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THE HATEFULNESS OF PROTECTED SPEECH: A COMPARISON OF THE AMERICAN AND EUROPEAN APPROACHES

Sionaidh Douglas-Scott* †

In its First Amendment jurisprudence, the United States Supreme Court has construed very broadly the constitutional protection of free speech. Similarly democratic governments in Europe, however, have adopted laws restricting certain types of speech—particularly hate speech—based on the view that the human rights of oppressed groups cannot be protected fully if hate speech is permitted. In this provocative Article, Professor Douglas-Scott briefly examines the American approach and contrasts it with the rationale underpinning European, especially German, law. Focusing on hate speech and the denial of the Holocaust voiced largely by neo-Nazi and other right-wing groups, she argues that such speech poses problems for society that are not addressed most effectively by strict adherence to unfettered free expression.

* * *

Recent attempts by German authorities to impose state censorship on the Internet, by pressurizing commercial providers to block access to material considered illegal under German law, have received considerable attention. The highly publicized conviction of Felix Somm, manager of CompuServe's German operations, for complicity in transmitting child pornography and the dissemination of Nazi symbols, illustrates the willingness of German prosecutors to regulate the Internet and to use

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† Unless otherwise noted, all translations of German law into English are by the author.

ensorship aggressively in acting against neo-Nazis.¹ This conviction also illustrates an approach to freedom of expression which stands in bold contrast to that of the United States Supreme Court, which in 1997 struck down provisions of the Communications Decency Act stating, "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."² Somm's conviction is unlikely to stand and, in any case, recent legislation in Germany specifies that on-line service providers are not responsible for material transmitted online if they have no means of filtering out the offending material.³ Apart from the emotive issues of Internet regulation, however, the Somm case illustrates that recent racial hatred legislation, not only in Germany but also in other European countries, permits restriction of freedom of expression which would not be permissible in the United States.

Attempts to censor certain types of racist or discriminatory speech raise the vexing question of whether governments should outlaw the expression of views that society generally abhors. In a recent article entitled *Should Wrong Opinions Be Banned?*,⁴ Ronald Dworkin takes a firm position with respect to this subject. Dworkin criticizes the prohibition in Germany of racist invective and concludes: "We must not endorse the principle that opinion may be banned when those in power are persuaded that it is false and that some group would be deeply and understandably wounded by its publication."⁵

Dworkin's view is based on a liberal justification of freedom of speech, namely, that free speech promotes certain key values such as individual autonomy and democracy (in that people should be able to decide for themselves which political and societal views should prevail). This view is also prevalent in the approach taken by the United States Supreme Court in its First Amendment jurisprudence, and it

¹ Somm was charged under sections 27 and 184 of the German Criminal Code, STRAFGESETZBUCH [StGB] §§ 27 & 184 Nr. 3 (F.R.G.), and convicted on May 27, 1998. He received a suspended sentence and a fine of 100,000 DM (approximately \$56,000). See *Head of German Web sentenced for pornography*, N.Y. TIMES, May 29, 1998, at A3; *Ex-CompuServe official convicted in German court*, WALL ST. J., May 29, 1998, at A6.

² *Reno v. ACLU*, 117 S. Ct. 2329, 2351 (1997).

³ The German prosecutors have taken the unusual step of appealing the CompuServe conviction which means that the case could go straight to the Bavarian State Supreme Court. In August 1997, the German Parliament passed the German multimedia law, which specifies that online providers are not liable if they do not have the technology to block the material, and it was on the basis of that law that the prosecutors asked for an acquittal. Gesetz zur Regelung der Rahmenbedingungen für Informations und Kommunikationsdienste (Federal Law to Regulate the Conditions for Information and Communications Services) [IuKDG], BUNDESGESETZBLATT, TEIL I [BGBl. I] v. 22.7.97 (BGBl. I S.1870) (F.R.G.).

⁴ Ronald Dworkin, *Should Wrong Opinions Be Banned?*, INDEPENDENT (London), May 28, 1995, at 27.

⁵ *Id.* Dworkin expresses similar views in *Liberty and Pornography*, N.Y. REV. BOOKS, Aug. 15, 1991, at 15.

contrasts with the more interventionist approach found in Europe. However, not everyone shares Dworkin's view—there is now a growing body of criticism on the near absolute strength of freedom of speech in the United States. These critics assert that it is better to allow inroads into freedom of expression than to continue permitting the harm caused by certain verbal utterances.⁶ This Article will demonstrate that some criticisms such as these are well-grounded, and that some types of speech produce problems for contemporary society that are not addressed most effectively by strict adherence to unfettered free expression. In so doing, this Article will focus in particular on hate speech and Holocaust denial,⁷ and will engage in a comparison of the German case law denigrated by Dworkin (as well as other European precedents) with the more absolutist and pro-free speech approach of First Amendment jurisprudence in the United States.

I. PRELUDE: CASE COMPARISONS

A comparison of two similar cases clearly highlights the distinctions between the American and European approaches to speech. The holdings in each case concerned the issue of whether the proscription of certain types of expression, on the grounds of its racist nature, offends the principle of freedom of speech.

In April of 1994, the German Constitutional Court, the Bundesverfassungsgericht, held that it was not contrary to Article 5(1) of the German Basic Law,⁸ which provides for freedom of expression, to ban an assembly in Munich at which the "revisionist historian" David Irving would be questioning the extent of the Jewish Holocaust during the Third Reich.⁹ The court held that the ban on the assembly and the consequent restriction of Irving's exercise of free speech were compatible with the German Constitution and authorized under certain provisions of the German Criminal Code, including those provisions that specifically set forth the offense of denying the Holocaust.¹⁰

⁶ See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); CATHARINE A. MACKINNON, *ONLY WORDS* (1993); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

⁷ This Article focuses on hate and discriminatory speech, but many of the arguments made here also may apply to pornography. See MACKINNON, *supra* note 6, *passim*.

⁸ GRUNDGESETZ [Constitution] [GG] art. 5 Nr. 1 (F.R.G.).

⁹ See Judgment of Bundesverfassungsgericht, Apr. 23, 1994, reported in *Neue Juristische Wochenschrift* [NJW] 1994, at 1779, discussed in greater depth *infra* notes 122-25 and accompanying text.

¹⁰ See *id.* at 1779; see also §§ 130 & 194 StGB.

In contrast, in the well-known American case of *Collin v. Smith*,¹¹ the Court of Appeals for the Seventh Circuit held that the First Amendment¹² protected from prior restraint the planned march of a group of neo-Nazis through Skokie, Illinois, a suburb of Chicago where a large number of Holocaust survivors lived¹³ and which was chosen by the neo-Nazis for precisely that reason. The court held that the march was protected speech, and it invalidated Skokie's anti-defamation law by which the Village sought to prevent the march.¹⁴ The Seventh Circuit held that protection of the sort of expression engaged in by the neo-Nazis in Skokie was the necessary price of liberty in America: "It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich."¹⁵

In *R.A.V. v. City of St. Paul*,¹⁶ the United States Supreme Court more recently spelled out the reasoning underlying the Seventh Circuit's holding in *Collin*. The facts in *R.A.V.* concerned the burning of a crudely made cross (with the clear intent to intimidate) on the lawn of a black family that had moved into a formerly all white neighborhood.¹⁷ The defendant, Robert Allen Viktora (*R.A.V.*),¹⁸ was charged under the St. Paul Bias-Motivated Crime Ordinance.¹⁹ According to this ordinance, anyone who "places on public or private property a symbol, [or] object . . . including . . . a burning cross . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct."²⁰ The Supreme Court held that the St. Paul ordinance was unconstitutional and that the charge must be dismissed.²¹ The local law offended the free speech guarantee of the First Amendment because it "prohibit[ed] . . . speech solely on the basis of the subjects the speech address[ed]."²²

Collin and *R.A.V.* are paradigmatic examples of the approach taken by American courts. The United States Supreme Court has expanded the scope of First

¹¹ 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

¹² U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech . . ."). The First Amendment's guarantee also is applicable to state law by incorporation through the Due Process Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV.

¹³ *See Collin*, 578 F.2d at 1199.

¹⁴ *See id.* at 1218-19.

¹⁵ *Id.* at 1201.

¹⁶ 505 U.S. 377 (1992).

¹⁷ *See id.* at 379.

¹⁸ The defendant was a juvenile at the time of the crime and, thus, the Court identified him only by his initials.

¹⁹ ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990), *quoted in R.A.V.*, 505 U.S. at 380.

²⁰ *Id.*, *quoted in R.A.V.*, 505 U.S. at 380.

²¹ *R.A.V.*, 505 U.S. at 396.

²² *Id.* at 381.

Amendment guarantees of freedom of speech through its decisions in a large family of cases this century, to which these two cases belong.²³ In this context, Ronald Dworkin recently commented: "The United States stands alone even among democracies, in the extraordinary degree to which its [C]onstitution protects freedom of speech and of the press."²⁴ This strong belief in freedom of speech, backed up as it has been by the use of metaphors such as "the marketplace of ideas," applies not only in the area of hate speech, but also to other highly contested areas of discourse such as pornography, in which the value of the "speech" concerned seems to be as low as hate speech.²⁵

In contrast, controls on free speech long have been permitted in many European countries to curb incitement to race hatred and other undesirable motivations.²⁶ The European Union declared 1997 a year of action against racism, and the Council of the European Union recently reached agreement on a text proposing joint action against racism and xenophobia, which would cover denial of the Holocaust and a wide range of hate crimes.²⁷

It is, perhaps, all too easy to attempt to justify the existence of such statutory curbs on free speech in Europe as the products of very different histories, circumstances, and ideologies than those of the United States. The United States did not suffer the totalitarian dictatorships of Europe in the 1920s and 1930s nor their disastrous consequences in the form of widespread anti-semitism, persecution, and

²³ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag-burning is protected by the First Amendment as a form of political speech); *Cohen v. California*, 403 U.S. 15 (1971) (holding that a state may not criminalize the mere public display of an expletive); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that a state may not forbid advocacy of the use of force or violation of a law unless the advocacy is intended or likely to incite or produce such action); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that a public official must prove "actual malice" in order to recover damages for defamation relating to his or her official conduct). But see *Wisconsin v. Mitchell*, 505 U.S. 476 (1993) (holding that the application of a penalty enhancement statute to a racist conviction did not breach the First Amendment).

²⁴ Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 55.

²⁵ Obscenity, as distinguished from pornography, is subject to regulation. See *Miller v. California*, 413 U.S. 15, 24-25 (1973) (setting forth guidelines by which states constitutionally may regulate obscene material).

²⁶ See, e.g., Public Order Act, 1986, Part III (U.K.) (proscribing racially inflammatory material as well as acts intended or likely to stir up racial hatred). In Germany, the "Auschwitzlüge" offense (literally, "lie of Auschwitz" offense) under sections 130 and 194 of the Criminal Code prohibits the approval, trivialization, or denial of Nazi crimes or the crimes of other violent regimes. §§ 130 & 194 StGB. Both the United Kingdom and the German provisions are discussed *infra*.

²⁷ Joint Action against Racism 96/443/JHA, 1996 O.J. (L 185) 5. The Council agreed to the joint action on July 15, 1996, on the basis of Article K.3 of the Treaty of European Union.

genocide. Nor has the United States had to confront the immediate consequences of the break up of the Soviet Union and Comecon. One such consequence has been the migration of large numbers of people to Western Europe, particularly to Germany (which until recently had extremely liberal asylum laws),²⁸ and the aggressive reaction from the resident population. Even if one excludes the horrific ethnic conflict in Bosnia, the incidence of racism, xenophobia, and hate crimes in Europe has increased.²⁹ Furthermore, the movement toward a united European Union with increasingly open borders is another factor capable of shaking the identity of Europeans. Physical borders, along with their legal and political significance, often assume cultural and psychological significance. When borders are eroded by such radical events as the fall of the Iron Curtain and the projects of the European Union for an ever closer union, national identity can be shaken. A result of such shaken identities may be the triggering of primitive psychological defense mechanisms and the projection of aggressive emotions onto vulnerable groups.³⁰ Restrictions on hateful and racist speech may be seen therefore as attempts to prohibit such inappropriately aggressive conduct and to express the distaste of nations and their citizens for it.

Not all of these circumstances are unique to Europe, though. Solutions to the problem of discrimination and racist speech have been sought beyond European borders. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires contracting states to "declare [as] an offence punishable by law all dissemination of ideas based on racial superiority or hatred."³¹ The South African constitution, for example, excludes "hate speech" from the protection of free speech.³² The Canadian Supreme Court has shown itself willing

²⁸ Article 16(a) of the German Basic Law provides that "persons persecuted on political grounds shall enjoy the right to asylum." Art. 16(a) GG. On May 28, 1993, the German Parliament voted to limit its policies on political asylum, and a new, more restrictive, Article 16(a) has since been enacted. See Friedrich Schoch, *Das neue Asylrecht gemäß Art. 16(a)99*, 108 DEUTCHES VERWALTUNGSBLATT 1161-70 (1993).

²⁹ See European Parliament, Resolution on the communication from the Commission on racism, xenophobia and anti-semitism, 1996 O.J. (C 152) 57.

³⁰ See, e.g., Avner Falk, *Border Symbolism*, 43 PSYCHO-ANALYTIC Q. 650 (1974).

³¹ International Convention on the Elimination of All Forms of Discrimination, *opened for signature* Mar. 7, 1966, art. 4(a), 660 U.N.T.S. 195, 220 (entered into force Jan. 4, 1969). This treaty has not been ratified yet by the United States, and probably will not be due to its inconsistencies with the First Amendment.

³² The relevant provision reads as follows:

- (1) Everyone has the right to freedom of expression, which includes
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to

to regulate speech when it conflicts with claims of equality. In *Regina v. Keegstra*,³³ a Canadian teacher who had described Jews as “treacherous,” “money loving” “child killers” who had “created the Holocaust to gain sympathy” was convicted under section 319(2) of the Canadian Criminal Code which prohibits communicating statements that wilfully promote hatred against any identifiable group distinguished by color, race, religion, or ethnic origin.³⁴ The Supreme Court of Canada justified the conviction under section 1 of the Canadian Charter, which guarantees rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”³⁵ In his opinion for the court, Chief Justice Dickson reasoned: “Expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values” because it contributes little to truth and tends to frustrate the autonomy and political expression of members of the targeted groups.³⁶ This opinion contrasts sharply with those of the American courts in *Collin* and *R.A.V.*

The United States’ history of slavery and race discrimination, along with a dramatic increase in the incidence of hate related crimes,³⁷ also might seem to justify prohibition of the sort of conduct which took place in *Collin* and *R.A.V.* Yet, the prevailing view in America, and more particularly, the Supreme Court, still seems to oppose such action, even given the harm that racial invective causes. Ronald Dworkin expresses, in terms redolent of *Collin*, the perceived merits of such an attitude: “Decent people are impatient with abstract principles when they see hoodlums with pseudo-swastikas pretending that the most monumental, cold-blooded

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- (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

S. AFR. CONST. § 16 (1996). For a sympathetic commentary on § 16(2)(c), see Franz Auerbach, *Warning: Hate Speech Can Kill—and that is not a human right to be enshrined in a constitution*, SUN. INDEP. (South Africa), Dec. 10, 1995, at 5 (providing an interesting contrast to Dworkin’s argument).

³³ [1990] 3 S.C.R. 697.

³⁴ See *id.* at 714-16.

³⁵ *Id.* at 734 (quoting § 1 of the Canadian Charter of Rights and Freedoms); see also *id.* at 717 (explaining that § 2(b) of the Canadian Charter guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”). The Canadian Charter is modeled on the limiting provisions of the European Convention on Human Rights (“ECHR”), such as Article 10(2). See Eur. Conv. on H.R. art. 10(2), reprinted in FRANCIS G. JACOBS & ROBIN C. A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 222 (2d ed. 1996).

³⁶ *Keegstra*, 3 S.C.R. at 762.

³⁷ See, e.g., U.S. DEP’T OF JUSTICE, F.B.I., *HATE CRIME STATISTICS* 5-18 (1995).

genocide ever was the invention of its victims. But freedom is important enough for sacrifices that really hurt."³⁸

A close examination of American case law and of the traditional arguments in favor of free speech, however, fails to disclose sufficient justification for these "sacrifices." First, this Article briefly examines the basis and logic of First Amendment jurisprudence. The second section contrasts the European approach with the American approach (with special attention to the German provisions criticized by Dworkin) and identifies an alternative theory of expression in Europe, which allows restrictions on speech on the basis of its content. The third section considers the theoretical justifications for a more absolutist approach and finds all of them wanting. The final section draws together the various threads and makes the case for a less absolutist approach to expression.

II. FREE SPEECH IN AMERICAN CASE LAW

The roots of freedom of speech as a value can be traced back to the seventeenth century. John Milton, in his famous essay *Areopagitica*, celebrated the virtues of free speech and tolerance.³⁹ He continued the essay, however, by writing that speech disrespectful to the Church ("tolerated popery, and open superstition"⁴⁰) could be punished by "fire and the executioner."⁴¹ According to Milton, "that also which is impious or evil absolutely either against faith or manners" could not be tolerated by any law "that intends not to unlaw itself."⁴²

Milton's reservations, however, have been either forgotten or ignored (perhaps wisely, given his suggested remedies) by the judges and scholars who have constructed a First Amendment jurisprudence this century. In this context, one of the prevailing judicial images and the bedrock of First Amendment doctrine is the well-known Holmesian market metaphor. In *Abrams v. United States*,⁴³ decided in 1919, Justice Oliver Wendell Holmes wrote in dissent:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get

³⁸ Dworkin, *supra* note 4, at 27.

³⁹ JOHN MILTON, *AREOPAGITICA* 60 (Cambridge Univ. Press 1918) (1644).

⁴⁰ *Id.*

⁴¹ *Id.* at 64.

⁴² *Id.* at 60.

⁴³ 250 U.S. 616 (1919).

itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁴⁴

These strong words have cast their spell over First Amendment jurisprudence for over half a century.⁴⁵

Another pillar of the temple of First Amendment jurisprudence is found in *Whitney v. California*,⁴⁶ which concerned the prosecution of Anita Whitney under the California Criminal Syndicalism Act for her participation in meetings of the California Communist Labor Party convention.⁴⁷ In a separate concurring opinion, Justice Louis Brandeis, joined by Justice Holmes, wrote:

[T]he fitting remedy for evil counsels is good ones. . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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.⁴⁸

For Brandeis, counter-persuasion, not prohibition, was the best remedy. Another pillar of First Amendment jurisprudence surely must be the principle of prohibiting “content regulation” which has emerged in more recent case law—that is, the view that some messages should not be favored over others on the basis that one prefers the message they contain. The majority opinion in *R.A.V.*, penned by Justice Scalia, provides a good illustration of this principle in action. In *R.A.V.*, the majority stated that “[the City of] St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”⁴⁹ However, in spite of its apparent aversion to any content-based regulation of speech, the United States Supreme Court never has held that all speech benefits from First Amendment protection. Some types of speech really are less “free” than others⁵⁰—a fact that should make the United States wonder whether “liberal” free speech jurisprudence really is so averse to banning “wrong” opinions.

⁴⁴ *Id.* at 630 (Holmes, J., dissenting).

⁴⁵ Questions still need to be asked about the operation of this marketplace of ideas: Is it possible for all ideas to find their way into this Holmesian marketplace? How is a society to avoid ideological monopolies? (This is the traditional problem of an unregulated market.)

⁴⁶ 274 U.S. 357 (1927).

⁴⁷ *See id.* at 359-60.

⁴⁸ *Id.* at 375-77 (Brandeis and Holmes, JJ., concurring).

⁴⁹ *R.A.V.*, 505 U.S. 377, 392 (1992).

⁵⁰ *See infra* text accompanying notes 60-75.

A. *The Apotheosis of Political Speech*

Under the First Amendment, freedom of speech is most crucial in the area of political speech. According to the “clear and present danger” test,⁵¹ all political speech is permitted unless it immediately threatens public safety. Political speech is defined very widely including, for example, the money contributed to finance political campaigns.⁵² According to this doctrine, the political arena should be a neutral forum for the expression of all points of view—even if those views actually are not expressed in words, but by so-called “symbolic speech.” In addition to monetary contributions to political campaigns, salient examples include conduct such as entering a courtroom with a shirt bearing the words “Fuck the Draft”⁵³ or burning the American flag.⁵⁴

Furthermore, this privileging of political speech has contaminated the law of defamation. In the seminal case of *New York Times v. Sullivan*,⁵⁵ the Supreme Court held that a public official could not win a libel verdict against the press unless the official proved that a statement made about him or her was not only false and damning but made with “actual malice”—that is, that the journalist published the statement either knowing that it was false or with reckless disregard for its veracity.⁵⁶ The Court based this decision on the principle that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials.”⁵⁷ The Court continued, noting a lower court’s statement: “Whatever is added to the field of libel is taken from the field of free debate.”⁵⁸ The Justices’ primary concern seemed to be that any other rule would operate to chill those who would give voice to public criticism. This approach is in striking contrast to the (astonishing) law in some European countries (at least prior to challenge under the European Convention) in which truth, even if established, may be insufficient as a defense to actions for insulting the government.⁵⁹

⁵¹ See *Schenck v. United States*, 249 U.S. 47 (1919) (setting forth the “clear and present danger” test); discussion *infra* accompanying notes 63-67. Pertinent applications of the test are discussed *supra* in text accompanying notes 11-25.

⁵² See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵³ See *Cohen v. California*, 403 U.S. 15 (1971).

⁵⁴ See *Texas v. Johnson*, 491 U.S. 397 (1989).

⁵⁵ 376 U.S. 254 (1964).

⁵⁶ *Id.* at 279-80.

⁵⁷ *Id.* at 270.

⁵⁸ *Id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942)).

⁵⁹ This approach was the law in Spain prior to the challenge brought under the European Convention in *Castells v. Spain*, 14 Eur. H.R. Rep. 445 (1992). See also *Lingens v. Austria*, 8 Eur. H.R. Rep. 407 (1986) (holding that journalist Lingens’ defamation conviction under Austrian law for criticizing a government minister violated Article 10 of the European

B. *The First Amendment Is Not an Absolute: Other Categories of Speech Are Less Well-Protected*

Some categories of speech, nevertheless, are excluded from the constitutional haven of the First Amendment, although the scope of these exclusions seems to be narrowing all the time. Obscene speech remains unprotected⁶⁰—although distinguishing between what is obscene and what is not remains perplexing. For example, pornography that subordinates women still may be protected as speech.⁶¹ Commercial speech usually has been considered to be protected by the First Amendment, although it commands a lesser degree of protection than political speech⁶²—a substantial state interest must be found to justify restrictions on professional or commercial advertising.

Justice Holmes was responsible for one of the other seminal passages in First Amendment jurisprudence. Holmes first employed the “clear and present danger” test in his 1919 opinion in *Schenck v. United States*⁶³ as a means of placing some, albeit minimal, constraints on the free marketplace of ideas. In *Schenck* he wrote: “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.”⁶⁴

Over the next few decades, the Supreme Court applied the clear and present danger test more and more strictly. In the 1950s, “clear and present danger” took a particularly draconian turn, being used to sanction the conviction of Communist Party organizers merely for advocating—but not actually plotting—the overthrow and destruction of the United States government by force and violence.⁶⁵ By 1969,

Convention).

⁶⁰ See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

⁶¹ For example, as Catharine MacKinnon notes, screenings of the film *Deep Throat* are still permitted, notwithstanding the extremely explicit nature of the film and the possible exploitation of the actress involved. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 128-130 (1987).

⁶² See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (limiting courts’ scrutiny of state regulation of commercial advertizing).

⁶³ 249 U.S. 47, 53 (1919) (upholding petitioner’s conviction for publishing anti-war statements during World War I).

⁶⁴ *Id.* at 52.

⁶⁵ See *Dennis v. United States*, 341 U.S. 494, 510 (1951) (rejecting the “contention that success or probability of success” of petitioners’ implicit plot to overthrow the government is a necessary criterion for invoking the clear and present danger doctrine). Despite the absence of any direct evidence of an actual plan by petitioner to overthrow the government, because of their adherence to Marxist-Leninist doctrine, which advocates violent revolution as a means of toppling capitalist governments, the trial court found petitioners as a matter of fact to advocate such direct action. See *id.* at 497-98.

however, in *Brandenburg v. Ohio*,⁶⁶ the Court reversed the conviction of a Ku Klux Klan leader who was convicted, under an Ohio Criminal Syndicalism Statute, of advocating violence as a means of political reform. The Court held that the First Amendment's guarantee of free speech did not allow "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."⁶⁷

The "fighting words" doctrine, enunciated in *Chaplinsky v. New Hampshire*,⁶⁸ is also often thought to provide another exception to the free speech doctrine. In *Chaplinsky*, the Court affirmed the conviction of a Jehovah's Witness for calling a city marshal "a damned Fascist" (under a state law which prohibited calling someone an offensive or derisive name) and held:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁶⁹

The fighting words doctrine may be capable of prohibiting some hate speech, given the ability of such speech to inflict great injury. Indeed, on the basis of the fighting words doctrine, in *Beauharnais v. Illinois*,⁷⁰ the Supreme Court somewhat surprisingly upheld the constitutionality of an Illinois group defamation law.⁷¹ Under that law, the petitioner had been convicted for distributing leaflets of the White Circle League, a white supremacist organization.⁷² Over the past few decades, however, the fighting words doctrine has been restricted and it is doubtful whether *Beauharnais*

⁶⁶ 395 U.S. 444 (1969).

⁶⁷ *Id.* at 447.

⁶⁸ 315 U.S. 568 (1942).

⁶⁹ *Id.* at 571-72 (footnotes omitted). The similarity between the language used here and that in the opinion of Chief Judge Dickson in *Keegstra*, 3 S.C.R. 697, 766, is striking. See *supra* notes 33-36 and accompanying text.

⁷⁰ 343 U.S. 250 (1952).

⁷¹ See *id.* at 266.

⁷² See *id.* at 252. This leaflet contained, *inter alia*, the following passage: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." *Id.*

still is good law. Following *Brandenburg v. Ohio*, the Court now insists that in order to be constitutionally proscribed, the speech in question must be intended to bring about imminent violence.⁷³

Existing American case law, therefore, makes it very difficult to prohibit conduct such as that of the neo-Nazis marching through Skokie. A strong antipathy to content-based regulation of speech within protected categories,⁷⁴ along with the near eclipse of the fighting words doctrine, makes any legislative attempts to prohibit racist (or otherwise wounding) speech (actual or symbolic) constitutionally suspect, no matter how shocking, wounding, or offensive that speech may be. The First Amendment protects the flag burning in *Texas v. Johnson*⁷⁵ that shocked Middle America as much as it protects the hateful expression in *R.A.V.* But Middle America is large and secure, whereas minority groups are small in number, and often vulnerable. The danger exists that, without some intervention, content neutrality allows certain groups to skew debate with the result that not all voices are heard.⁷⁶

III. CONCEPTIONS OF FREEDOM OF EXPRESSION AND HATE SPEECH IN EUROPE

In contrast to American First Amendment jurisprudence, European judges have shown themselves far more willing to countenance restrictions on freedom of expression. Several European countries have implemented statutes prohibiting incitement to race hatred which probably would not withstand constitutional scrutiny in American courts.

For example, in the United Kingdom, Part III of the Public Order Act of 1986⁷⁷ prohibits behavior intended to or likely to have the result of stirring up racial hatred. In the United Kingdom, "racial hatred" is defined as hatred against a group of persons defined by reference to color, race, nationality, or ethnic or national origin.⁷⁸

⁷³ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

⁷⁴ This antipathy seems to exist even outside of such protected categories. See Justice Scalia's majority opinion in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). While acknowledging that the St. Paul ordinance fell within the fighting words doctrine, Justice Scalia also stated that content regulation within an excluded category still was not permissible. See *R.A.V.*, 505 U.S. at 393-96. See also discussion *supra* notes 16-22 and accompanying text (discussing *R.A.V.*'s facts and holding).

⁷⁵ 491 U.S. 397 (1989).

⁷⁶ See FISS, *supra* note 6, at 21 ("[T]he principle [of content neutrality] should not be extended to situations like hate speech, pornography and political expenditures, in which private parties are skewing debate and the state regulation promotes free and open debate.").

⁷⁷ See Public Order Act, 1986, Part III (U.K.) (proscribing acts intended or likely to stir up racial hatred as well as racially inflammatory material). This Act subsequently was amended by § 164 of the Broadcasting Act of 1990.

⁷⁸ Public Order Act, 1986, § 17. This statute is broad in scope and includes within its prohibitions behavior, the use of words, the display of written material, public performance

However, the provision has not been used widely. Furthermore, the provision in the United Kingdom's laws does not criminalize the dissemination of racist propaganda per se absent likelihood that race hatred will be stirred up. In 1997, a member of the House of Commons introduced an unsuccessful Private Member's Bill in an attempt to make the denial of the Holocaust a criminal offense in the United Kingdom.⁷⁹ Under this Bill, a bare denial of the Holocaust would have been deemed sufficient in itself to stir up racial hatred.

Throughout continental Europe, a number of other jurisdictions restrict racist speech. In France, the so-called Gayssot Act states that imprisonment of up to one year or a fine of up to 300,000 francs, or both, "shall be applied to anyone who contests . . . the existence of one or several crimes against humanity as defined in Article 6 of the International Military Tribunal."⁸⁰ It was under this statute that Robert Faurisson, Professor of Literature at the University of Lyon, was convicted for publishing his contention that there were no gas chambers at Auschwitz.⁸¹ In Austria, it is an offense "if in print, over the radio or through another medium or otherwise on a public manner accessible to many people," a person "denies, grossly trivialises, approves or seeks to justify the national socialist genocide or other national socialist crimes against humanity."⁸² On a regional level, the European Union adopted a Joint Action on the basis of Article K3 of the Treaty of European

of a play, distributing, showing or playing a recording of visual images or sounds (such as a program in a television or radio broadcasting service) and possession of racially inflammatory written material. Offenses are committed if the words, behavior, etc. are "threatening, abusive or insulting," and if they are intended to stir up racial hatred or, considering all the circumstances, if racial hatred is likely to be stirred up. Exceptions are provided for situations in which the activity takes place within a private house. There also is a defense when the words or behavior, etc., are not intended to be threatening, abusive or insulting and there was a lack of awareness that they might be so. Prosecutions may be instituted only by or with the consent of the Attorney General. *See* Public Order Act, 1986, Part III.

⁷⁹ *See* 289 PARL. DEB., H.C. (5th Ser.) Col. 370-71 (1997). The Bill, introduced by Mike Gapes, MP, as the Holocaust Denial Act of 1997, was to amend the Public Order Act of 1986 to include a new section, 5A: "[A]ny words, behaviour or material which purport to deny the existence of the policy of genocide against the Jewish people and other similar crimes against humanity committed by Nazi Germany ('the Holocaust') shall be deemed intended to stir up racial hatred." *Id.*

⁸⁰ Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, at 8333; 1990 J.C.P., No. 64046 (Fr.) (amending the French Law on Freedom of the Press of 1881 to permit the suppression of all racist, antisemitic or xenophobic acts).

⁸¹ The United Nations Human Rights Committee upheld Faurisson's conviction, and held that the conviction did not violate his right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights. *See* Robert Faurisson v. France, GAOR Hum. Rts. Comm., 58th Sess., U.N. Doc. CCPR/C/58/D/550/1993 (1996).

⁸² Federal Constitutional Law amending the Prohibition Law, Law No. 148 Bundesverfassungsgesetz [BVG] Bundesgesetzblatt [BGBl] 57/1992 (Aus.).

Union to ban the distribution of racist or xenophobic literature, the excusal or denial of crimes against humanity, and participation in organizations which advocate or implicitly support racial discrimination.⁸³

A. *The German Experience*

Germany has enacted stringent legislation to prevent race hatred. This legislation is worth examining in detail as it provides an example of the type of regulations that Ronald Dworkin and similarly minded liberals criticize. German law also provides a striking contrast to the approach of the United States Supreme Court.

The German Criminal Code contains far-reaching provisions that outlaw political activities and organizations, as well as public speech and writings, hostile to the Basic Law (the Grundgesetz). Germany's Nazi history earlier this century is, of course, the reason for the existence of such legislation, although the post cold-war resurgence of neo-Nazi activities has led to legislative reforms designed to strengthen these provisions still further.⁸⁴ In particular, the need to facilitate prosecution of an increasingly popular propaganda theme among neo-Nazi groups, the so-called "Auschwitz lie," motivated the reform of the Criminal Code in 1985 (which was

⁸³ 1996 O.J. (L 185) 5. The relevant provision reads as follows:

Title I

A. In the interests of combatting racism and xenophobia, each Member State shall undertake, in accordance with the procedure laid down in Title II, to ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviour:

- (a) public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;
- (b) public condoning for racist or xenophobic purpose, of crimes against humanity and human rights violations;
- (c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of or degrading to a group of persons defined by reference to colour, race, religion or national or ethnic origin;
- (d) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

- 1. participation in the activities of groups, organisations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

Id.

⁸⁴ See, for example, the amendment to policies on political asylum, *supra* note 28.

further amended in October 1994).⁸⁵ Purveyors of this lie claim that the extermination of Jews by the National Socialist regime never took place, and that reports of such actions were deliberate lies formulated to defame Germans and exploit them financially.⁸⁶ Unfortunately, this theme has become a recurrent feature of efforts made by "revisionist historians" of the Nazi regime,⁸⁷ and the troublesome case of Gunter Deckert⁸⁸ shows just how difficult prosecution of this type of hate crime had become.

Gunter Deckert, leader of the right wing National Democratic Party, organized a rally at which an American neo-Nazi speaker, Fred Leuchter, claimed there had never been gas chambers at Auschwitz.⁸⁹ Deckert subsequently translated Leuchter's speech and tried to publish it. He was convicted of inciting hatred.⁹⁰ The Federal Supreme Court of Germany (the Bundesgerichtshof) reversed the conviction and held that publication of another person's denial of the Holocaust could not constitute incitement to racial hatred.⁹¹ The German court remanded the case to the lower court to decide whether Deckert was in fact guilty of inciting hatred.⁹² The press widely criticized the Federal Supreme Court's decision, reflecting the fear among many Germans that it would become more difficult to prosecute the advocacy of racial hatred and anti-Semitism.⁹³ In response to the Deckert decision, the legislature amended section 130 of the Criminal Code⁹⁴ and created the new crime of "bare denial of the Holocaust" punishable by up to five years in prison.⁹⁵ The controversy did not end there. The lower court reconvicted Deckert but imposed a very light sentence (one year probation) by holding that his was an honest expression of

⁸⁵ The 1985 reform amended sections 130 and 131 of the German Criminal Code to include a provision on the denial of the Holocaust, §§ 130 & 131 StGB, 1985 BGBl. I S.965. The provision was further amended in 1994, § 130 StGB, BGBl. I S.994 & 186. For a history of the 1985 amendment, see Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies,"* 85 MICH. L. REV. 277 (1986).

⁸⁶ See discussion *infra* notes 87-93 and accompanying text.

⁸⁷ See, e.g., Stein, *supra* note 84; Pierre Vidal-Naquet, *Thèses Sur le Révisionnisme, in L'ALLEMAGNE NAZIE ET LE GÉNOCIDE JUIF* 496 (Colloque de l'École des hautes Études en sciences sociales ed., 1985).

⁸⁸ BGH, NJW 1994, 1421.

⁸⁹ *Id.* at 1421.

⁹⁰ *Id.*

⁹¹ *Id.* at 1423.

⁹² *Id.* at 1426.

⁹³ See Daniel Beisel, *Die Strafbarkeit der Auschwitzlüge*, NJW 1995, 997 (discussing criticisms of the decision).

⁹⁴ § 130 StGB, 1985 BGBl. I 965.

⁹⁵ Gesetz zur Änderung der Strafgesetzbuches, der Strafprozeßordnung und andere Gesetz, v.28.10.1994 (BGBl. I S.3186). It is this new legislation which seems to have been the major target of Dworkin's criticism in his article in *The Independent*, *supra* note 4.

political opinion.⁹⁶ The Federal Supreme Court refused to allow such reasoning to stand and held that there should be no mitigation of punishment for those who refused to open their eyes to the truth, even if they did so out of political conviction.⁹⁷ This holding contrasts sharply with the United States Supreme Court's privileging of political speech.

Freedom of expression is an essential feature of the German Constitution. The free expression provisions of German Constitutional law, however, interact with measures in the German Criminal Code designed to prohibit racist expression in a way that would not be possible under American law. Article 5(1) of the German Basic Law guarantees freedom of expression in the following terms: "Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasting and films are guaranteed. There shall be no censorship."⁹⁸ The boundaries of such freedom of expression, however, are demarcated by paragraph 2 of Article 5 which states that "[t]hese rights are limited by the provision of the general laws, the provisions of law for the protection of youth, and the right to inviolability of personal dignity."⁹⁹ Thus, present within Article 5 of the Basic Law is a mechanism for placing restrictions on free speech, which is put into effect by the Criminal Code.

Article 5 also must be viewed in the context of the Basic Law as a whole. The abuse of freedom which led to the collapse of the Weimar Republic and the suppression of freedom during the National Socialist regime contributed greatly to the form and substance of the Basic Law and subsequent legislation.¹⁰⁰ Most importantly, the German Basic Law aims to create a value system based on the dignity of human beings. The Basic Law's fundamental charter of rights begins with a clear affirmation of human personhood. Article 1, the basis of all rights guaranteed by the Constitution, declares: "the dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."¹⁰¹ The German Constitutional

⁹⁶ The lower court also made the extraordinary comment that Deckert came from a good family and his opinions "came from the heart." BGH, NJW 1994, at 1421; and NJW 1995, at 340 (discussing lower court's decision). Two of the lower court judges subsequently were relieved of their offices.

⁹⁷ For reports of the Federal Court's decisions, see *id.*

⁹⁸ Art. 5.1 GG.

⁹⁹ Art. 5.2 GG.

¹⁰⁰ See Cyril Levitt, *Under the Shadow of Weimar: What Are the Lessons for the Modern Democracies?*, in *UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES* (Louis Greenspan & Cyril Levitt eds., 1993).

¹⁰¹ Art. 1 GG. According to the Federal Supreme Court, this "inviolability of human dignity is not a mere programmatic statement but 'a directly effective norm' of the objective constitutional law." BGHSt 32, 535 (citing I.H. v. MANGOLDT & F. KLEIN, DAS BONNER GRUNDGESETZ 147 (2d ed. 1955)).

Court, the Bundesverfassungsgericht, has underlined this commitment and has declared dignity to be the highest legal value of the Basic Law. In a judgment handed down in 1975 the Constitutional Court declared: "The Basic Law has erected a value-oriented order which places the individual human being and his dignity at the centre of all determinations . . . [and it is] this value judgment of the Constitution that informs the organisation and interpretation of the entire legal order."¹⁰² This hierarchy under the Basic Law explains much of the jurisprudence in this area.

Also, it is argued that basic rights are conferred not only for the benefit of the individual but also in the public interest, and that the democratic political order must be protected against their misuse. In Thomas Mann's phrase, the Bonn republic, unlike the Weimar Republic, is a "militant democracy"—that is, a democracy willing to defend itself ("wehrhafte Demokratie").¹⁰³ In its 1952 decision banning the neo-Nazi Socialist Reich party and its 1956 decision banning the *Kommuniste Partei Deutschlands* (KPD), the German Constitutional Court claimed that a "value order" was an element of the "free democratic basic order" and that parties denying these values placed themselves outside the Constitution.¹⁰⁴ In 1976, the court upheld the administrative practice of excluding radicals from the public service: "The Constitution is not morally neutral but grounds itself on certain central values, takes them in its protection and gives the state the task of protecting and guaranteeing them. It establishes a militant democracy."¹⁰⁵

B. *Limiting Freedom of Expression Under German Law*

Certain provisions of the German Criminal Code are prime examples of the general laws referred to in Article 5(2) of the Basic Law,¹⁰⁶ under which freedom of expression may be limited. Section 130 of the Criminal Code prohibits attacks on human dignity likely to breach the public peace by malicious slander or contempt, as well as incitement to hatred.¹⁰⁷ On the introduction of the original legislation in the

¹⁰² Bundesverfassungsgericht (BVerfG), BVerfGE 39, 1 (67). See also GERHARD LEIBHOLZ ET AL., GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR AN DER RECHTSPRECHUNG (4th ed. 1971) (discussing the Constitutional Court's human dignity jurisprudence).

¹⁰³ See generally WILLIAM E. PATERSON & DAVID SOUTHERN, GOVERNING GERMANY 60 (1991) (describing Germany's adoption of a "democratic-functional theory" of Basic Rights as mandating that the political order "must be protected against misuse of Basic Rights").

¹⁰⁴ See BVerfG 2, 1; BVerfG 5, 85.

¹⁰⁵ BVerfGE 39, 334 (349).

¹⁰⁶ Art. 5.2 GG. See also discussion *supra* note 100 and accompanying text.

¹⁰⁷ Section 130 Incitement to Hatred (Volksverhetzung) (§ 130 StGB, 1985 BGBl. I S. 965) reads:

- (1) Whoever, in a manner apt to disturb the public peace (order), by
 1. Inciting hatred against sections of the population or calling for

German Bundestag, the Justice Ministry elucidated the concept of "attack on human dignity" in terminology similar to that used by the highest German courts, namely, as attacks "'on the core area of [the victim's] personality,' a denial of the victim's 'right to life as an equal in the community,'"¹⁰⁸ or treatment of a victim as "an inferior being excluded from the protection of the constitution."¹⁰⁹

Since its amendment in 1994, section 130(3) also prohibits the approval, denial, or qualified denial of the Holocaust in the following terms:

Whoever, in a manner apt to disturb public order, publicly or in a gathering approves or denies or makes appear harmless an act committed

violent or arbitrary measures against them, or

2. Attacks the human dignity of others on the grounds of their being part of the population by maliciously exposing them to contempt or slandering them,

shall be punished by a term of imprisonment of three months to five years.

Section (2) has recently been added:

(2) The following shall be punished with a term of imprisonment of up to 2 years or by a fine:

1. Writing which incites hatred against a section of the population or against a group on account of its nationality, race, religion or ethnic origin, calls for violent or arbitrary measures against them or attacks their human dignity on the grounds of their belonging to a section of the population or one of the aforementioned groups by maliciously exposing them to contempt or slandering them, by

a) disseminating;

b) publicly exhibiting, posting, presenting or otherwise making available;

c) offering or making available to a person under the age of 18;

d) producing, subscribing to, supplying, stocking, offering, announcing, recommending, undertaking to import into or export out of the territory to which this law applies, in order to use them, or pieces derived from them, in the manner indicated in a) to c) above, or to enable others to do so, or

2. Disseminating a work with the content listed in paragraph (2)1 through the broadcasting network.

¹⁰⁸ Stein, *supra* note 88, at 285 (quoting Dr. Schafheutle, Ministerialdirektor, Before the 99th Session of the Legal Committee of the German Bundestag, Mar. 17, 1960). Note the parallels here with feminist arguments, such as those articulated by Catharine MacKinnon, which stress that allowing the dissemination of pornography as free speech threatens women's ability to play their parts as equals in the community. See MACKINNON, *supra* note 61, at 177. Owen Fiss also favors the regulation of some speech on the basis of allowing fair and equal participation of the victims of that speech. See FISS, *supra* note 6, at 26.

¹⁰⁹ Stein, *supra* note 88, at 285 (quoting Dr. Schafheutle, Ministerialdirektor, Before the 99th Session of the Legal Committee of the German Bundestag (Mar. 17, 1960)).

under the National Socialist period [in one of the forms listed in section 220(1)] shall be punished by up to [five] years in prison or by a fine.¹¹⁰

This is the so-called “bare Auschwitzlüge” under which there is no further requirement that the proscribed speech incite hatred. Section 131 makes the production or dissemination of writings which incite racial hatred punishable.¹¹¹

Also relevant in this context are section 185 of the Criminal Code, which provides for the punishment of insults¹¹² and the original “Auschwitzlüge” under section 194, which prohibits acts of libel or slander that trivialize or deny Nazi crimes or the crimes of other violent regimes.¹¹³

Further case law illustrates how these extensive provisions have been applied in practice. In a much cited German case from the early 1980s,¹¹⁴ the defendant was convicted for posting leaflets on a public wall declaring that the murder of millions of Jews in the Third Reich was “a Zionist swindle that could not be accepted.”¹¹⁵ The case was dismissed by the Koblenz appeals court,¹¹⁶ but the Federal Supreme

¹¹⁰ § 130 (3) StGB.

¹¹¹ § 131 StGB. Section 131, entitled *Aufstachelung zum Rassenhass* (Inciting Race Hatred), reads:

Whoever disseminates, publicly exhibits, makes available to persons under 18 or otherwise produces writings that:

(1) incite race hatred or describe cruel or otherwise inhuman acts of violence, or represent the cruel or inhuman aspects of the occurrence in a manner offending human dignity, shall be punished by a term of imprisonment of up to one year or by a fine.

Paragraph (2) covers broadcasting, and Paragraph (3) states that paragraphs (1) and (2) are not applicable when the act is in the service of reporting on current events or history.

¹¹² § 185 StGB (stating that insults shall be punished by imprisonment for a term of up to one year or by a fine and, if the insult is committed by a physical act, by a term of imprisonment of up to two years or by a fine).

¹¹³ Section 194(1) reads as follows:

1. Prosecution for insults shall be instigated only upon petition. When the act is committed by disseminating or by making publicly accessible a writing . . . or in an assembly or by means of broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under the National Socialist or another violent and arbitrary dominance, if the group is part of the population and the insult is connected with such persecution. However, there can be no prosecution ex officio if the injured person opposes it. The opposition may not be withdrawn. If the injured person dies, the right of petition and of opposition passes to the next of kin specified.

§ 194(1) StGB.

¹¹⁴ BGHZ 75, 160.

¹¹⁵ *Id.* at 160.

¹¹⁶ The court reasoned that the insult was not aimed expressly at Jews, but rather at everyone, including non-Jews, who denied the Auschwitz lie his leaflets propagated. The

Court reversed the judgment and reinstated the conviction. In the most striking language, quite unlike anything emanating from the United States Supreme Court, the German Federal Supreme Court attempted to draw a line between a "mere falsification of history and injurious invective."¹¹⁷ The defendant did not direct the statements in the pamphlet toward a specific understanding of history, but instead, by denying the fact of the racial murder of Jews, denied their "inhuman" and "unique" fate which:

[G]ives every one of them a claim to recognition and respect. . . . The single fact that people were singled out under the so-called Nuremberg laws and were robbed of their identity with a view to their extermination allocates to the Jews living in the Federal Republic a special personal relationship with their fellow citizens. In the context of this relationship the past is present even today. They are entitled, as a matter of their personal identity, to be viewed as belonging to a fatefully selected group, to which others owe a special moral responsibility which is part of their self worth. Respect for their personal identity is for each of them a guarantee against a return to such discrimination and a fundamental condition for their living in Germany. Whenever someone tries to deny these precedents, they deny each of these individuals their personal value. For this signifies the continuation of discrimination against the group to which they belong.¹¹⁸

In this way, what appears on its face to be a simple denial of history is seen to involve far more. Thus, the case may be considered as not merely raising free speech issues. The denial of the past is interpreted as a specific attack on the personal identity of Jewish people, with profound impact on their self worth. The case cited above¹¹⁹ was decided before the amendments to section 130(3) created a new offense of denial or approval of the Holocaust, but the German Supreme Court's reasoning still can help Americans to see why more than free speech is at issue and why certain speech must be restricted.

The necessity of these laws in Germany is further illustrated by the poignant contrast with case law from the National Socialist period. For example, in a 1936 decision the Reichsgericht (the pre-1945 German Supreme Court) held that full rights extended only to those of German origin. The Reichsgericht stated that "fundamental

target audience, thus, was deemed too numerous to fulfill the "particular group" requirement of section 130. BGHZ 75, 160 (161).

¹¹⁷ *Id.* at 162. The case was decided prior to the 1994 amendment to section 130 which made a mere denial of the Holocaust a criminal offense.

¹¹⁸ *Id.*

¹¹⁹ See *supra* notes 114-18 and accompanying text.

restrictions placed on aliens under former laws are renewed, and ideas again taken up, which were recognized earlier based upon the differentiation between those with full legal responsibility and those persons with fewer rights."¹²⁰

There is a marked distinction between the post-war court's concern that individual identity and dignity be respected, and the Reichsgericht's refusal to recognize certain groups as having "full legal responsibility and rights." The Reichsgericht's logic contrasts sharply with post-war universal declarations of rights and the notion that everyone present within the jurisdiction should gain the same protection from fundamental rights.¹²¹

The German Constitutional Court, the Bundesverfassungsgericht, also has had to consider the constitutionality of prosecutions under the Criminal Code. In 1994, the Constitutional Court held that orders prohibiting a conference at which the "revisionist historian" David Irving was to speak did not violate Article 5(1) of the Basic Law.¹²² The planned conference was banned due to threatened breaches of sections 130 and 185 of the Criminal Code.

In the *Irving* case, the Constitutional Court grappled with the difficulties involved in banning opinions which often cannot be proven either true or false and, thus, usually qualify for protection under Article 5(1); the court noted, however, that false or inaccurate information does not merit constitutional protection. The Court stressed that under Article 5(1) freedom of speech was not given absolute protection, but that limitations on speech were permissible according to Article 5(2), and that rules had been developed for this balancing exercise.¹²³ It is particularly interesting that the Court stressed that protection of personal identity normally would take precedence over freedom of speech in cases in which the speech took the form of insults or abuse.¹²⁴ The Court also referred to its earlier Federal Supreme Court judgment¹²⁵ and to the "Auschwitzlüge" offense. The Court concluded that even if the statements made at the conference were merely opinions rather than statements of fact, in view of the weight that had to be given to injury to dignity, the defendant could not object to the priority given to protection of personal identity over freedom of expression in the contested order banning the assembly. This position contrasts boldly with the general refusal of the United States Supreme Court to consider

¹²⁰ 91 *Seufferts Archiv für Entscheidungen der obersten Gerichte* 65 (1936).

¹²¹ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) ("All human beings are born free and equal in dignity and rights.").

¹²² See Judgment of Bundesverfassungsgericht (BVerfG), Apr. 23, 1994, NJW 1994, at 1779.

¹²³ See *id.* at 1781.

¹²⁴ See *id.* at 1782.

¹²⁵ See *id.* at 1782 (citing BGHZ 75, 160 discussed *supra* notes 114-18 and accompanying text).

competing claims of equality in *R.A.V. v. St. Paul*¹²⁶—and in its constitutional jurisprudence, generally, since *New York Times v. Sullivan*.¹²⁷

German jurisprudence thus demonstrates, often in quite extraordinary language, a way of dealing with the fear that, once certain types of expression are forbidden, a nation will be on a never-ending downward slope of state regulation and censorship. Freedom of speech must give way when it proves injurious to other values which are as essential to a particular society. In the case of Germany, these other values include the protection of individual dignity in a society still haunted by its past, as well as preservation of the democratic order itself.

C. *Freedom of Expression Under the European Convention*

German law, of course, is not the only legal system to place explicit limitations on the exercise of freedom of expression. In contrast to the First Amendment, but in conjunction with Article 5 of the German Basic Law, Article 10 of the European Convention is not expressed as an absolute; there are eleven different permissible limitations on freedom of expression under Article 10(2).¹²⁸

Attempts have been made to translate this approach into action. It is difficult to maintain that Article 10 has provided a coherent vision of free expression. In some cases, the Court of Human Rights has shown itself to be a keen defender of free speech, particularly in the context of political speech. The court's holding in *Castells v. Spain*¹²⁹ is a good example. Castells was a member of the Spanish Parliament who was charged with insulting the Government by alleging governmental involvement in right wing killings in the Basque region.¹³⁰ Under Spanish law, Castells was not allowed to plead the truth of his accusations and was convicted and given a heavy sentence.¹³¹ The European Court found Spain to be in breach of Article 10, for "freedom of expression is as a general rule held to be essential in a democratic

¹²⁶ 505 U.S. 377 (1992). *See supra* text accompanying notes 16-22, 49.

¹²⁷ 376 U.S. 254 (1964). *See supra* text accompanying notes 55-58.

¹²⁸ *See* THE EUROPEAN CONVENTION ON HUMAN RIGHTS 426 (Francis G. Jacobs & Robin C.A. White eds., Clarendon Press 2d ed. 1996). Article 10(2) reads:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities and 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.

Id.

¹²⁹ 14 Eur. H.R. Rep. 445 (1992).

¹³⁰ *See id.* at 449.

¹³¹ *See id.* at 451.

society.”¹³² While freedom of expression is important for everyone, the court held, “it is especially so for an elected representative whose very rôle is to act as a spokesman for the opinions and concerns of his constituents.”¹³³ Accordingly, “interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.”¹³⁴

In other cases, the court has shown itself less inclined to champion freedom of expression and more willing to defer to member state interests, particularly community morality. In *Otto Preminger Institute v. Austria*,¹³⁵ the Court upheld an Austrian law that permitted the banning and seizure from a private cinema of a film, *Council of Heaven*, because the film offended the strongly Catholic community of Innsbruck with its portrayal of the Holy Family.¹³⁶

Characteristic of all the Article 10 case law, however, is the willingness of the court to balance the exercise of the right to freedom of expression with its limitation by legitimate aims under Article 10(2), regardless of whether the limitation is related to the content of the expression. The court thus is compelled to address the issue of whether the restriction is “necessary in a democratic society” as required by Article 10(2),¹³⁷ a phrase which the court has not interpreted to mean useful or desirable, but to correspond to a “pressing social need.”¹³⁸ In this way, every European court applying the provisions of the Convention is required to consider the purpose of restrictions on a Convention right and the proportionality of such restrictions to their purpose. Simply stated, the restrictions should be no more intrusive than necessary to accomplish their purpose.¹³⁹ The fact that legislation prohibits speech on the grounds of its content is not, in itself, a reason to hold that legislation in contravention of the Convention. If *R.A.V. v. St. Paul*¹⁴⁰ had fallen under the jurisdiction of the European Court, that court would have had to scrutinize closely the state legislature’s motive in passing the ordinance, which was to prevent aggressive behavior of a certain sort, targeted at certain groups. The main focus of such an inquiry, then, would require the court to consider whether the state’s action

¹³² *Id.* at 461.

¹³³ *Id.*

¹³⁴ *Id.* at 476.

¹³⁵ 19 Eur. H.R. Rep. 34 (1994).

¹³⁶ For additional examples, see *Müller v. Switzerland*, 13 Eur. H.R. Rep. 212 (1988) (confirming the conviction of the organizer of an art exhibition depicting scenes of bestiality), and *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737 (1976) (upholding under Article 10 the conviction of an English publisher who planned to sell obscene books in his possession).

¹³⁷ See EUROPEAN CONVENTION, *supra* note 128, at 426.

¹³⁸ *Handyside*, 1 Eur. H.R. Rep. at 754.

¹³⁹ See *id.* at 754.

¹⁴⁰ 505 U.S. 377 (1992). See discussion *supra* notes 16-22, 49 and accompanying text.

was necessary in response to a "pressing social need," and in proportion to its objective.

Not many cases which concern racial vilification or hate speech specifically have found their way to the Convention institutions.¹⁴¹ Those cases that have been adjudicated, however, illustrate a willingness by the Convention courts to look to values other than freedom of expression. A recent application brought by David Irving against Germany failed.¹⁴² In this case, Irving claimed that his convictions for insulting and blackening the memory of the deceased pursuant to sections 185, 189, and 194 of the German Criminal Code¹⁴³ infringed Article 10 of the European Convention. (Irving had been convicted in Germany for claiming that the gas chambers found at Auschwitz were actually fakes built in the post-war period.) The European Commission held that Irving's conviction had been "necessary in a democratic society" under Article 10(2) and that the public interest in the prevention of crime and disorder in German society due to insulting behavior against Jewish citizens, as well as the requirements of protecting their reputation and rights, outweighed the applicant's freedom to deny the existence of the gas chambers.¹⁴⁴ Similarly, in cases referred from Germany and Belgium concerning the compatibility with the Convention of prosecution for denial of the Holocaust, the Commission had

¹⁴¹ The scarcity of such cases is surprising, given the increased incidence of hate crimes in Europe over the past decade. However, because Article 35(1) of the European Convention on Human Rights requires applicants to exhaust national remedies before approaching the Convention institutions (which themselves proceed slowly because of the sheer volume of work), it takes cases a long time to work their way to the European Court. See EUROPEAN CONVENTION, *supra* note 128, at 431.

A case that both provides an example of the extraordinary amount of time it takes for Convention institutions to decide a case, and is similar to those discussed in this Article is *Lehideux & Isorni v. France* (55/1997/839/1045), Judgment of September 23, 1998, which was decided too late for consideration in this Article. This case concerned the applicants' conviction under French law for "public defense of war crimes or the crimes of collaboration" following the appearance in a national newspaper in 1985 of an advertisement, placed by the applicants, representing Marshal Philippe Pétain in a positive light. *Id.* at ¶ 12. The European Court of Human Rights held that this conviction violated Article 10 of the European Convention. *Id.* at ¶ 58. This case may be distinguished from the cases under consideration in this Article, however, as the applicants had explicitly stated their disapproval of "Nazi atrocities and persecutions." *Id.* at ¶ 47. The Court specifically stated that "the Justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10." *Id.* at ¶ 53.

¹⁴² See Application 26551/95 David Irving v. Germany (June 26, 1996). See also Application 25991/94 Nationaldemokratische Partei Deutschlands [National Democratic Party of Germany] v. Germany (Apr. 23, 1994), which appealed a decision of the German Constitutional Court.

¹⁴³ §§ 185, 189, 194 StGB.

¹⁴⁴ See Application 26551/95 David Irving v. Germany (June 26, 1996).

no difficulty in finding these prosecutions justifiable under Article 10(2).¹⁴⁵ The only cases on the topic of hate speech to have reached the court are *Kosiek v. Germany*¹⁴⁶ and more recently *Jersild v. Denmark*.¹⁴⁷ In *Kosiek*, a German school teacher challenged the authorities' refusal to continue his contract on the basis of his extreme right wing views. The court followed the German government's line of reasoning in dismissing the claim as one that raised the right to belong to the civil service, which is not a Convention right, rather than an Article 10 claim. This point is somewhat tenuous and led to the result that the government's action could not be faulted under the Convention.¹⁴⁸

The *Jersild* case concerned the conviction of a Danish journalist under Articles 266(b) and 23(1) of the Danish Penal Code.¹⁴⁹ The journalist was found to have aided and abetted the dissemination of racist remarks by broadcasting an interview with a group of Danish skinheads who expressed offensive racist views.¹⁵⁰ The court held that the conviction was not compatible with Article 10 of the Convention.¹⁵¹ It is interesting to note, however, that the conviction of the skinhead group was not challenged.¹⁵² There was also a substantial dissent (seven judges dissented on a panel of nineteen) in *Jersild* that articulated the opinion that Jersild should have expressed disagreement with the skinheads' views.¹⁵³ The dissenting judges expressed their views strongly and placed the case in the context of its time, in a manner which contrasts sharply with American jurisprudence and is worth repeating in full:

¹⁴⁵ See *T v. Belgium*, 34 Eur. Comm'n H.R. Dec. & Rep. 158 (1983) (holding that the "restriction on the [plaintiff's] exercise of the freedom of expression was necessary for the prevention of disorder . . . as well as for the maintenance of the authority of the judiciary"); *Künen v. Germany*, 29 Eur. Comm'n H.R. Dec. & Rep. 194 (1982) (holding that prohibiting an individual from displaying pamphlets denying the Holocaust is necessary to protect the reputation of others in a democratic society).

¹⁴⁶ 9 Eur. H.R. Rep. 328 (1986).

¹⁴⁷ 19 Eur. H.R. Rep. 1 (1994).

¹⁴⁸ See *Kosiek*, 9 Eur. H.R. Rep. at 341-42. This holding may be an example of the European Court respecting the German principle of "militant democracy," on which the policy of *Berufsverbot* (excluding radicals from the German civil service) is based.

¹⁴⁹ See *Jersild*, 19 Eur. H.R. Rep. at 7-11.

¹⁵⁰ See *id.* at 1. Statements in the interview which provided the basis for the conviction included: "A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called." *Id.* at 5.

¹⁵¹ See *id.* at 18.

¹⁵² See *id.* at 28.

¹⁵³ See *id.* at 31 (Gölcüklü, Russo & Valticos, JJ., dissenting). Interestingly, section 130 of the German Criminal Code contains a requirement that journalists reproduce such statements with a critique. For example, the documentary film by the film maker Wilfried Bonengel, *Beruf: Neonazi*, which contained the antisemitic statements of a far right extremist, was proscribed under this regulation because it was produced without commentary. See Beisel, *supra* note 93.

While appreciating that some judges attach particular importance to freedom of expression, the more so as their countries have been largely deprived of it in recent times, we cannot accept that this freedom should extend to encouraging racial hatred, contempt for races other than the one to which we belong, and defending violence against those who belong to the races in question. It has been sought to defend the broadcast on the ground that it would provoke a healthy reaction of rejection among the viewers. That is to display an optimism, which to say the least, is belied by experience. Large numbers of young people today, and even the population at large, finding themselves overwhelmed by the difficulties of life, unemployment and poverty, are only too willing to seek scapegoats who are held up to them without any real word of caution¹⁵⁴

IV. JUSTIFYING FREE SPEECH

A. *Speech, Harm, and Action*

The United States and European authorities have illustrated that, whatever the virtues of freedom of speech, its free exercise can threaten the well-being of others. Speech, like so many actions humans perform, clearly is not always politically constructive or inherently self-regarding. It affects others—often very painfully.¹⁵⁵ Yet discussions on freedom of expression often proceed as though speech has no capacity to harm. As recognized under German law, insults and abuse, whether in words or “symbolic” speech, can cause direct harm in the form of psychic injury to the victim.¹⁵⁶ Speech also can harm directly by encouraging the victim, or others, to take immediate hostile action. (This type of harm is the most likely to be recognized and targeted by legislation.) But such invective, of course, also can cause indirect harm by helping to form an image in society that those attacked are less than human,¹⁵⁷ thereby fostering a situation in which those attacked become less able to defend themselves against the abuse by the “more speech” recommended by Justice Brandeis in *Whitney*.¹⁵⁸ Thus, the victims’ right to equality is affected by hateful

¹⁵⁴ *Jersild*, 19 Eur. H.R. Rep. at 32 (Gölcüklü, Russo & Valticos, JJ., dissenting).

¹⁵⁵ See Delgado, *supra* note 6, at 136-49 (detailing the types of harm caused by racist invective).

¹⁵⁶ See *supra* notes 98-125 and accompanying text.

¹⁵⁷ See Delgado, *supra* note 6, at 143-49.

¹⁵⁸ See *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis & Holmes, JJ., concurring); discussion *supra* notes 46-48 and accompanying text.

speech, as is their ability to respond and participate in public discussion, which is itself a right of free expression. In short, victims are silenced.¹⁵⁹

Another related feature of the nature of expression, and one that underlines its potential to harm, is the difficulty that one may have in distinguishing words from actions. Conduct such as cross-burning may be classified as speech for the purposes of the First Amendment, but to many it would be more readily identifiable as an act of pure aggression, clearly intended to intimidate. It can be very difficult to distinguish speech from harmful conduct, as Justice Holmes's example of shouting "fire" in a crowded theater¹⁶⁰ illustrates, and the treatment of statements such as "Raise your fares twenty percent, I'll raise mine the next morning" as attempted joint monopolization, not ordinary speech.¹⁶¹ J. L. Austin recognized the work that such "performative utterances" could do when he called them "speech acts."¹⁶² Likewise, Catharine MacKinnon has argued that pornography is discriminatory conduct as much as speech.¹⁶³ In a recent review of MacKinnon's *Only Words*, however, Wojciech Sadurski criticizes those such as MacKinnon who seek to regulate hate speech and pornography in order to bring about equality by suggesting that such regulation denies the autonomy and individual responsibility of the hearers.¹⁶⁴ Sadurski also is unwilling to accept the characterization of hateful speech as speech acts, for reasons which merit a more detailed discussion of the theory of speech acts.

J. L. Austin criticizes the view that presumes that language is primarily descriptive. As Austin points out, utterances are rarely just statements to be tested for truth and falsity; most have nothing to do with truth or falsity.¹⁶⁵ Instead, most utterances are acts: they perform. Thus, Austin calls them performatives, as in, for example, the "I do" of a marriage ceremony.¹⁶⁶ Such an utterance cannot be translated into a descriptive form, or at least the attempt to do so does no justice to the statement. This emphasis on the performative capacity of language reminds one of the strength and power of words, which already is obvious in insults and racist

¹⁵⁹ See Delgado, *supra* note 6, at 147.

¹⁶⁰ See *Schenck v. Unites States*, 249 U.S. 47, 52 (1919) (arguing that such speech is harmful because of its propensity to cause panic).

¹⁶¹ See *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984) (defining attempted monopolization as a "highly verbal crime"), *cited in* MACKINNON, *supra* note 6, at 12 (noting that the "conviction nicely disproved the defendant's view, expressed in the same conversation, that we 'can talk about any goddamn thing we want to talk about'").

¹⁶² See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 4-17 (J.O. Urmson & Marina Sbisa eds., 1975).

¹⁶³ See MACKINNON, *supra* note 6, at 22-23.

¹⁶⁴ See Wojciech Sadurski, *On 'Seeing Speech Through an Equality Lens': A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography*, 16 OXFORD J. LEGAL STUD. 713, 717 (1996).

¹⁶⁵ See AUSTIN, *supra* note 162, at 5.

¹⁶⁶ *Id.* at 5-6.

invective. A speech-act analysis such as Austin's makes clear the harm that words may commit.

Sadurski, however, criticizes the application of speech act theory to hate speech and pornography by maintaining that such "utterances" are, in fact, what Austin described as perlocutionary in nature. That is, the effects of such "speech" consist in their causal consequences, of their ability to convince readers and listeners to adopt certain views, as opposed to the illocutionary or performative sort of utterances which form what one may regard as traditionally-defined speech acts.¹⁶⁷ According to Sadurski, the fact that speech has this persuasive effect is no reason to forbid its publication because to do so would deny the autonomy and individual responsibility of the listeners.¹⁶⁸ Perlocutionary utterances, then, are classical examples of speech rather than speech acts and, thus, should benefit from the traditional justifications of free speech.¹⁶⁹

Austin, however, takes the argument further than Sadurski. For Austin, it is not just obvious performative or illocutionary statements that act, but perlocutionary statements also can have a vigorous impact.¹⁷⁰ In order to see the executive power of language one must examine the way it transforms situations in which it occurs. Sadurski suggests that to count as an illocution a statement must be a verdict on that matter; it must be based on "institutional facts," to use John Searle's terminology.¹⁷¹ According to Sadurski, the utterances of pornographers and racists are ineffective as illocutions if the utterances are not recognized as having either a "special authority" or the intention to issue a set of rules of conduct for the subject area they address.¹⁷²

The strength of speech as an act depends on its immediate transformative capacity. When a marriage takes place, when war is declared—performative or illocutionary acts—the world is not the same as it was before. Likewise, the world is not the same after a "revisionist historian" such as David Irving stands up in Munich and asserts that there were no gas chambers at Auschwitz. A verbally aggressive act hurtful to many people has taken place and, perhaps, a seed of doubt has been sown in the minds of others. This fact is underscored by the atavistic rather than representational, by the distorted, defaced, and essentially violent character of hate speech, the effects of which are not merely persuasive in nature. Thus, the strength of Sadurski's argument is lost if the distinction between perlocutionary and illocutionary acts collapses, as indeed Austin recognized.¹⁷³ The suggestion is that

¹⁶⁷ See Sadurski, *supra* note 164, at 718-23.

¹⁶⁸ See *id.* at 717.

¹⁶⁹ See *id.* at 723.

¹⁷⁰ See AUSTIN, *supra* note 162, at 101-32.

¹⁷¹ See JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33-42 (1969).

¹⁷² See Sadurski, *supra* note 164, at 722.

¹⁷³ See AUSTIN, *supra* note 162, at 121-47.

there are good reasons to accept MacKinnon's argument for refusing First Amendment protection altogether for these types of statements on the basis that they are not "Only Words." If this is the case, the traditional arguments in favor of free speech should not be applicable if what is at issue is not, or should not be, protected speech.

If this argument is not accepted, however, and Sadurski's line of reasoning is followed, then there is still much to be said about why the traditional arguments for prioritizing speech are inadequate. Some of the justifications offered by the United States Supreme Court have been discussed above. What follows is an attempt to place these justifications into a broader philosophical context.

B. *The Argument for Truth*

The "argument for truth" is perhaps the most well-known of justifications for free speech, and it is becoming somewhat care-worn in spite of having a good pedigree. Freedom of speech, freedom of inquiry, and the freedom to criticize are necessary, so this argument goes, in order for citizens to be able to distinguish truth from falsehood. Milton's argument in the *Areopagitica*¹⁷⁴ is based to some extent on the premise that the absence of government restrictions on publishing will enable society to locate truth and reject error. John Stuart Mill also posited the search for truth as the foundation of his plea for liberty of thought and discussion.¹⁷⁵ Starting from the premise that the opinions suppressed on account of their supposed falsity may in fact turn out to be true, or to contain a portion of truth, Mill argued that the elimination of suppression consequently would increase the likelihood of exchanging error for truth.¹⁷⁶ This theme also has surfaced in judicial opinions in the United States. Justice Frankfurter's observation in *Dennis v. United States* is typical:

The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge.¹⁷⁷

Several questions arise with respect to such an approach: first, the nature of the truth to which freedom of expression is supposed to lead—and whether this truth is in fact a valuable objective and, second, whether freedom of expression actually increases the probability of attaining truth.

¹⁷⁴ See MILTON, *supra* note 39; discussion *supra* notes 39-42 and accompanying text.

¹⁷⁵ See JOHN STUART MILL, *ON LIBERTY passim* (Stefan Collini ed., 1989).

¹⁷⁶ See *id.* at 20-24, 47-53.

¹⁷⁷ *Dennis v. United States*, 341 U.S. 494, 550 (1951).

The first issue stems from skeptical arguments regarding the epistemological status of truth claims. The view that free speech will enable the United States to reach the truth relies on a certain type of rationalism (often denigrated as resting on "Enlightenment values"). This view presupposes that one can test empirically the beliefs or facts underlying speech with regard to self-evident truths. That is to say, this theory is based on a worldview in which truth is absolute and objective. This worldview certainly is not accepted universally. For many, truth is a relative concept and what is true in one community may be entirely false in another. As well, a great amount of speech seems to have no truth value at all; many opinions are simply not verifiable (unless one accepts the view that truth is a matter of coherence with a given set of beliefs¹⁷⁸). One may attempt to avoid such relativism by confining oneself solely to speech based on facts capable of verification and excluding all value judgments, or highly speculative claims. But this is not a satisfactory remedy. Most existing free speech guarantees extend protection to opinions as well as facts.¹⁷⁹ Libel laws otherwise would be extremely draconian. J. L. Austin's theory of speech acts also surely must provide another blow to the claim that free speech will help citizens find truth, given his view that most utterances have nothing to do with truth or falsity but, instead, are performative acts rather than reflections of reality.¹⁸⁰

On the other hand, if "the truth" could be proven objectively, would there be any reason to reject the point made by the Victorian jurist James Fitzjames Stephen that if one could be absolutely certain that a proposition were true and its negation false, then there would be no reason not to suppress the negation?¹⁸¹ Clear error surely does nothing to help citizens in their search for truth. Stephen's approach seems to have been adopted under German law, in which plain denial of the Holocaust is taken to be a clearly false claim and, thus, unworthy of protection under the free expression provisions of the German Constitution.¹⁸² Some writers have suggested that falsity is necessary for confirmation of the truth,¹⁸³ but falsity may in fact be more appealing than the truth or, in the words of the Williams Committee report: "Against the principle that truth is strong and (given the chance) will prevail, must be set Gresham's Law, that bad money drives out good."¹⁸⁴

¹⁷⁸ See, e.g., RALPH C.S. WALKER, *THE COHERENCE THEORY OF TRUTH: REALISM, ANTI-REALISM, IDEALISM* (1989).

¹⁷⁹ See, e.g., *Lingens v. Austria*, 8 Eur. H.R. Rep. 407, 420-21 (1986) (declaring value judgments—i.e., opinions—to be an essential element of freedom of the press).

¹⁸⁰ See AUSTIN, *supra* note 161, at 4-7.

¹⁸¹ See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (R.J. White ed., Cambridge Univ. Press 1967) (1873).

¹⁸² See *supra* text accompanying notes 84-98.

¹⁸³ See, e.g., 1 K.R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 123-24 (Princeton Univ. Press 1966) (1945).

¹⁸⁴ REPORT OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP 55 (Bernard Williams ed., 1979) (arguing that Gresham's Law, which "predicts that it will not necessarily

The requirement that truth be subject to objective perception may strike some as overbold and unsophisticated. Truth may still exist, and free discussion, communication, and expression may still render it more accessible, even if it cannot necessarily be identified. But such justifications are questionable. For example, suppose any allegiance to an objective theory of truth is abandoned in favor of a "survival" theory of truth—that is, the view that truth is a matter of whatever survives in the market. This approach has, of course, accrued support from distinguished members of the United States judiciary, most notably Justice Holmes.¹⁸⁵ It is also implicit in Justice Frankfurter's previously quoted statement in *Dennis*.¹⁸⁶ But survival theories of truth can produce bizarre and undesirable results. If truth is merely that which survives in any particular marketplace of ideas, then surely this view implies that National Socialism was "right" in Germany in the 1930s or that slavery in the United States was correct prior to the Civil War.¹⁸⁷ One suspects that few in the United States are willing to accept the implications of this unpalatable form of moral relativism.

Abandoning objectivity simply does not help free speech absolutists. It may be the case that whatever one believes to be true depends on the evidence deemed relevant to truth or falsity. But even if this is so, there is no such thing as "ideologically unconstrained" speech.¹⁸⁸ For if this is the way one assesses truth, then one remains within the constraints of one's community discourse. From this perspective, the objectivity sought by American constitutional law is simply an impossibility.

The second critique of the "argument for truth" is related to the first, and arises when one moves from making general statements such as "truth is promoted by free inquiry" to specifying the conditions for free inquiry that will promote truth (or, for that matter, some other favorable outcome). Society must attempt to ensure that its more powerful elements, particularly those with greater access to the media, do not dominate, shout down, or silence weaker but possibly truer voices. If truth is so valuable, the question remains whether the state should intervene to ensure that all opinions are equally accessible—a view advocated by Owen Fiss as a reason for

be the most interesting ideas or the most valuable works of art that survive competition," has implications for cultural discourse).

¹⁸⁵ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *supra* text accompanying note 44.

¹⁸⁶ See *Dennis v. United States*, 341 U.S. 494, 550 (1951); *supra* text accompanying note 177.

¹⁸⁷ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 21 (1982) (opposing the adoption of a "majority rule" approach to truth).

¹⁸⁸ See STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO* 102 (1994) (arguing that societies must restrict some speech in order to be faithful to their core values).

regulating hate speech.¹⁸⁹ Furthermore, all members of society may not be in positions to be able to choose between ideas. John Stuart Mill, for example, assumed an educated, middle class audience whose members would be able to make up their own minds.¹⁹⁰ Not all members of society are in such a position—and even those who are come armed with many biases and assumptions. One who sympathizes with these issues may feel that “truth” (whatever it may be) would be better protected by something other than an ideological free-for-all.

C. *Expression and Autonomy*

In the literature on freedom of communication, it is common to find references to “the intrinsic worth of the communicative experience”¹⁹¹—that is, the value of communication in and of itself. On closer inspection, however, it can be difficult to disentangle such rationales from their consequentialist cousins. The most common justification of freedom of speech that does not look to its supposedly beneficial consequences is based on respect for the moral responsibility or autonomy of others—the view that people should be free to make up their own minds.¹⁹² This view, of course, is grounded in liberal notions of self-respect, autonomy, and self-expression. Ronald Dworkin, in making an argument for freedom of speech based on these grounds, wrote:

Freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and “constitutive” feature of a just political society that government treat all its adult members . . . as responsible moral agents Government frustrates and denies that aspect of moral personality when it disqualifies some people from exercising these responsibilities on the ground that their convictions make them unworthy participants.¹⁹³

The instrumental and “constitutive” grounds need not be mutually exclusive. Mill endorses both,¹⁹⁴ as did Justice Brandeis in *Whitney*: “Those who won our

¹⁸⁹ See FISS, *supra* note 6, at 18-21.

¹⁹⁰ See MILL, *supra* note 175.

¹⁹¹ Tom Campbell, *Rationales for Freedom of Communication*, in FREEDOM OF COMMUNICATION 17 (Tom Campbell & Wojciech Sadurski eds., 1994).

¹⁹² See Dworkin, *supra* note 24, at 56-57; see also Sadurski, *supra* note 164, at 717; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); David A. Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

¹⁹³ Dworkin, *supra* note 24, at 57.

¹⁹⁴ See MILL, *supra* note 175, *passim*.

independence believed that the final end of the State was to make men free to develop their faculties; . . . they valued liberty both as an end and as a means."¹⁹⁵

It may be argued, however, that the autonomy-based arguments really do not argue for free speech as a good in and of itself, but rather promote autonomy, which a liberal society considers to be extremely valuable. Stanley Fish makes this general point when he insists: "Speech, in short, is never a value in and of itself, but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict."¹⁹⁶ For Fish, any defense of free speech must be instrumental: "You assert, in short because you give a damn, not about assertion—as if it were a value in and of itself—but about what your assertion is about."¹⁹⁷ Consequentially, free speech as a means sometimes must yield when autonomy and respect for personality are supported better by its restriction, as the German judgments illustrate.

D. Against an Individualistic Conception of Personhood

Even if it is possible for a free-standing justification of free speech to exist, serious problems still remain with respect to the liberal theory of the person underlying American conceptions of free speech. Feminist theorists claim that an emphasis on autonomy reveals an isolationist and invariably male conception of personhood, which is ill-equipped to deal with issues of gender, class, or race.¹⁹⁸ Communitarian critics claim to provide a justification for laws that punish racially or religiously bigoted expression, based on the necessity of such laws to the integrity of the community. Such criticism proceeds from the Aristotelian thesis that humans are incomplete as individuals because they can develop and exercise distinctively human capacities only through participation in group life.¹⁹⁹ According to communitarians, permitting hate speech significantly harms individuals and the political community as a whole because religious and racial affiliations are central to the identities of many individuals. One cannot disregard such sensibilities, as liberals suppose, while simultaneously respecting the personhood of individuals who experience them.

¹⁹⁵ *Whitney v. California*, 274 U.S. 357, 375 (1927).

¹⁹⁶ FISH, *supra* note 188, at 104.

¹⁹⁷ *Id.* at 107.

¹⁹⁸ See SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 156-58 (1992) (noting the narcissistic male's definition of female as opposite of himself); ELIZABETH FRAZER & NICOLA LACEY, *THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL COMMUNITARIAN DEBATE* 54 (1993) (discussing the deficiencies of theories regarding abstract individuals).

¹⁹⁹ See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1985); CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* (1985).

Those of a more liberal persuasion, however, might respond with a line of questioning well-known in this field: "Yes, but where do we draw the line? How do we avoid sliding down the slippery slope on which any attempt to regulate in one area will lead to the complete legal subjugation of the individual?"²⁰⁰ Which communities should be protected against speech offensive to them? If a predominantly Jewish community should be permitted to prohibit a Nazi demonstration, then why should not a segregated white community similarly be permitted to bar a civil rights rally? In response, it has been suggested that this "thin end of the wedge" issue can be resolved by accepting a particular conceptual distinction between "constitutive" and "instrumental" communities.²⁰¹ According to communitarians, most groups, whether professional, educational, or political, are "instrumental" communities. Such communities exist as means of pursuing shared goals and are dedicated to interests formed by individuals prior to membership. Therefore, a person's identity is separable from such affiliations, even though membership in these groups may have a significant impact on that individual's life. "Constitutive" communities, however, are distinctive because of the effect they have in forming their members' identities. One may regard very close-knit religious groups or, perhaps more salient to this discussion, groups with distinct ethnic or racial identities as examples. Thus, communitarians conclude that respecting individuals as persons requires the restriction of group vilification only when it is aimed at constitutive affiliations, because only these affiliations are inseparable from individual identity.²⁰²

Wojciech Sadurski has criticized this view by asserting that communitarian arguments only pretend to draw the line between constitutive and instrumental communities:

In fact, I suspect that the operative line is between those communities of which we approve and those of which we do not. . . . A Ku Klux Klan member may well be psychologically and morally affiliated with his organization to a higher degree than many other people are with their nations or their religions. . . . Hence, the distinction between "constitutive" and "instrumental" groups is just a proxy for a substantive judgment about those groups' identities and whether or not they deserve

²⁰⁰ Robert Post, for example, compares attempts to regulate speech with the attempts during the Spanish Inquisition to punish actions by Jewish and Moorish converts—to the extent that the Inquisition concluded that "eating couscous or disliking pork were themselves punishable as heresy." Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 270 n.14 (1991).

²⁰¹ MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 147-54 (1982) (evaluating John Rawls's theory of community).

²⁰² See, e.g., Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 689-94 (1988).

protection. . . . If we are prepared to engage in such a value judgment about the worthiness of some sensibilities that deserve protection, then we must face the consequences of unrestrained majoritarianism.²⁰³

It is possible to extend protection to certain individuals or groups who have been targeted for vilification, without either falling down the slippery slope posited by so many liberal critics or succumbing to Sadurski's "unrestrained majoritarianism." This extension can be achieved by placing a firm emphasis on other values which liberal democratic society itself recognizes and respects, such as dignity and equality, as well as seeking to restrain some speech when it threatens the ability of others to participate and play their part in a democratic community. Some European case law does so protect,²⁰⁴ but further theoretical amplification is set out in the next section.

E. *Free Speech and Participatory Democracy: A Way Forward?*

Scholars sometimes justify freedom of speech as promoting the flourishing of participatory democracy. This, they suggest, is possible only if government does not censor certain viewpoints. Democracy, according to the Madisonian view (cited approvingly by Justice Brennan in *New York Times v. Sullivan*) requires that people, not government, should decide which views on political issues should prevail.²⁰⁵ The writings of Alexander Meiklejohn, according to whom freedom of speech is "a deduction from the basic American agreement that public issues shall be decided by universal suffrage,"²⁰⁶ employ this form of justification. Connections also may be drawn with John Hart Ely's theory of judicial review which stresses the importance of citizens' participatory rights.²⁰⁷

There are some difficulties involved, however, in embracing such a broad free speech principle. As Ronald Dworkin noted in his commentary on Justice Brennan's *Sullivan* opinion,²⁰⁸ this view does not explain why the majority of people should not

²⁰³ Wojciech Sadurski, *Racial Villification, Psychic Harm, and Affirmative Action*, in *FREEDOM OF COMMUNICATION* 80-81 (Tom Campbell & Wojciech Sadurski eds., 1994).

²⁰⁴ See *supra* text accompanying notes 76-154.

²⁰⁵ See *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964).

²⁰⁶ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 39 (1948). See also DAVID HUME, *OF THE LIBERTY OF THE PRESS* (1817), reprinted in DAVID HUME'S *POLITICAL ESSAYS* 3-11 (Charles W. Hendel ed., 1953); BENEDICT DE SPINOZA, *A THEOLOGICO-POLITICAL TREATISE* ch. XX (1689), reprinted in BENEDICT DE SPINOZA, *A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE* 257-66 (R.H.M. Lewis trans., 1951).

²⁰⁷ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* *passim* (1980). Meiklejohn also presented his arguments as a theory of United States constitutional interpretation. See MEIKLEJOHN, *supra* note 206.

²⁰⁸ See Dworkin, *supra* note 24, at 56.

be allowed to impose censorship that they approve of and want—that is, the “tyranny of the majority” referred to by de Tocqueville²⁰⁹ and Mill.²¹⁰ If democracy simply means that the majority should have its way, then this justification provides the United States with no reason why the majority should compromise its will by providing for freedom of speech if it does not wish to do so.

The general theory of human rights, however, is premised on the necessity of placing restraints on the majority at times; as well, contemporary visions of democracy tend to reject the majoritarian view as inadequate by focusing instead on ensuring participation of all members of society. The European Court of Human Rights constantly has emphasized in its case law, particularly in the area of freedom of expression, that it sees “tolerance and broadmindedness” as essential features of democratic society.²¹¹ But this interpretation of democracy does not produce a right of freedom of speech with the strength of the First Amendment, as Karl Popper’s “paradox of tolerance” illustrates. According to Popper, it is paradoxical to allow freedom of speech to those who would use it to destroy the very freedoms and toleration on which such a vision of democracy is based.²¹² This argument has not been well received in American jurisprudence. For example, it was used unsuccessfully by those who sought to ban the neo-Nazis from marching in Skokie.²¹³

Many European legal systems, however, have been much more willing to restrict rights when the exercise of those very rights threatens the foundations of civilized society. For example, Article 17 of the European Convention on Human Rights states:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.²¹⁴

The European Commission on Human Rights relied on Article 17 in its decision in *Glimmerveen and Hagenbech v. The Netherlands*, and held that the defendants’ conviction for inciting racial discrimination by urging the removal of immigrants from the Netherlands did not interfere with their free expression rights.²¹⁵ Similarly, Article 18 of the German Basic Law, which provides that certain basic rights are

²⁰⁹ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248-52 (Henry Reve trans., Arlington House 1966) (1835).

²¹⁰ See MILL, *supra* note 175, *passim*.

²¹¹ See *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 754 (1976).

²¹² See POPPER, *supra* note 183, at 265 n.4.

²¹³ See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

²¹⁴ EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 128, at 427.

²¹⁵ See 18 Eur. Comm’n Dec. Rep. 187 (1979).

forfeited if abused “to combat the free democratic order,”²¹⁶ also has been used in cases involving the banning of neo-Nazi parties.²¹⁷ The German constitutional principle of militant democracy, of course, also is built on these premises. In the European cases, neither judges nor lawyers seemed to be worried inordinately by the difficulties involved in singling out those groups that might constitute a threat to democracy.

Several writers, including Hans Kelsen, Jurgen Habermas, and Emile Durkheim, have emphasized the importance to democracy of an open communicative structure.²¹⁸ Furthermore, those who reject some of liberalism’s fundamental aspects have provided support for the argument from democracy. In stressing that power ultimately rests with people as a group or community, the argument from democracy avoids criticisms which are made of the atomistic and elitist nature of liberalism. So, although the stress placed by Habermas, for example, on a model of ideal communication initially might seem attractive to free speech absolutists (as it puts discussion at center stage), it must be noted that the Habermasian call for free discussion also requires the removal of inequality and oppression in society, while controlling biased speech and affording minorities protection by positive assistance. This assistance sometimes also may involve silencing the powerful (for example, by placing restrictions on ownership or control of the media or the amount of money spent on campaign financing). Owen Fiss reached a similar conclusion, citing the “silencing” effect of unrestrained speech as a reason for some restrictions on its exercise.²¹⁹

The argument from democracy illustrates that it is particularly important to protect political speech (because of the role it plays in safeguarding democracy), while at the same time appreciating that restrictions on speech may be necessary to safeguard democracy. This view runs counter to the usual argument that free speech is the bedrock of democracy, which enables the United States to applaud decisions on political speech taken by the European Court of Human Rights—the language in the *Castells* and *Lingens* judgments, for example, echoes the United States Supreme Court in *Sullivan*²²⁰—while not seeing a reason to pursue this firm approach in other

²¹⁶ Art. 18 GG.

²¹⁷ See, e.g., BVerfGE 38, 23.

²¹⁸ See EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 89 (Cornelia Brookfield trans., Greenwood Press 1958) (1950); JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 81 (Thomas McCarthy trans., 1987); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 284-86 (Anders Wedberg trans., Russell & Russell 1973) (1961).

²¹⁹ See FISS, *supra* note 6, at 5-26.

²²⁰ See also *Observer and Guardian v. United Kingdom*, 14 Eur. H.R. Rep. 153 (1991) (the “spycatcher” case) (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)); *Derbyshire v. Times Newspapers Ltd.*, 1993 All. E.R. 1011, 1019 (denying Public Authorities the right to sue in libel on the basis that “such actions would place an undesirable

areas of expression. The argument from democracy allows the United States to argue for a strong core right of freedom of expression, without taking the United States as far as Dworkin would like, while acknowledging that there may be times when the purposes for which free expression is pursued force the United States to compromise free expression for the ultimate goal of democracy.

V. CONCLUSION: INSENSITIVITY TO OTHER VALUES?

There clearly is a radical difference between the German or, more generally, the European and American approach to the regulation of speech. It is helpful to identify two distinctive features of the European approach. First, European and, especially, German jurisprudence emphasize particular values—dignity, protection of personal identity, and equality. German judgments stress the potential of racist insults and denials of Nazi atrocities to affect the very core of the identities of members of certain groups, even if those individuals have not been specifically targeted for abuse. This approach recognizes a different sort of harm caused by the abuse of freedom than the danger of imminent lawless action required under American law. The *Brandenburg* requirement that violence be imminent before hateful speech may be proscribed is objectionable. Different listeners respond in different ways to so-called fighting words. Not all react by violence—particularly those who are old, sick, or weak. This type of legislative response privileges a particular type of angry “macho” reaction without addressing the often more severe harm caused in other cases in which the victim may be too frightened to respond.²²¹ European case law looks not only to the harm caused by such expression, but also proceeds from a particular conception of individual personality and psychology. The European courts’ view is a long way from the United States Supreme Court’s conclusion in *Cohen v. California*, that individuals should “avert their eyes” in cases of offensive expression.²²² In this way, European case law rejects a conception of individuals as beings who merely should be left to their own devices to make up their own minds about the value of expression in the public domain, to be free to ignore it, or to counter it with more speech. Such an approach isolates human beings by forcing them to take the consequences of painful conduct and ignores the particular susceptibility of certain groups to injury, especially when the offense of the speech seems to be targeted at such groups because of their identity. Under the American model, the individual will be left to his or her less communal and somewhat atomistic existence.²²³

fetter on freedom of speech”).

²²¹ See Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990).

²²² *Cohen v. California*, 403 U.S. 15, 21 (1971).

²²³ See MARY ANN GLENDON, *RIGHTS TALK* 109-70 (1991) (exploring this particular

In contrast, modern European precedents reveal a different conception of the individual. For example, the German Constitutional Court has stated: "The concept of man in the Basic Law is not that of an isolated sovereign individual; rather the Basic Law resolves the conflict between the individual and the community by relating and binding the citizen into the community, but without detracting from his individuality."²²⁴

Furthermore, the First Amendment tends to eclipse other constitutional values with which it comes into contact. This problem is particularly acute with respect to the issue of equality. Catharine MacKinnon's work is indicative of a growing body of opinion in the United States which believes that "[t]he law of equality and the law of freedom of speech are on a collision course."²²⁵ MacKinnon notes that this state of affairs stands out in bold relief in the United States, where "both rights have been highly developed but out of sight of each other."²²⁶ The Supreme Court's insensitivity to the dynamics of equality in this context is illustrated well by the lack of any reference in *R.A.V.* to the Fourteenth Amendment's Equal Protection Clause.

Second, the European approach is fundamentally more sympathetic to a conception in which the state plays a role in facilitating the realization of freedom, democracy, and equality. Under the European approach, it becomes natural for the state to assume a more affirmative role in actualizing specific constitutional rights. Within the area of freedom of speech this would require the state not only to refrain from violating certain constitutional norms, but also to participate in their realization—an approach which usually is assumed only to be required of socio-economic rights, such as the right to work. The realization of socio-economic rights is scorned by some because of the degree of government intervention required.²²⁷ The European Court emphasized this approach in *Informationsverein Lentia v. Austria*²²⁸ in which it held that, in order to guarantee pluralism the State must take active steps to promote a variety of sources of information. In the United States, however, regulation of speech is likely to be struck down not only when it discriminates on the basis of content, but also when it is intended to promote equal opportunities for the dissemination of speech; there is little sympathy for the broader, more balanced approach found in Europe. Thus, in its holding in *Miami Herald v. Tornillo*,²²⁹ the Supreme Court was hostile to legislation which ensured a right of reply for those castigated by the press, although the right to broadcast such attacks was upheld.

criticism of American constitutional rights jurisprudence).

²²⁴ BVerfGE 30, 1 (20).

²²⁵ MACKINNON, *supra* note 6, at 71.

²²⁶ *Id.*

²²⁷ See MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 65-77 (1973).

²²⁸ 17 Eur. H.R. Rep. 93 (1993).

²²⁹ 418 U.S. 241 (1974).

Of course, the privileging of speech is not presented as such. Instead, it is presented in terms of a desire to foster neutrality and to condemn content-based regulation of expression. As Cass Sunstein recently has claimed, however, neutrality, in the sense demanded by free speech, may not have neutral effects: "Rules that are content-neutral can, in light of an unequal status quo, have severe harmful effects on some forms of speech."²³⁰ Laurence Tribe also sees such neutrality as liable to produce decisions that affect some groups more than others, such as those which do not have access to adequate financial resources.²³¹ Tribe points to the unwillingness of the United States Supreme Court to "take account of background institutions of power and the costs of participation in public dialogue" as giving rise to a serious threat to rights of expression of the disadvantaged.²³²

Surely it is not enough for societies that claim to be committed to the ideals of social and political equality and respect for individual dignity to remain neutral and passive when threats to these values exist. Sometimes the state must act to show its solidarity with vulnerable minority groups and its commitment to equality. Laws prohibiting racist speech are an important component of this commitment, as Chief Justice Dickson noted in the *Keegstra* case.²³³ Sometimes the State must take steps to protect democracy itself, which may involve repressing speech—a notion that finds support in the German Constitutional Court's theory of militant democracy as well as in decisions under the European Convention which look to Article 17 of the Convention for support.

Contrary to what Dworkin would argue, freedom does not require the United States to sacrifice permitting hate speech. Rather, some of the values relied on by free speech adherents, such as autonomy, respect for personhood, and equal participation in democracy, dictate the regulation of such hateful utterances. If the joint European Union action against racism, xenophobia, and hate speech,²³⁴ is to be

²³⁰ SUNSTEIN, *supra* note 6, at 178.

²³¹ See LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 194-95 (1985) (discussing how the prohibition of placing "mailable matter" in recipients' mailboxes without using the postal service may appear neutral but, according to Tribe: "[T]he regulation, by restricting the favored means of communication of less wealthy people, augments the voice of the rich.").

²³² *Id.* at 198. This observation leads to a further, related point. Private concerns, particularly media monopolies, currently are usurping individuals as rights bearers and can be just as threatening to individual rights as can the State. There is a growing body of case law on commercial expression under the European Convention, the leading case being *Markt Intern and Beermann v. Germany*, 12 Eur. H.R. Rep. 161 (1989). Sir Stephen Sedley, in *Human Rights: a Twenty First Century Agenda*, Autumn, 1995 PUB. L. 386, 396, asks:

[W]hy of all the human rights issues there are should it be the issue of free speech which is constantly at the head of the queue for rights adjudication? The answer is very clear: it is because for the mass media free speech is a valuable commodity and litigation a worthwhile investment in it.

²³³ [1990] 3 S.C.R. 697. See *supra* text accompanying notes 33-36.

²³⁴ See *supra* text accompanying note 27.

effective, many member states must introduce new legislation, which inevitably will be controversial. A test for state intervention might proceed along the following lines. When the speech concerned attacks the dignity and equality of those targeted, to the extent that their own ability to participate freely and equally in public discussion is affected in a way that undermines the democratic nature of the polity, then this speech constitutes a “harm” worthy of regulation. This type of harm already is recognized under the European Convention and in German law. This test is based on equality and also on ensuring that everyone’s speech rights are respected. It will involve the targeting of different types of speech in different times and societies. Contrary to Dworkin, this Article argues for restrictions on hate speech. A willingness to ban hate speech, however, does not necessitate the eclipse of free expression as the strong ideology of free expression of cases such as *Castells* illustrates.

In conclusion, Sigmund Freud reminds us of the power and complexity of language: “By words one person can make another person blissfully happy or drive him to despair, by words the teacher conveys his knowledge to his pupils, by words the orator carries his audience with him and determines their judgements and decisions. Words provoke affects and are in general the means of mutual influence among men.”²³⁵

²³⁵ SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS (1916), *reprinted in* 15 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 17 (James Strachey ed., 1963).