 20 provides an authoritative method of determining whether any reservation is incompatible or inhibitive in relation to this Convention; namely, formal objection thereto by at least two thirds of the States parties to the Convention. None of the conditions imposed upon U.S. ratification of this Convention has been objected to in that manner.[230]

More recently, the US threat not to ratify the Convention on Cybercrimes if it included provisions limiting hate and extremist speech pushed the drafters of this convention to remove any reference to hate

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[226] HUGO GROTIUS, 2 THE LAW OF WAR AND PEACE [DE JURE BELLI AC PACIS] 428 (Francis W. Kelsey trans., 1925) (1646).

[227] International Convention on the Elimination of All Forms of Racial Discrimination, art. 20, Mar. 7, 1966, 660 U.N.T.S. 195.

[228] International Convention of the Elimination of all Forms of Racial Discrimination, Declarations and Reservations, Mar. 7, 1966, 660 U.N.T.S. 195, *available at* http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf.

[229] Comm. on Human Rights, Rep. on its 20th Sess., Feb. 17–Mar. 18, 1964, U.N. Doc. E/CN.4/874 at para. 188, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/874.

[230] Comm. on the Elimination of Racial Discrimination, Rep. Submitted by State Parties under Article 9 of the Convention, U.N. Doc. CERD/C/351/Add.1, at para. 148 (Oct. 10, 2000).

and xenophobic speech and place them into a separate protocol.[231] This allowed the United States to ratify the convention,[232] but it still refused to sign the Additional Protocol to the Convention on Cybercrime Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer System.[233]

B. THE YAHOO! INC. CASE & THE US SUPREME COURT'S MISSED OPPORTUNITY

The *Yahoo! Inc.* case illustrates yet another complication of regulating free speech in a globalized world and the challenge to extend First Amendment protection of American citizens' free speech rights outside US borders. This case concerned Yahoo's auction sites, which allowed anyone to post an item for sale and to solicit bids from any computer user around the globe. In April of 2000, *La Ligue Contre Le Racisme Et l'Antisemitisme* ("LICRA") and *L'Union Des Etudiants Juifs De France* ("UEJF"), both non-profit organizations dedicated to eliminating anti-Semitism, sued Yahoo before the *Tribunal de Grande Instance de Paris* (Grande Instance Court of Paris) because they believed that the selling of goods related to Nazis and the Third Reich through Yahoo's auction services violated French law.[234] The court entered an order requiring Yahoo to:

> (1) eliminate French citizens' access to any material on the yahoo.com auction site that offers for sale any Nazi objects, relics, insignia, emblems, or flags; (2) eliminate French citizens' access to web pages on Yahoo.com displaying text, extracts, or quotations from *Mein Kampf* and *Protocol of the Elders of Zion*; (3) post a warning to French citizens on yahoo.fr that any search through yahoo.com may lead to sites containing material prohibited by Section R645-1 of the French Criminal Code, and that viewing the prohibited material may result in legal action against the Internet user; and (4) remove from all browser directories accessible in the French Republic index headings entitled "negationists" and from all

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[231] *See* MURRAY, *supra* note 6, at 130.

[232] *See* Council of Europe Treaty Office, *Chart of Signatures and Ratifications of Treaty 185,* (Jan. 7, 2004), *available at* http://conventions.coe.int/Treaty/Commun/print/ChercheSig.asp?NT=185&CL=ENG.

[233] *See also* Council of Europe Treaty Office, *Chart of Signatures and Ratifications of Treaty 189,* (Jan. 28, 2004), http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/signatures?p_auth=vJgVG400.

[234] Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001).

> hypertext links the equation of "negationists" under the heading "Holocaust."[235]

The order subjected Yahoo to a penalty of 100,000 Euros for each day that it failed to comply with the order.[236] Yahoo contended that such a ban would infringe impermissibly upon its rights under the First Amendment of the US Constitution. Accordingly, it filed a complaint before the US District Court for the Northern District of California seeking a declaratory judgment that the French court's orders were neither cognizable nor enforceable under the laws of the United States.[237] The issue in this case was "whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation."[238] The court ruled in favor of Yahoo, saying that allowing France to regulate speech by a US resident would be inconsistent with the US First Amendment.[239]

Unsatisfied with the district court ruling, LICRA and UEJF appealed before the US Court of Appeals for the Ninth Circuit, challenging the district court's rulings on personal jurisdiction, ripeness, and abstention.[240] Although a majority of the en banc panel held that the district court properly exercised personal jurisdiction over LICRA and UEJF and a plurality of the panel concluded that the case was not ripe, the court did not reach a consensus on the abstention question. As the court put it, "the only question in this case is whether California public policy and the First Amendment require unrestricted access by Internet users in France. In other words, the only question would involve a determination whether the First Amendment has extraterritorial application."[241] To answer this question the court observed that "the extent of First Amendment protection of speech accessible solely by those outside the United States is a difficult and, to some degree, unresolved issue."[242] As a matter of fact, this difficulty can be observed in rulings of different US courts, which found variously that "First Amendment protections do not apply to all extraterritorial publications

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[235] *Id.* at 1184–85.
[236] *Id.* at 1185.
[237] *Id.* at 1186.
[238] *Id.*
[239] *Id.* at 1194.
[240] Yahoo! v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006).
[241] *Id.* at 1217.
[242] *Id.*

by persons under the protections of the Constitution";[243] that it is "not clear whether even American citizens are protected specifically by the First Amendment with respect to their activities abroad";[244] and that "[t]here can be no question that, in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders."[245] This uncertainty could have worked to Yahoo's benefit, but the Ninth Circuit opted for ambiguity by holding that:

> the core of Yahoo!'s hardship argument may thus be that it has a First Amendment interest in allowing access by users in France. Yet under French criminal law, Internet service providers are forbidden to permit French users to have access to the materials specified in the French court's orders. French users, for their part, are criminally forbidden to obtain such access. In other words, as to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law and to facilitate the violation of French criminal law by others. As we indicated above, the extent-indeed the very existence-of such an extraterritorial right under the First Amendment is uncertain.[246]

To resolve this uncertainty, the US Supreme Court was recently asked to rule on this case, but denied certiorari in *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*.[247] With this refusal, the highest court of the United States proved that it was not yet ready to decide whether the US First Amendment provides protection to its citizens for speech which, though protected under First Amendment, may be punishable in foreign countries.

C. THE SPEECH ACT

In 2010, Congress adopted the Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act") because it was worried that, with the advent of the Internet and the

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[243] *Id.* (quoting Desai v. Hersh, 719 F.Supp. 670, 676 (N.D. Ill. 1989)).

[244] *Id.* (quoting Laker Airways Ltd. v. Pan American Airways, Inc., 604 F.Supp. 280, 287 (D.D.C. 1984)).

[245] *Id.* (quoting Bullfrog Films, Inc. v. Wick, 646 F.Supp. 492, 502 (C.D. Cal. 1986)).

[246] *Id.* at 1221.

[247] La Ligue Contre le Racisme et l'Antisemitisme v. Yahoo!, No. 05-1302, 2006 WL 993483 (2006); *see also* Pinsent Masons, LLP, *Supreme Court Won't Hear Yahoo! Nazi Auctions Case*, OUT-LAW.COM (May 31, 2006), http://www.out-law.com/page-6964.

international distribution of foreign media, there was a danger that one country's unduly restrictive libel law might affect freedom of expression worldwide on matters of valid public interest.[248] Congress had found that some individuals were obstructing the free expression rights of US authors and publishers by suing them in foreign jurisdictions that do not provide the full extent of free speech protections that are available in the United States.[249] According to Congress, this practice needed to be stopped because it risked "chilling" the interest of citizenry in receiving information on matters of importance, suppressing the free speech rights of the defendants to the suit, and inhibiting other written speech that might otherwise have been written or published but for fear of a foreign lawsuit.[250]

The SPEECH Act provides that US courts shall not recognize or enforce a foreign judgment for defamation except in a very limited number of situations. The first situation is when the US court determines that the defamation law applied in the foreign court's adjudication provides at least as much protection for freedom of speech and press in that case as would be provided by the First Amendment, and by the constitution and law of the state in which the domestic court is located.[251] The second situation is when the party opposing recognition has been found liable by a domestic court applying US federal and local law.[252] Such judgments shall not also be recognized or enforced unless the US court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements imposed on domestic courts by the US Constitution.[253] In all these cases, the burden of establishing consistency of judgment is on the foreign judgment holder seeking to enforce the foreign judgment.[254] The SPEECH Act also allows a person against whom a foreign judgment is entered on the basis of the content of any writing, utterance, or other speech by that person that has been published to bring an action for a declaration that the foreign defamation judgment is "repugnant to the constitution or laws of the

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[248] Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act of 2010, Pub. L. No. 111-223, § 2(4) (124 Stat.) 2380 (2010).

[249] SPEECH Act § 2(2)–(3).

[250] *Id.*

[251] *Id.* at § 4102(a)(1)(A).

[252] *Id.* at § 4102(a)(1)(B).

[253] *Id.* at § 4102(b)(1).

[254] *Id.* at § 4102(b)(2).

United States."[255] A judgment is repugnant to the constitution or laws of the United States if it would not be enforceable under the provisions of the SPEECH Act.[256]

The statute also offers a broader protection to Internet "providers of interactive computer service."[257] It provides that US courts shall not recognize or enforce a foreign judgment for defamation against such providers unless the US court determines that the judgment would be consistent with Section 230 of the Communications Decency Act, which protects against liability for user-generated content, if the information that is the subject of such judgment had been provided in the United States.[258]

IV. CONCLUSION: TOWARD A NEW US INTERNATIONAL POLICY ON FREE SPEECH

US reservations to international treaties that limit free speech, as well as acts such as the SPEECH Act, may protect the United States from its international law obligations and the enforcement of foreign judgments in the United States,[259] but they cannot completely shelter Americans from foreign trials and judgments for violations of international and foreign domestic law limitations on free speech. As a matter of fact, when dealing with the arrest warrant against Nakoula, the arrest of Peter Erlinder, and the fining of Yahoo, solutions based on politics and compromise trumped any First Amendment legal arguments. In the case of Nakoula, although on record his arrest was not related to his First Amendment rights, it was nonetheless connected to the release of his video and the need to appease the revolt that followed its publication in the Muslim world.[260] In the case of Erlinder, his release

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[255] *Id.* at § 4104(a)(1).

[256] *Id.*

[257] "Interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

[258] Communications Act of 1934, 47 U.S.C. § 230.

[259] *See* LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES, RATIFY OR RUIN? (1995). *See also* Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments*, FEDERAL JUDICIAL CENTER (Apr. 2012), http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf.

[260] *See* Evan Perez & Erica E. Phillips, *Alleged Maker of Anti-Muslim Video Jailed in Fraud Case*, WALL ST. J. (Sept. 28, 2012), http://online.wsj.com/news/articles/SB10000872396390443328404578022953359653378; *see*

from the Rwandan justice system was in no way a result of the First Amendment protection he had proudly raised, but rather a result of heavy diplomatic pressure from the US Department of State on the Rwandan government.[261] In the case of Yahoo, it was not Yahoo's call for First Amendment protection that allowed it to escape from French justice, but rather its acceptance of French free speech limitations.[262] Regarding the effectiveness of the SPEECH Act, while it has earned praise from many who saw it as overdue, it is unlikely to offer full protection to American citizens.[263] Some have actually seen it as merely symbolic, with a very limited speech-protective effect, mainly because, despite American non-recognition, "foreign defamation judgment will still stand and may be enforceable elsewhere."[264] As the majority of countries limit defamatory speech, unless the speaker confines his assets to the United States, the SPEECH Act is unlikely to protect him or his assets located overseas.

Both the United States' failure to convince other liberal democracies of the dangers of limiting free speech with the slippery slope argument and the limited effect of the SPEECH Act and treaty

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also Gillian Flaccus & Greg Risling, *Nakoula Basseley Nakoula Appears In Court, Reveals Aliases*, HUFFINGTON POST (Sept. 28, 2012), http://www.huffingtonpost.com/2012/09/28/nakoula-basseley-nakoula-aliases-innocence-of-muslims_n_1922945.html.

[261] Amanda Pinto, *Peter Erlinder Arrest a Blow to International Law*, GUARDIAN (June 30, 2010), http://www.theguardian.com/law/2010/jun/29/peter-erlinder-arrest-international-law.

[262] Henry Weinstein, *Yahoo's Nazi Suit Tossed*, L.A. TIMES (Jan. 13, 2006), http://articles.latimes.com/2006/jan/13/business/fi-yahoo13.

[263] *See* Op-Ed, *A Victory for Writing*, N.Y. TIMES, July 23, 2010, at A22. The American Civil Liberties Union ("ACLU") expressed that "the United States is justified in standing up for its progressive free speech standards, which are far closer to international standards than those of Great Britain." Letter from Am. Civil Liberties Union to U.S. S., *ACLU Supports H.R. 2765 – Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act")* (July 15, 2010), *available at* http://www.aclu.org/files/assets/Ltr_to_Senate_supporting_SPEECH_Act.pdf;

> Federal legislation should build on the New York law by avoiding its jurisdictional overreaching, while at the same time giving it teeth by including a damages remedy that will deter future libel forum-shopping. This approach would avoid constitutional problems while allowing an affirmative measure that will hit enough real tourists to dampen their libel-holiday adventures.

Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J.L. & LIBERTY 252, 292 (2009); Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 MISS. L.J. 617, 625 (2010) ("the libel tourist is ordinarily attempting to circumvent the First Amendment by suing the American speaker in a foreign court"); Thomas Sanchez, Note, *London, Libel Capital No Longer?: The Draft Defamation Act of 2011 and the Future of Libel Tourism*, 9 U.N.H. L. REV. 469 (2011) ("[The Draft Defamation Act] marks an important first step in the curbing of libel tourism in London as well as the reformation of English libel laws in general.").

[264] Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 529 (2012).

reservations justify the need for an approach that better guarantees free speech of American citizens in this era of the global marketplace of ideas, free movement of people, and information technology. This approach should be more preventive and legal than curative and political: it requires the United States to move away from its old international relations approach that focused on the slippery slope argument. This new approach should instead start from the recognition that free speech is not absolute. As Van der Burg has correctly observed, appeals to the slippery slope argument are so futile that when evoked in a legal debate they serve to frustrate rather than persuade the other side.[265] It is obvious that the slippery slope argument on free speech limitation cannot work in international law negotiations between the United States, with its strong free-speech cultural symbolism, and Europe, with its traumatic experience of Nazi propaganda. This is mainly due to the fact that such an argument is usually unconvincing to people whose outlooks differ from those of the arguments' proponents[266] and rarely works in legislative debates such as the ones that create international treaties.[267]

It is, therefore, no surprise that the slippery slope argument on free speech limitation has never worked in US international relations. This argument should therefore be abandoned and replaced by the one that recognized from the beginning that free speech is not absolute. Recognizing that free speech is not absolute does not mean that the United States should abandon its free-speech cultural symbolism and constitutionalism; these are very important elements domestically and even to some extent internationally. This recognition should instead invite the United States and other liberal democracies to the table and give the United States a leadership role in developing better standards for defining protected and unprotected speech, thus ensuring American citizens better free speech protection outside US borders.

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[265] Wibren van der Burg, *The Slippery Slope Argument,* 102 ETHICS 42, 65 (1991).

[266] *Id.* at 42.

[267] *Id.* at 48-51; *see also* Lode, *supra* note 137, at 1494-95.