Hate Speech

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Given the evils of hate, any argument for protecting is, at best, an uphill effort and, at worst, simply misguided. Many people either accept or, at least, wonder whether they should accept, an argument that goes something like this:

> Anyone sensitive to the horror of genocide knows that hate pervades the atmosphere at such times. Few goals can rank higher than preventing genocide and the murderous racial conflicts presented to the world during the twentieth century. Moreover, it is difficult to find any value in the freedom to engage in racist hate speech. Important but ultimately less significant values such as free speech cannot, for any sensitive person, lead to any pause in outlawing the speech that contributes to these horrors. Whether or not the ban will be effective in even a few cases at preventing genocide or racial violence, the mere possibility that it will more than justifies the ban.

As an advocate of almost absolute protection of free speech, I should explain the grounds for my valuation of free speech and rejection of the above claim. That explanation, it turns out, is too ambitious for this essay. Nevertheless, Part I describes but does not defend a theory of why racist or hate speech should be protected – a theory that I believe provides the best, though often unrecognized, explanation of existing American case law but one that is surely a controversial, probably minority, view even in the United States.

Most readers will realize, as do I, that these theoretical grounds do not really answer my imagined proponent of regulation. Thus, Part II describes the empirical evidence that would cause me to abandon the theory described in Part I, at least in the context of some category of racist or hate speech, but then gives reasons to doubt that this evidence will be forthcoming. In the end, this essay is more a call for more knowledge – I stand ready to be shown that the relevant evidence overrides my doubts about the efficacy of suppression.

But given the inevitable empirical uncertainties in evaluating such evidence, Part II does not answer the last sentence of the imagined argument for regulation set forth above about the mere *possibility* of making a contribution toward prevention. Thus, the final part of this essay offers a different answer: it considers reasons to expect, as a practical matter, that hate speech regulation is more likely to contribute to genocidal events and major events of racial violence than to reduce them. These historical horrors help justify, or so I suggest, greater protection for speech. My hypothesis is that the empirical investigation supports the gamble that strong speech

protection leads to better results.

Before beginning, however, I offer the following preface. Constantly, references to 'American exceptionalism' are made in discussions of free speech. Usually the suggestion is that the United States is extremely protective of free speech, disregarding most contrary values, while Europeans, although generally protective of core speech freedoms, have a margin of appreciation that also recognize other important values that it considers in determining the extent of protection of speech – basically an approach Americans call 'balancing.' This suggestion of difference is, at best, overblown. First, in many contexts many Europeans favor – including some Justices on the European Court of Justice – something close to what has been portrayed as the strongly speech-protective American position. For example, a 2004 decision of the Hungarian Constitutional Court, followed its earlier 1992 decision in repeatedly invoking the American 'clear and present danger' test in finding unconstitutional a law that punished speech provoking racial hate.[1] In contrast, many if not most American First Amendment scholars and courts favor 'balancing' that is quite like what is portrayed as the European approach.[2]

Moreover, though some Americans – I am one – favor the strongly speech-protective approach identified with American exceptionalism, that approach has been in the United States a 'fighting faith' that often has not (yet) prevailed. Admittedly, the last half of the twentieth century saw generally increasing protection of speech in America. Still, earlier in the twentieth century, American courts regularly approved limits, jailing or fining people for their speech activities. All sorts of expression have been prohibited and punished – speech favoring socialism, communism, anarchism,[3] and an even more mainstream political editorial;[4] racist

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[1] Hungarian Constitutional Court, Decision 18/2004 (v.25) AB, available at: http://www.mkab.hu/content/en/en3/09360304.htm (visited 23 Sept 2007)

[2] Virtually all First Amendment opinions of Chief Burger or Justice Powell adopt a form of balancing, which has received one of its best defenses in Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge, Ma: Harvard U. Press, 1990), an approach that would probably require reversal of many of the great modern First Amendment opinions in which no hint of balancing occurs. See Baker, Harm, Liberty, and Free Speech, 70 So. Calif. L.Rev. 979 (1997)

[3] See cases described in Zachariah Chafee, Jr., *Free Speech in the United States* (Cambridge, MA: Harvard U. Press, 1964), especially chap. 2, 36-107.

[4] An editorial cartoon criticizing political corruption was the basis for a fine, with the court refusing to hear the publisher's offer to prove its truth. Patterson v. Colorado, 205 U.S. 454 (1907)

speech[5] or sexually explicit speech;[6] publication and sale of great novels,[7] feminist materials important for sex education;[8] labor picketing[9] and public assemblies.[10] And to this day, the First Amendment, which applies only to governmental not private activity, does not protect people from being fired by private employers for their speech or political associations.

Interestingly, putting aside official legal doctrine, some political scientists have concluded that in practice as opposed to rhetoric the United States is not exceptional in the way these comments suggest. The impression of one commentator is that, as 'compared to nine European democracies, the U.S. has imposed the most severe legal and social "obstacles to political dissent."'[11] Later this chapter will raise doubts about causal claims. Still, I cannot help wondering if the extraordinarily sad state not only of American foreign policy but also of domestic policies, which have left the U.S. with greater income inequality than any other industrialized democratic country, reflects in part the historically *inadequate* protection of speech freedom in the United States. How would our politics have gone if we had not suppressed labor activists from early in our history, the liberal internationalists during or after World War I, or wiped progressive thinkers out of the universities and cultural industries during the McCarthy period, a cleansing that took decades to repair? Much of Zachariah Chafee's classic book on free speech can be read as supporting his speculative comment that greater respect for free speech at the time of World War I might have lead to a better treaty after the

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[5] *Beauharnais v. Ill.* 343 U.S. 250 (1952).
[6] *Roth v. United States*,. 354 U.S. 476 (1957).
[7] Courts upheld, for example, bans on Theodore Drieser, *American Tragedy* in 1930, Lillian Smith, *Strange Fruit* in 1945, Edmund Wilson, *Memories of Hecate County* in 1947, Erskine Caldwell, *God's Little Acre* in 1950. See T. I. Emerson, *The System of Freedom of Expression* 468-70 (New York: Random House, 1970). Beyond the judicial approval of censorship of specific books was, of course, the effect of this potential on what was written and deleted. This censorhip of great – as well as not so great – literature in the United States is well and exhaustively described in Edward de Grazia, *Girls Lean Back Everywhere* (New York: Random House, 1992).
[8] Most faqmous is Margaret Sanger's persecution under the Comstock laws for trying to circulate birth control information. Margaret A. Blanchard, 'The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize,' 33 William and Mary L.Rev. 741, 766-78 (1992).
[9] Giboney v. Empire Storage Co, 336 U.S. 490 (1949); Hughes v. Superior Court, 339 U.S. 460 (1950); International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957).
[10] A conviction for public speaking in a public place were famously affirmed by Justice Holmes in the now discredited decision of Commonwealth v. Davis, 162 Mass. 510 (1895), aff'd 167 U.S. 43 (1897) and later echoed in decisions such as Cox v. Louisiana, 379 U.S. 559 (1965) (upholding ordinance that prohibited picketing near a courthouse, though reversing conviction because of selective application of statute against defendants) and Adderley v Florida, 385 U.S. 39 (1966) (upholding conviction for peacefully demonstrating outside a county jail). .
[11] R. J. Goldstein, *Political Repression in Modern America: From 1870 to the Present* (Cambridge, Mass: Schenkman, 1978) xiv, quoting R. Dahl, *Political Oppositions in Western Democracies* xvi, 390-92 (New Haven: Yale U. Press, 1968).

war, to support in the United States for the League of Nations, and to 'save[ing] English children from German bombs in 1941.'[12] In any event, though prominent advocates of rather absolutist speech freedom may come from American scholars and jurists, identifying that position with an American and contrasted with a European reality is exaggerated. Still, relatively absolutist protection is the view that my comments endorse.

I

My premises are: (i) that the legitimacy of the state depends on its respect for people's equality and autonomy and (ii) that as a purely formal matter, the state only respects people's autonomy if it allows people in their speech to express their own values – no matter what these values are and irrespective of how this expressive content harms other people or makes government processes or achieving governmental aims difficult. Achievement of more substantive aims, such as helping people experience fulfillment and dignity, must occur with a legal structure that as a formal matter respects people's equality and autonomy.

The conception of autonomy that the state must respect is, as noted, in a sense *formal* not *substantive*.[13] A legal order must ascribe autonomy to people generally, usually withdrawing this attribution only for the extent of involvement in institutional structures frameworks steered by mechanisms other than communication and a person's choices. The state cannot coherently *ask* a person to obey its laws unless it treats the person of capable of making choices for herself, for example, the choice to obey the law.[14] As so conceived, respect for a person's autonomy is in general an on/off value. A government regulation either is or is not consistent with the required respect. A person is not treated as formally autonomous if the law denies her the right to use her own expression to embody her views. As used here, formal autonomy has an activity or choice, not a result or resource-oriented focus. (I have gone further and argued that she also must have a general right over the value-expressive uses of herself – her own body – but that raises interpretive difficulties not necessary to examine here.) Moreover, meeting the

[12] Chafee (note xx), at xiii, 561-62.
[13] C. E. Baker, 'Autonomy and Informational Privacy or Gossip: The Central Meaning of the First Amendment' (2004) 21 *Soc.Phil.& Pol'y* 215 (2004).
[14] Seeing the law this way represents the most important transformative element of H.L.A. Hart's transformation of positivism. See H.L.A. Hart, *The Concept of Law, 2nd ed* (Oxford: Oxford University Press, 1994, originally published 1961); C. Edwin Baker, *Hart's Transformation of Positivism* (ms, 2007).

requirement of respecting her choice autonomy, granting this expressive right, creates no actual or even potential conflict with respect for others' formal autonomy, that is, no conflict with recognizing their equivalent choice or expressive rights with respect to their body or speech. Law's respect for formal autonomy of one person never denies respect for the formal autonomy (or, for that matter, the formal equality) of another.

In contrast to respect for a person's formal autonomy as an absolute requirement of legal legitimacy, a central aim of a democratic state should be to promote people's *substantive autonomy*. Substantive autonomy involves a person's actual capacity and opportunities to lead the best, most meaningful, self-directed life possible. Laws that advance one person's substantive autonomy – by allocating resources to her or providing her information, for example – often reduce the substantive autonomy of another person. In making policy choices, a state is properly influenced but not controlled by substantively egalitarian aims, welfare maximizing considerations, and various inevitably non-neutral collective self-definitional or majoritarian values. These policy or legal choices, as compared to others the state might make, inevitably favor some people's substantive autonomy over that of others.

Democratic legitimacy, I believe, and certainly the civil libertarian commitment, requires that, in advancing people's substantive autonomy as well as in advancing substantive egalitarian aims and other proper policy goals, the legal order neither have the purpose to nor use general means that disrespect people's formal autonomy (or their formal equality). On this view, respect for free speech is a proper constraint on the choice of collective or legal means to advance legitimate policy goals. Typically racist hate speech embodies the speaker's at least momentary view of the world and, to that extent, expresses her values. Of course, her speech does not respect others' equality or dignity. It is not, however, her but the state's legitimacy that is at stake in evaluating the content of the legal order. Law's purposeful restrictions on her racist or hate speech violate her formal autonomy, while her hate speech does not interfere with or contradict anyone else's formal autonomy even if her speech does cause injuries that sometimes include undermining others' substantive autonomy. For this reason, prohibitions on racist or hate speech should generally be impermissible – even if arguably permissible in special, usually institutionally bound, limited contexts where the speaker has no claimed right to act autonomously – such as when, as an employee, she has given up her autonomy in order to meet

role demands that are inconsistent with expressions of racism..

Admittedly, other influential theories of free speech could lead to different conclusions – or different explanations for similar conclusions. Pragmatic balancers are likely to treat the notion of formal autonomy as incoherent or lacking moral appeal and instead seek to advance people's substantive autonomy, possibly in a roughly egalitarian manner, or to advance other substantive goals. Undoubtedly, the mere expression of racist hate speech can cause real injuries and has the potential to stimulate further harms. As will be noted below, however, those disparaged by hate speech might well be better off without legal restrictions on the speech. Without offering any sympathy for the racists, the pragmatic balancer could plausibly come out on either side in this debate about legal restrictions on hate speech.[15]

Equally interesting is a more foundational approach to free speech. Some view free speech guarantees as a necessary implication of democracy – with the scope of protection limited by its rationale.[16] To many thoughtful observers, this democratic basis for the protected legal status of speech suggests justifiable restrictions on at least some racist hate speech. The assertion is that racist speech contradicts the democratic premise – an equality in being self-governing – that justifies protection of speech. For example, hate speech that portrays a particular group as unfit to participate in the governing process or that advocates crimes against members of a particular group rejects basic premises of democracy. The critique observes that the hate speech does not take a position *within* democratic discourse but rather aims at thwarting democracy and democracy's discourses by means of actual or expressive exclusion. For this reason, it is argued, hate speech can be prohibited.

In the past, a number of jurists have accepted roughly the above view – arguing that anti-democratic speech is permissibly prohibited. Judge Learned Hand treated counseling or advocacy of law violation as inconsistent with the democratic methods of change and, therefore, properly made illegal.[17] Justice Felix Frankfurter explained that communists' speech ranked low on any scale of values.[18] Presumably the low ranking occurred because the communists

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[15] S. H. Shiffrin, *Dissent, Injustice, and the Meaning of America* 49-87 (Princeton, N.J.: Princeton Univ. Press), 1999).

[16] A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper, 1960)
[17] See *Masses Publishing Co. v. Patten* 244 Fed. 535 (S.D.N.Y. 1917).
[18] See *Dennis v. United States* 341 US 494 (1951) (Frankfurter, J., concurring).

recommended change by non-democratic means; for that reason, their speech was not 'political' within Frankfurter's understanding of democratic practice. Robert Bork likewise denied that advocacy of law violation – for example advocacy of revolution or even peaceful civil disobedience – could be 'political speech,' which is the only category that he would protect.[19] At mid-century, Carl Auerbach argued that the basic postulate behind the First Amendment allows Congress to 'exclude from the struggle,' to restrict the speech, of 'those groups which, if victorious, would crush democracy and impose totalitarianism.'[20] Such arguments could apply equally to racist hate speech, at least to the extent the speech rejects the premise of democratic inclusion.

Others argue, however, that this conclusion does not follow, at least does not follow for 'our' (meaning the American) particular version of democracy.[21] They claim that all speech, no matter how disrespectful of others, that is part of public discourse, merits protection, possibly absolute protection. Even if emphatic about locating the basis of free speech in democracy, 'our' conception of democracy often seems premised on people's autonomously arriving at their own political views – that is, arriving at their views without legal restriction on the public discourse leading to those views. A person must be able to explore (advocate or hear) even views inconsistent with democracy in order to formulate her own commitments – although this strong protection of speech applies only to speech that is part of public discourse, which seemingly covers only speech evocative of possible public issues and which is part of a possible public sphere or public discourse.

This view has undeniable strengths both interpretatively and normatively and may very well reach the same conclusion about most regulation of hate speech as does my emphasis on formal autonomy. Still, unlike a theory grounded on respect for individual autonomy, this democratic approach does not cover protection to speech not characterized as part of public

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[19] R. Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Ind. L. Rev.* 1, 20, 29-31. At about the time of publication, Bork in a lecture given at Yale Law School, he argued, as I remember it, for an even more restrictive interpretation of the scope of political speech.

[20] C.A. Auerbach, 'The Communist Control Act of 1954' (1956) 23 *U. Chi. L. Rev.* 173, 189.

[21] R.C. Post, 'Hate Speech' [this volume]; id., *Constitutional Domains* (Cambridge, Mass.: Harvard Univ, Press, 1995), 119-178; J. Weinstein, 'Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy', in T. Hensley (ed.), *Boundaries of Free Expression & Order in American Democracy* (Kent, Oh. (check): Kent State Univ. Press, 2001)146-69 ; id., 'Hate Speech and Democracy' [this volume].

discourse. (Interestingly, though for different reasons, both the autonomy and the democratic discourse approaches either completely or largely deny protection to 'commercial speech.') My theoretical objection to this view relates to its initial premise – that we should protect speech fundamentally because the protection is essential to democracy or, more precisely, to the conception of democracy that we accept. My question is *why* are we so concerned with democracy? Why does democracy provide a foundational premise? (The strategy of my question is the expectation that any sound normative answer to this inquiry will both explain the proper contours of democracy and show that an explanation of the *nature and significance* of democracy's contribution to the legitimacy of the legal order requires and reflects acceptance of value premises that go beyond the structure of the political order to matters such as protection of even non-political self-expression.)

One response could attempt to avoid the normative question and merely say – perhaps for the United States but maybe not those European countries that restrict hate speech – that we are not only in fact deeply committed to democracy but also that *our* conception of democracy requires virtually complete citizen autonomy within public discourse. This essentially sociological response, however, leaves two problems. First, it does not answer the skeptic, the person who wonders why we should be committed to democracy, particularly *our* conception of democracy, especially given 'the sheer stupidity of the policies of this nation.'[22] Second, even more fundamentally, to the extent that we do in fact adopt laws punishing hate speech – even if invalidated by courts – it seems that *our* conception of democracy is at least contested. It even seems that, in the view of the majority, our conception of democracy is more like the one that Justice Frankfurter and Judge Hand describe than the one Professors Post and Weinstein propose. They may be right but they need a normative, not merely sociological, rationale for their position.

Instead of the contextual sociological claim, I have argued that the best answer to this normative question of what it is about democracy that justifies our allegiance is that democracy is the *only* political order that embodies a normative principle of equal respect for people's right to be engaged in self-determination when self-determination occurs at the group level, leads to

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[22] A. Mieklejohn, 'The First Amendment Is an Absolute'[1961] *Supreme Court Review* 245, 263.

legal allocation of resources, and involves coercion – that is, is the only form of government that respects people as free and equal in the process of choosing laws. But if legitimacy (or the justification of legal obligation) requires respect for people's right of self-determination, there is no reason why this required respect applies only when people act to decide about the collective but not when they act to decide about themselves. If this is right, the fundamental status of each person's equality and autonomy provides *both* the normative basis for democracy and a set of normative principles that democratic laws must not violate. These values both require democracy and require limits on democracy. The logic of this rationale for democracy does not so much place free speech at the center of democracy but rather locates democracy as an off-shoot of respect for free speech or, more specifically, respect for individual autonomy (and equality). Respect for ascribed autonomy is both definitive of, and a restriction on, the scope of both free speech and democracy. Thus, I reject an emphasis on democratic foundations for free speech in favor of this more basic premise of respect for individual's autonomy to which the law must conform even as it pursues practices that favor people's substantive autonomy. On this basis, the legal order must respect the autonomy even of the individual who would deny such respect to others in the community – the law must respect the freedom of the racist to express her views.

II

Abstract theory is fine. But a convincing case that a different approach to free speech might prevent occurrences such as the holocaust, more recent genocides like that in Rwanda, or the other virulent, murderous racist practices would lead me – and I suppose any person of good will – to revise abstract commitments that counsel against legal prohibitions of racist speech. So the natural question is: what evidence or argument would such a convincing case require?

First, historical evidence should be available. But then the question becomes: what specific historical evidence should be tellingly relevant to us today? Germany's experience with Nazism is often noted in explaining their current prohibitions on hate speech but it is less clear that this history shows that these prohibitions are now needed. Historical accounts might find that racist hate speech prominent in periods leading up to the genocide. But that finding would clearly not be enough. It would not show whether this speech was causal or merely

symptomatic, maybe even usefully symptomatic (in exposing a problem that needed to be dealt with), of deeper underlying forces. And it would not show whether, even if causal in that historical context, it would be so under different historical conditions – for example, the conditions that exist in modern democracies. Moreover, even if historically causal and potentially causal again, racist speech takes many forms and occurs in many contexts. Thus, the account would need to show, in addition, that *the specific hate speech* that proposed legal regulations would effectively prevent was at least a contributing cause of virulent racist or genocidal practices. Support for this last empirical issue – that the restriction would be effective in dealing with the particularly relevant racist speech – will be much harder than a showing of correlation or even cause. Or, alternatively, the account could be convincing in some other way – possibly by showing that the symbolism implicit in the speech prohibitions would be effective at combating racism – again a difficult claim to make with confidence. (Many countries that have experienced the worst racist violence have, in fact, had such prohibitions without successfully preventing racist or genocidal results.[23])

Still, even in the absence of good empirical evidence, a causal claim about racist hate speech – at least as a contributing cause within a longer chain of causation – seems plausible. Genocide or virulent racial discrimination presumably reflects attitudes. It is difficult to understand how such attitudes could first arise and then persist if not in some way embodied in people's communications, their expression. Of course, such expression is unlikely to arise out of nothing. Material conditions and social orientations that are not themselves equivalent to the expression of racism are also likely to be a central part of the causal chain. If so, the question becomes where in this causal chain, where in its fight against virulent racism, should a legal order target its intervention(s)?

The seriousness of the evil surely justifies multiple interventions if their multiplicity increases the likelihood of favorable outcomes. Still, pragmatically to justify hate speech regulation seems to require that the following be shown:

(i) hate speech occurs in cases of genocide or virulent racial discrimination – a demonstration that usually, maybe always can be made;

(ii) as a causal matter, hate speech – or, more specifically, the hate speech that would be

[23] I was told at the conferences where this paper was presented that both Rwanda and Germany are examples.

outlawed by hate speech regulation – contributes to these evils. The more general version of this claim is probably right, although the more specific claim about the specific hate speech that would be barred is considerably more speculative. Evidence on the point is seldom offered and, I suspect, any offering would seldom be fully convincing.

Even if these two points are right, the argument for legal prohibitions also requires persuasive support for the following additional claims:

(iii) legal prohibitions of hate speech would actually be an effective place (even if not the exclusive place) to intervene in the causal chain: I have seen little empirical evidence supporting this claim. Below I will suggest doubts that this argumentative burden can be met;

(iv) these legal bars on hate speech would not reduce the efficaciousness or likelihood of other (legal or social) interventions that would be more effective in preventing virulent racist acts; or, at least, that any negative effects would not be greater than any benefits the bars on hate speech provide; and

(v) enactment of the hate speech prohibitions will not have other 'costs' – unrelated to race but possibly related to the extent or nature of democracy and to human freedom – that are greater than the net benefits of these means in comparison with or in addition to other means for combating daunting racial evils.

An assessment of these five essentially empirical matters is crucial. I will put aside the fifth, assume the first two arguendo, and focus on the third and fourth.

The third point requires two doubtful claims. It must assume that political forces will be able to secure adoption and adoption of the needed prohibitions on hate speech *in those situations* where the prohibitions are needed and could be causally effective as a means to prevent virulent racism or genocide. Clearly, many places in the modern world have adopted such prohibitions. The possibility is real, however, that the prohibitions will be adopted and enforced only in places where not needed. Still, maybe the proper purpose of international conventions requiring their adoption is precisely to add to the political pressure to adopt such restrictions, thereby increasing the likelihood of their adoption where needed.

Even more problematic, to be an effective place to intervene, adopted prohibitions must

be efficacious in reducing the likelihood of serious racist evils. Most obviously, this result probably requires sufficient enforcement of the prohibitions against the relevant targets. Maybe, however, their mere adoption could help create a cultural climate where racist speech, and even more importantly, virulent racist practices, are unacceptable. The question of whether to expect effective enforcement is made more difficult because it is not clear at what stage enforcement would be meaningful in preventing the polity from devolving in an unacceptably racist direction or whether enforcement could be effective at reversing cultural directions. Active enforcement (against appropriate targets) is likely only if racist groups have not become too established. By the time Nazis were gaining power, or during the year immediately preceding the genocide in Rwanda, effective enforcement was unlikely. At the relevant time, enforcement would likely either be blocked, create a backlash against the enforcers and sympathy for the 'suppressed' racists, or as will be discussed below, enforced primarily against 'unpatriotic' or 'racist' speech of those most needing protection – Jews or Tutsis, for example, or against African-Americans in the United States or Algerians in France.

Thus, the hope of those favoring hate speech prohibitions must be that enforcement will be meaningful and effective at a quite early stage. Pessimism about this speculative hope seems justified. First are generic doubts about the likelihood of effective legal enforcement. More important, however, is the likelihood that at this most relevant stage the speech that meaningfully contributes to developing or sustaining racism will be subtle, quotidian and, to many people, seemingly inoffensive or at least not 'seriously' offensive speech. This speech is likely to fly under the legal radar screen and, in any event, meaningful enforcement of prohibitions against this speech is even less likely. Thus, even given a belief that racist speech contributes significantly to virulent racism and genocidal practice, my hypothesis is that at earlier stages legal prohibitions will not cover or be effectively enforced against the most relevant speech and at later stages enforcement will not occur, will be counter-productive in creating martyrs for a racist cause, or will focus on the wrong targets.

Even if there is reason to doubt the effectiveness of legal prohibitions in preventing the reign of racist practices, the horrific evil feared (as well as the noxious quality of speech properly covered by a prohibition) recommend that error should be on the side of caution. Here is where the fourth point about possible negative effects of restrictions on hate speech, preliminarily

suggested by some comments above, is crucial. Caution is often given as a reason to prohibit hate speech. This reason, however, depends crucially on rejecting two further real empirical possibilities: (i) that the prohibitions themselves will contribute to the racist nature of society and (ii) that adoption of hate speech prohibitions will make other, more effective interventions against the development of a racist, genocidal culture or polity less likely or less effective. Of course, the opposite empirical results are possible. Advocacy of and then adoption of hate speech prohibitions and pressure for their enforcement could invigorate an anti-racist politics that makes other, maybe even more significant interventions, more likely. This scenario is, however, at best questionable. And, if the first possibility turns out to be true, adoption of hate speech prohibitions could contribute to the evil outcomes that a country must try to prevent. That is, official legal suppression of 'evil' speech could generate the very evil that motivates suppression.

Given these alternative empirical possibilities, the debate is not between idealistic but uncaring 'liberal' defenders of free speech and fierce opponents of the worst forms of racism. Rather the pragmatic debate is about different empirical predictions concerning the most effective strategy for opposing racism. Empirical evidence of which scenario is most likely should be welcome. Maybe the evidence exists, thought I do not know of it at a level where confidence on a particular conclusion is warranted. Thus, Part III describes considerations supporting the empirical hypothesis that speech prohibition will actually exacerbate racist practice. Finally, if the issue remains in doubt, I will consider which direction merits our gamble.

Before engaging in that discussion, however, I will describe an example of when such an exacerbation hypothesis was invoked in a judicial decision. In the late 1940s and early 1950s, the United States prosecuted leaders of the Communist Party for what could be benignly characterized as advocating (teaching), or conspiracy to teach, the necessity and propriety of violent means to achieve a proletarian dictatorship (though without any relevant evidence, some Justices gave the speech at issue a more malignant characterization). When their convictions were affirmed by the Supreme Court in *Dennis v. United States*, Justice Douglas in dissent powerfully asserted:

> Communism on the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. *Free speech* has destroyed it as an effective political party.[24] (emphasis added).

Essentially Douglas' account claims 'exceptionalism' for the American response to communism. The claim is implicitly two-fold: that the American response was to rely on free speech and that this response was more effective than other responses tried elsewhere in the world. Unfortunately, specifics of Douglas historical account and causal claim are either doubtful or much too simplistic. Nevertheless, Douglas illustrates the logic of a view that favoring free speech provides a central aspect of the best response to a major evil to which objectionable speech is said to contribute. Crucially, nothing in Douglas's argument for allowing the expression of evil views counsels neutrality toward or even toleration of those objectionable revolutionary views. The same lack of toleration even more obviously applies to the expression of racial hatred. Nothing about legally allowing the speech – either in the *Dennis* case or in the hate speech context – suggests that the views expressed do not present a serious threat to the existence of an acceptable world. Rather, the *pragmatic* claim is that to allow people the option to express their dreadful views is less dangerous than to attempt to outlaw this expression.

III

Finally, consider reasons that hate speech prohibitions are likely to backfire. My hypothesis has two reciprocal prongs. First, as an empirical matter, my suspicion is that the prohibitions will not be effective at reducing the chances of horrendous results. That point has been discussed above. Second, also as an empirical matter, my suspicion is that prohibitions on hate speech will actually exacerbate problems, will increase the likelihood of horrendous results. I consider six interrelated points that suggest this hypothesis.

First, prohibitions on hate speech may divert energy from and dampen the sense of necessity of the more vital activity of responding expressively to and critiquing racist views.

[24] *Dennis v. United States* 341 US 494, 588 (1951)

Prohibitions, to the extent that they take overt expression of racism out of public discourse, create a danger about which John Stuart Mill warned. Without people having the experience of responding to and opposing expressions of misguided views, truth is in danger of becoming sterile dogma, ineffective for good because people will have lost the ability to justify and explain the truth when challenged.[25] This point – the need for any noxious doctrine that exists within a community to be publicly expressed and then persuasively rejected – was probably the underlying lessen offered by Justice Douglas' account of the discursive defeat of communism in the United States.

Here is a place to repeat the point that, even if human rights, including the right of everyone to express her views no matter how horrifying, require rejecting legal prohibitions of hate speech, this legal toleration does not imply neutrality or complacence toward the evil views. Neutrality or *social* toleration is the opposite of what society needs. In any free discussion – or in wide-open debate where speech may be 'vehement, caustic, and sometimes unpleasantly sharp' in its attacks[26]– conversational partners (or political opponents) should be committed to each being able to express her view. But the response of the other can be: 'no, your view is entirely unacceptable, it is wrong for the following reasons, and I will do everything within my (legal) power to prevent it from being realized.' Despite conservative objections, people *should seek political correctness*, like all forms of correctness. Of course, ideal responses to the people whom a person believes is offering evil counsels is a subject too extensive to take up here, but I should note that I am hardly recommending retributivist responses or denial of rights. Still, to the extent they are able, people should reject, not tolerate, evil counsels and evil endeavors. Specifically, people should condemn the racist expression and react accordingly to the people who purvey it.

As an empirical hypothesis, I suggest that more active (and thus more effective) opposition to racist views is likely to come from social practices of not tolerating racist expression than from laws making it illegal. People in positions of power or authority do and should lose their influence, and often even their position of authority, for public or exposed

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[25] J.S. Mill, *On Liberty*, chap. 2 (originally published 1859).
[26] *New York Times v. Sullivan* 376 U.S. 254, 270 (1964).

private racist expression. Society should be and apparently is prepared to maintain strong social norms rejecting racist viewpoints. I fear, however, that such social practices would be weakened by, and even replaced by laws prohibiting racist expression. Legal prosecutions focus on the wrong issues – legal requirements, legal line drawing, propriety of prosecution of this rather than other cases. In any minimally decent society that legally permits hate speech, such expression of hate reflexively creates, for those who object to racism, a platform to explain and justify their objections. This expressive activity may provide the greatest safeguard against racist cultures and polities. In contrast, repression creates a platform for racists to claim victim-hood and to appeal to the many who value liberty to oppose the suppression of their freedom, shearing off the energy of a significant group from the chorus that condemns the racist views.

Second is a closely related point. By causing racism to (largely) go underground, speech prohibitions are likely to obscure the extent of the problem and the location or the human or social carriers of the problem, thereby reducing both the perceived necessity and the likely effectiveness of opposition to racism. My experience has been that among those people who are likely targets of hate speech but who still favor free speech, the reason most often given for favoring speech is the advantage of 'knowing the enemy.' Knowledge of the existence, views, and, importantly, the identity of those with racist attitudes increases the capacity of those potentially subject to racist harms to protect themselves and to make meaningful rhetorical, strategic, political and legal responses.

Third, speech prohibitions can increase (or create) racist individuals' or groups' sense of oppression and, thereby, their rage and belief that they must act. There is an empirical issue of whether prohibitions on racist speech do more to prevent than to fan the development of racist attitudes. I only speculate here, but I suggest that the causes are deeper and the prohibitions may do little. If this suggestion is right, the primary immediate effect of the speech prohibition may be simply to suppress (or to attempt to suppress) people's expression of their racist views. The primary dynamic consequence of suppression is to outrage and alienate those suppressed. They reasonably experience the majority (that is, those who back the law) and the legal order as specifically denying their basic rights, their right to express their truthfully held views in the public sphere (or in whatever contexts the specific law applies) while everyone else has this freedom. For this reason, they may conclude, they can no longer accord allegiance to (or view

as legitimate) this legal order. That is, the prohibition is likely to increase the virulence of their views and their self-understanding of being treated unjustly by a legal order that they see as coddling those whom they despise. Under these conditions, those whose speech the prohibitions make illegal are likely to feel more increasingly justified in using any means – including violent or illegal means – to pursue their values. Essentially, this is the point of Thomas Emerson's fourth, often neglected reason to protect free speech.[27] Speech freedom, he argues, helps create a balance between stability and change, which reduces the likelihood that pent-up anger, when almost inevitably it *eventually* expresses itself, will be expressed with irrational violence. The prediction is that even if speech prohibitions decrease the short term level of expression of the forbidden views, they will increase the likelihood that those views will periodically be expressed by violent outbreaks.

Fourth, prohibiting the *expression* of any values – even the most offensive views such as expression that denies democratic values or calls for violent or illegal actions – in the context of discourses where verbal responses are possible – is likely to reduce the democratic cultural self-understanding that conflicts are to be dealt as a political rather than violent struggle. This self-understanding, as suggested earlier, helps decrease the likelihood (without eliminating the danger) that racism will be expressed in overt violence. This is basically Ralf Dahrendorf's vision that the idea of democracy is not to embody the naive goal to eliminate conflict but rather to move society's inevitable real conflicts from the plane of violence to the plane of politics.[28]

Fifth, a political program of enacting and enforcing hate speech prohibitions runs the danger of diverting political energy from arguably more meaningful political responses to the underlying causes of racism. Often the purveyors of racism have themselves experienced forms of social or material discrimination (or deprivation) – and sometimes they even list their depressed material condition as evidence justifying disparaging racist views. Changing these material conditions is crucial. Though full consideration of the causes of racism is far beyond the scope of this talk (and my understanding), social and material conditions, including those that generate feelings of economic and social marginalization, are likely contexts in which racial

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[27]T. I. Emerson, *The System of Freedom of Expression* 7 (New York: Random House, 1970); T. I. Emerson, *Toward a General Theory of the First Amendment* 11-15 (New York: Random House, 1967).

[28] R. Dahrendorf, *Class and Class Conflict in Industrial Society* (Stanford, Ca.: Stanford Univ. Press, 1959).

resentment flourishes. Changing these conditions, combined with creating contexts that can defuse racist attitudes, could make a significant difference to the likelihood of outbreaks of racial violence as well as to the commonality of attitudes of racial hate. Though the prospects of successful suppression of hate speech may not be good, may even exacerbate the problem, the possibility of reducing (though probably not eliminating) underlying causes may be real. Political energy should be devoted to this task.

Anti-censorship feminists made a similar point in debates about regulation of pornography. Although their substantive views about pornography varied greatly, the anti-censorship feminists were united both in the view that the existing social order operated to oppress women in many spheres and that a strategy of trying to suppress pornography was a misdirection of their political energy.[29] Similarly, the more meaningful political responses to racism include fighting racism within public discourse, referred to in the first point above, but also efforts to change social conditions that generate the alienation of groups among which racism flourishes. Equally important are policy endeavors aimed at integrating into the culture and economy typical targets of racist oppression. Creation and effective enforcement of laws prohibiting discrimination in employment and education, as well as affirmative recruitment or subsidy of typical targets of racism, could help change the material conditions that create racial oppression. The goal should be to change the material conditions that reflect, breed, and sustain racial hatred.

As an example of wrongly directed energies, I have observed corporate leaders showing their liberality by favoring suppression of hate speech (which, in any event, is not conducive to a good business climate). They thereby seem to be (I expect are) caring people who as individuals are opposed to racism. These same leaders, however, often oppose legal civil rights provisions that would force their firms to take responsibility for lack of minorities in their work force or discrimination against minorities on the job. It is hard to avoid the view that this politics favors the superficial, and for these businesses, the inexpensive remedy over real material responses to underlying social conditions that contribute to racism and racial subordination.[30]

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[29] C. Meyer, 'Sex, Sin, and Women's Liberation: Against Porn Suppression' (1994) 72 *Tex. L. Rev.* 1097; N. Strossen, 'A Feminist Critique of "the" Feminist Critique of Pornography' (1993) 79 *Va. L. Rev.* 1099.
[30] See a similar suggestion in James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* 155-56 (Boulder, CO: Westview Press, 1999).

Finally, a prohibition on even a narrowly formulated category of hate speech embodies a principle that will be hard to circumscribe. There are two problems here. First, these laws are likely to be abused by those in power, who will often be able to characterize the speech or politics of their opponents as amounting to hate speech or its equivalent. Consider possible characterizations: that labor agitators ferment class hatred and, potentially, class violence; lesbians ferment hatred of and violence against men; black nationalists make racist attacks on whites, Algerians insult the French, . . . Nadine Strossen has argued that the typical use of laws prohibiting hate speech or related offenses to honor, even if adopted to protect minority groups, are most used to defend dominant groups and punish minority group members or suppress their speech.[31] Minorities in Ethiopia were punished under hate speech laws for their criticisms of Ethiopia's dominant ethnic group.[32] That is, hate speech prohibitions have been continually used to punish activists among oppressed groups for the criticism of dominant groups.

The second problem involves the slippery-slope both in application of these categories and use of the justification. Any principle that allows restrictions on speech that preaches hate will be hard to contain. Suppression of other 'harmful' speech to deal with other nasty problems will seem similar. Few laws aiming to restrict speech cannot receive as a justification that the law responds to real harms. But most laws restricting speech see application only or primarily against marginal individuals and groups – the outsiders or dissenters who should be the primary beneficiaries of speech protection.[33] A real danger to free speech is that prohibitions on hate speech, justified because of the serious harm the expression can causes, are likely to justify other restrictions on the basis of arguments about other purported harms with the net effect of further subordinating the disempowered.

Even without any certainty that the prohibitions will have meaningfully beneficial effects, caution might at first seem to justify prohibitions of hate speech. If, however, the six points listed here are right, that is precisely the wrong conclusion. Instead, if these points are right, caution would accept the necessity of some real harms out of a realistic fear that prohibitions would overall be counter productive and lead to even worse results. Those six reasons were: (1) allowing and then combating hate speech discursively is the only real way to

[31] Nadine Strossen, 'Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?' (1996) 46 *Case Western Reserve L. Rev.* 449, 465-70.
[32] This observation was made at the Budapest conference, supra note *, by an activist focused on Africa.

keep alive the understanding of the evil of racial hatred; (2) forcing hate speech underground obscures the extent and location of the problem to which society must respond; (3) suppression of hate speech is likely to increase racists' sense of oppression and their willingness to express their views violently; (4) suppression is likely to reduce the societal self-understanding that democracy means not eliminating conflict through suppression – what Justice Jackson described as the unanimity of the graveyard [34] – but rather moving conflict from the plane of violence to the plane of politics; (5) legal prohibition and enforcement of laws against hate speech are likely to divert political energies away from more effective and meaningful responses, especially those directed at changing material conditions in which racism festers; (6) the principle justifying prohibitions and the specific laws prohibiting hate speech are likely to be abused, creating a slippery slope to results contrary to the needs of victims of racial hatred (including jailing the subjects of racial hatred for their verbal responses) and to the needs of other marginalized groups.

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Thus, my fear is the precedent of punishing racial hate speech, even punishing loosely defined genocidal speech, may itself contribute to tragedy. For example, as I understand the facts, the International Tribunal's conviction of Rwandan radio broadcasters for genocide based on their speech, speech which was integrated into the actual practice of murder much like that of the leader of a pack of gunmen who directs her subordinates as to whom to shoot, was proper and would have been proper under the relevant U.S. free speech doctrine relating to intentional creation of a clear and present danger of crime.[35] The First Amendment does not protect a person in using speech in an attempt to commit a crime.[36] The speaker who gives orders to her associated gunmen is properly treated as having participated in any murder they commit. However, conviction for genocide of the Rwandan newspaper publisher, Hassan Ngeze, who periodically published racist diatribes against his group's traditional oppressors, while purporting

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[33] Shiffrin (n.16 above).
[34] *West Virginia State Board of Education v. Barnette* 319 US 624, 641 (1943).

[35] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[36] H. Linde, '"Clear and Present Danger" Reexamined,' (1970) 22 Stanford L. Rev. 1163.

to speak in defense of a historically subordinated group, under circumstances where the traditionally subordinated group was apparently under armed attack by those oppressors, and who published his views substantially before the occurrence of the genocidal murders, sets a troubling precedent.[37]

As I see it, if cycles of oppression and societal violence are to be broken, a society desperately needs to create a culture of open expression where all views, especially the most extreme views, are openly expressed and debated. In contrast, legal prohibitions on racist speech – to the they would (often did) exist where 'needed' but given how much and against whom these laws most likely would be (or were) enforced – would not have prevented the occurrence of the genocide in Rwanda or elsewhere. But the mere existence of International Tribunal's precedent of jailing this publisher is likely to be used – I have been told informally, has been used – by those in power in African countries at a similar stage in the development of civil society and of democracy, to suppress expression of opposition groups. The precedent might even be used (or more accurately, 'abused') to justify punishment of 'disrespectful' or 'inaccurate' speech about those in power. The impact of this precedent on a nation, through its impact on press freedom, can be hugely significant. Any consequent lack of free press will contribute greatly to the likelihood of corruption in existing governments and to making any replacements of ruling elites much more likely to come only through violence. If my fears are right, the International Tribunal could have hardly given Africa a worse present.

My main pragmatic point, I suppose, is to doubt the validity of the hypothesis that a legal prohibition of (necessarily only some) racist speech, speech which admittedly occurs in contexts that produce genocidal results, would contribute to preventing such events. More specifically, the empirical suppositions justifying this opposition to hate speech regulation are: 1) Speech prohibitions will be ineffective. Contexts in which genocide practices occur are ones in which enforcement of hate speech prohibitions will not occur and the development of such contexts will not be effectively prevented by earlier attempts to legally suppress hate speech. Too many bigoted practices and expressions will fly below the radar screen of any speech prohibitions. (2)

[37]See Prosecutor v. Nahimana, Yagwiza, and Ngeze, No. ICTR-99-52-T (December 3, 1003), available at http://69.94.11.53/default.htm; C. Edwin Baker, 'Genocide, Press Freedom, and the Case of Hassan Ngeze' (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=480762

Regulation of hate speech may affirmatively contribute to the rise of racist genocidal cultures or polities. (3) A key though hardly the only element in the most effective strategy of preventing the rise of such a culture or polity is to provide for more robust protection of speech.

As a concluding comment, I want to indicate awareness of the fact that hate speech causes many real harms, many real injuries. Though I reject the conclusion, these injuries could plausibly justify suppression of hate speech even if suppression were not a wise way to respond the most dramatic evils of racism, For two reasons, this chapter does not address arguments for suppression of hate speech based on these other injuries. First, much of the commentary explaining America's exceptionalism, its (purportedly) greater protection of speech, especially of hate speech, involves Europe's twentieth century close-up experience with fascism and the holocaust. I wanted therefore in this chapter to rebut the suggestion that some countries have reasons to restrict hate speech different from the reasons operable in the United States. Thus, I needed to argue that this historical experience does not justify, whether or not it explains, a purportedly different European evaluation of free speech. In this regard, I might note that the single most defining element of the American experience, continually reflected in countless aspects of American law, especially in our policy failures, is the legacy of African-American slavery and the American civil war. Europe hardly has a monopoly on hate, on hate speech, or on racism.

Second, though the arguments that racist speech causes real harms is surely right, that point is hardly unique to racist speech. Real harms are caused by most speech that judges or legislatures consider as possible bases for legal liability or punishment.[38] Here is not the place to discuss the point but one or both of the reasons given here to protect speech – either normative views that protection is necessary to justify the legitimacy of the legal order or pragmatic arguments about bad consequences of accepting the propriety of regulation – justifies a speech protective stance despite the harms speech can and does cause. This is especially true given the inevitable errors of identifying what speech causes greater harms than benefits and given the inevitable chilling effect of speech regulation on valuable speech.

Justice Holmes argued that our theory of free speech 'is an experiment, as all life is an

[38]See C. Edwin Baker, 'Harm, Liberty, and Free Speech,' (1997) 70 S. Cal. L. Rev. 979, 979-82, 986-88.

experiment.' It is a 'wager … based on imperfect knowledge.'[39] Given lack of adequate evidence for any certainty about the guess whether suppression or freedom provides the best security, I think wisdom requires that choice favor liberty. Liberty is the choice if people are fundamentally good and worthy of respect – suppression is the choice if the opposite holds factually. We are worthy of intellectual attention and concern only if the former is true. For this reason, recognizing that the guess may turn out to wrong, I would rather have hazarded the guess that justifies a concern with the circumstances and future of humanity. Only then would being right in the guess matter. Moreover, I suspect, given that the answer is not writ in stone, that guess can be a self-fulfilling prophesy. If so, it is clear which prophesy should be favored.

[39]Abrams v. United States 250 US 616, 624 (1919) (dissenting opinion).