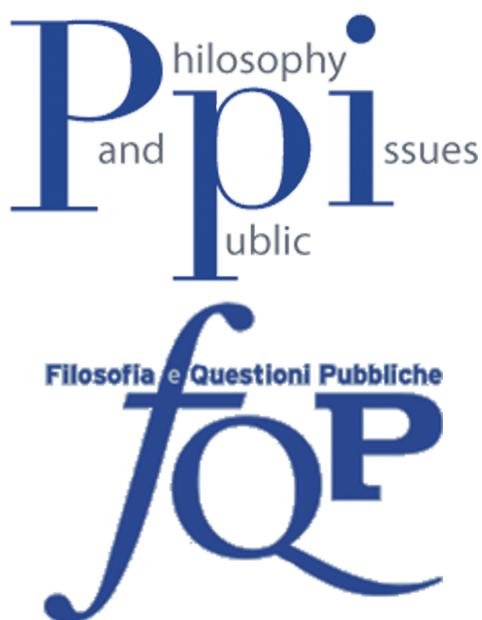


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HATE AND RACIST SPEECH IN THE UNITED
STATES
A CRITIQUE

BY
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Hate and Racist Speech in the United States A Critique

Raphael Cohen-Almagor

This article attempts to explain why the United States is exhibiting the most liberal stand on protecting freedom of expression. It is argued that the American credo is comprised of strong belief in liberty and individuality and of strong anti-government sentiment. The First Amendment is enshrined in its culture and tradition. The protection of political speech is fundamental to the American democracy. As United States Constitution strongly protects political speech, it confers protection also on hate speech that is included in the broad definition of political speech. It is emphasised that incitement is outlawed in the democratic world, including the USA, and that all forms of hate speech should be weighed carefully as they might result in hate crimes. The article further criticizes the American ‘viewpoint-neutrality’ concept and argues that a balance needs to be struck between competing social interests. Freedom of expression is important as is the protection of vulnerable minorities.

I

Introduction

In June 1990, several teenagers burned a cross on a black neighbour’s lawn. The teenagers were prosecuted and

subsequently convicted by a Minnesota court for violating a St. Paul, Minnesota Bias-Motivated Crime Ordinance (1990), which prohibits the display of a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”¹ The petitioners appealed to the American Supreme Court and obtained a reversal of the conviction, on the grounds that the ordinance was *prime facie* invalid under the First Amendment. The Supreme Court held that the government may not regulate speeches based on “hostility, or favoritism, towards a nonproscribable message they contain.”² The St. Paul, Minnesota Bias-Motivated Crime Ordinance targeted speech that would not amount to incitement to violence, and it was based on impermissible viewpoint discrimination. While the Ordinance criminalized expressions likely to incite violence on the basis of race or religion, it did not criminalize similar expressions equally likely to incite violence on other grounds, such as homosexuality. “The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavoured subjects.”³ Speech should not be silenced on the basis of its viewpoint.

It is hard to imagine that such a decision, with this reasoning, could be made in another Western democracy. Most democracies apply protective mechanisms and restrictions on racist hate speech, even when certain publications do no more than denying the Holocaust (which is protected speech in the USA).⁴

¹ *R.A.V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992).

² *Ibid.*

³ *Ibid.*

⁴ Holocaust denial is illegal in many countries including Austria, Belgium, the Czech Republic, France, Germany, Israel, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia and Switzerland. In 2008, the twenty-seven-member European Union adopted a resolution declaring that “Racism and xenophobia are direct violations of the principles of liberty,

The aim of this essay is to explain and criticize the American stance on racism and hate speech. It has been suggested that European countries are less tolerant of racism and hate speech because of their traumatic experience in overcoming Nazism, but this argument is insufficient to explain their restrictive line-drawing. Canada, Australia and New Zealand were not under the Nazi boot or threat, yet all three opted to adopt a policy that is more akin to the European than to the American. Like the United States, Canada, Australia and New Zealand are countries of immigration but unlike the United States their line-drawing weighs more heavily on the side of preserving the mosaic of multiculturalism and protecting vulnerable third-parties than on the side of freedom of expression. Most countries in the free world are not willing to pay the price that the United States is willing to pay for protecting freedom of expression.

The United States is exceptional in its belief that the harm of restricting hate speech is more weighty and dangerous than the harm of hate speech. According to the American liberal culture, freedom of speech is essential for democratic self-rule. Also important are the democratic processes, and putting constant checks on government against its potential attempts to restrict individual liberties. American liberals conflate different

democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States”. Consequently, the resolution calls upon member states to take the necessary measures to ensure that the following intentional conduct is punishable publicly condoning: “denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes ... directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group”. See Council Framework Decision 16771/07, Brussels, February 26, 2008, <http://register.consilium.europa.eu/pdf/en/07/st16/st16771.en07.pdf>

approaches to make the strongest possible protection of free expression. We indeed should be worried about government's tendency to abuse its powers. We have seen that this fear is founded.

I will make the following arguments:

- Hate speech is repugnant. We should not be neutral about it. Instead, we should take a strong stand against it. Hate speech creates a virulent atmosphere of “double victimization”: The speakers are under attack/misunderstood/marginalized/delegitimized by powerful forces (governments, conspiratorial organizations); the answer to their problem is the victimization of the target group. Their victimization is the speakers' salvation.
- Liberal democracies have an obligation to protect vulnerable minorities and to act against hate mongers.
- Often time, taking a stand need not resort to legal means. Education, public rebuke and condemnation should be invoked to counter bigotry and hateful expressions.
- At the same time, we need to acknowledge that counter-speech might be insufficient to fight bigotry. All forms of hate speech should be taken seriously and sometimes there is a need to resort to legal means against radical forms of hate speech that incite violence.
- The use of the criminal law should be confined to cases when there is likelihood that the hateful expressions will result in tangible harm to the target group.
- The United States is willing to pay a high price to protect hate speech. Its very liberal attitude is unique in the western world. The USA confers legal protection on speech that is vile in essence and that might lead to hate crimes.

Hate speech in its various forms should be taken seriously because it is harmful. It could potentially silence the members of target groups, might cause them to withdraw from community life, and interferes with their right to equal respect and treatment. Hateful remarks are potentially so hurtful and intimidating that they might reduce the target group members to speechlessness or shock them into silence. The notion of silencing and inequality suggests great injury, emotional upset, fear and insecurity that target group members might experience. Hate might undermine the individual's self-esteem and standing in the community.⁵ While the United States tolerates forms of hate short of incitement, other countries limit the scope of tolerance for bigots as they weigh freedom of speech against the harm it produces and assign more weight to protecting vulnerable minorities.

Hate is a social evil that offends the two most basic Kantian and Millian principles that underlie any democratic society: respecting others, and not harming others.⁶ Kant argues that each person has dignity and moral worth. People should be respected qua being persons and should never be exploited. Kant wrote: "Such beings are not merely subjective ends whose existence as a

⁵ See Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press 2000): 127; R. Moon, "The Regulation of Racist Expression," in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance: Essays in Honor and Memory of Yitzhak Rabin* (Ann Arbor: University of Michigan Press, 2000): 182-199; R. Cohen-Almagor, "Harm Principle, Offense Principle, and Hate Speech," in Cohen-Almagor, *Speech, Media, and Ethics* (Houndmills and New York: Palgrave-Macmillan 2005): 3-23.

⁶ Appleby's comment is most revealing. The former president of the American Historical Association writes that liberal democracy is about limiting the power of government in deference to individual liberties. Neither the Declaration of Independence nor the Preamble to the U.S. Constitution include the principles of respecting others, and not harming others, though one might infer them from the idea of "promoting the general welfare." Appleby is writing from an American perspective while I write from a European perspective.

result of our action has value for us, but are objective ends, i.e. things [Dinge] whose existence is an end in itself.”⁷ In turn, the Millian Harm Principle holds that something is eligible for restriction only if it causes harm to others. Mill wrote in *On Liberty*: “Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind.”⁸ Whether an act ought to be restricted remains to be calculated. Hence, in some situations, people are culpable not because of the act that they have performed, though this act might be morally wrong, but because of its circumstances and its consequences. While Kant spoke of unqualified, imperative moral duties, Mill’s philosophy is consequentialist in nature. Together the Kantian and Millian arguments make a forceful plea for moral, responsible conduct: Always perceive others as ends in themselves rather than means to something, and avoid harming others. As the American First Amendment scholar Ronald Dworkin suggests, the concept of dignity needs to be associated with the responsibilities each person must take for her own life. Dignity requires owning up to what one has done.⁹

⁷ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, <http://www.earlymoderntexts.com/assets/pdfs/kant1785.pdf>, p. 29. For further discussion, see Graham Bird (ed.), *A Companion to Kant* (Oxford: Blackwell, 2006).

⁸ John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* (London: J. M. Dent. Everyman’s edition, 1948), chapter 3 of *On Liberty*, or <http://www.bartleby.com/130/3.html>. For further discussion, see Piers Norris Turner, “‘Harm’ and Mill’s Harm Principle,” *Ethics*, Vol. 124 (2014): 299-326.

⁹ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011), chapter 8, esp. pp. 210-211. For further discussion, see Jeremy Waldron, “Is Dignity the Foundation of Human Rights?,” SSRN: <http://dx.doi.org/10.2139/ssrn.2196074>.

My aim is to promote and provoke debate, especially in the United States, about the culture in which every person can hate anybody and everybody, usually people who are very different from the one who spouts hatred. This free speech culture results in a culture full of hatred and bigotry. The American people who are paying a high price for this freedom should ask themselves whether this price is (a) affordable, (b) justified, and (c) whether the freedom to hate should not be confined in some more limited boundaries. Hate speech can and does lead to hate crimes. Hate is self- and other-destructive. If it is left to flourish, it might consume the hater as well as the targets of hatred.

II

American Culture

The most important values in the United States are liberty and individuality. Liberty is the bedrock of the American political culture. Influenced and inspired by the thought of classical liberals – Locke, Montesquieu and Rousseau – emphasis is put on negative liberty – on freedom from state restraints.¹⁰ The value of liberty is enshrined in the culture, education, political processes, legal system and state symbols. The 14th Amendment to the Constitution holds that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.”¹¹ The United States has a long tradition, stemming from its struggle for independence and freedom, fighting against the coercive British

¹⁰ Nigel Bowles and Robert K. McMahon, *Government and Politics of the United States* (London: Palgrave-Macmillan, 2014): 17.

¹¹ 14th Amendment, Section 1,
<http://www.law.cornell.edu/constitution/amendmentxiv>

Empire. The Declaration of Independence (1776) speaks of Life, Liberty and Pursuit of Happiness.¹² Life provides us with liberties, and liberties, in turn, enable the pursuit of happiness. These are the most important values in the American Constitution.

The American anthem speaks of “the land of the free”. Another national symbol is the Liberty Bell in Philadelphia. In the same city, President Roosevelt said upon accepting his renomination for the Presidency in 1936: “That very word freedom, in itself and of necessity, suggests freedom from some restraining power. In 1776 we sought freedom from the tyranny of political autocracy.”¹³ In the Civil War, Americans were divided over their understanding of liberty and who is entitled to enjoy it. Afterward, new visions were promoted about the scope of liberty, enlarged to include people who had formerly been excluded from a free society – African-Americans, American Indians, and immigrants. The twentieth century saw liberty tested by external (and some suspected also internal) enemies and contested at home, yet it brought the greatest outpouring of new visions, from Franklin Roosevelt’s “Four Freedoms” Speech to Martin Luther King’s “I Have a Dream” Speech. The education system, from young age to university, emphasises individual freedoms.¹⁴

Liberty is a necessary condition for individuals to exercise their capabilities independently. It is required in order to enable people to discover, from the open confrontation of the ideas that are

¹² The Declaration of Independence: A Transcription

http://www.archives.gov/exhibits/charters/declaration_transcript.html

¹³ Franklin D. Roosevelt, “Acceptance Speech for the Renomination for the Presidency,” (July 27, 1936),

<http://teachingamericanhistory.org/library/document/acceptance-speech-for-the-renomination-for-the-presidency/>

¹⁴ Eric Foner, *Give Me Liberty! - An American History* (NY: W. W. Norton & Company, 2011), Vols. 1 and 2; David Hackett Fischer, *Liberty and Freedom: A Visual History of America's Founding Ideas* (NY: Oxford University Press, 2004).

cherished in their society, their own stand, their beliefs, their future life plans, and their autonomy. The central idea of autonomy is of self-rule, or self-direction. Individuals are perceived as being more important than society and must retain their liberty in the face of attempts to limit it.¹⁵ Accordingly, the view is that individuals should be left to govern their own affairs without being overwhelmingly subject to external forces. Liberty thus means freedom from authoritarian and institutional powers.

The principle of limited government was central to the American Founding Fathers and this principle remains *en vogue* and most important today.¹⁶ The danger to liberty is power and here a delicate balance has to be drawn between vesting government with the power to rule, a precondition to furthering individual liberty and autonomy, and preventing officials from abusing that power. In the language of James Madison, “The Father of the American Constitution”, “it is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience.”¹⁷

When freedom of expression is concerned, the American founders did not believe in equilibrium between government authority and freedom. The balance, from the very beginning, was tilted to freedom of expression. In 1787, Thomas Jefferson, who later became the third American president, wrote: “The basis of our government being the opinion of the people, the first object

¹⁵ Nigel Bowles and Robert K. McMahon, *Government and Politics of the United States*: 17.

¹⁶ *Ibid*: 33.

¹⁷ James Madison’s Letter to Thomas Jefferson (October 17, 1788), <http://www.revolutionary-war-and-beyond.com/james-madison-letter-to-thomas-jefferson-october-17-1788.html>

shall be to keep that right; and were it left for me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to choose the latter.”¹⁸ Freedom of the press provides an indispensable check on government.

III

American Trust in Government

Trust refers to expectations of future behaviour and is based on beliefs about the trustee’s competence and sense of fiduciary responsibility. Mistrust results from the gap between expectations and perceived outcomes.¹⁹ The American public exhibits suspicion of government precisely because past governments have abused their powers. Experience has shown that different governments did not use their powers only in legitimate ways and that sometimes they were tempted to promote partisan interests and undermine their opposition. The first Sedition Act was enacted in 1798 (known as the Alien and Sedition Acts²⁰).

¹⁸ Jefferson’s letter to Edward Carrington, in Henry J. Abraham, *Freedom and the Court* (NY: Oxford University Press, 1982, 4th Edition): 160.

¹⁹ Bernard Barber, *The Logic and Limits of Trust* (New Brunswick, NJ: Rutgers University Press, 1983); Jack Citrin and Samantha Luks, “Political Trust Revisited: Déjà Vu All Over Again?”, in John R. Hibbing and Elizabeth Theiss-Morse (eds.), *What Is It About Government that Americans Dislike?* (Cambridge: Cambridge University Press, 2001): 9-27.

²⁰ The first law, the Naturalization Act, extended the time immigrants had to live in the United States to become citizens from five to 14 years. The Alien Enemies Act provided that once war had been declared, all male citizens of an enemy nation could be arrested, detained, and deported. The Alien Friends Act authorized the president to deport any non-citizen suspected of plotting against the government during either wartime or peacetime. The Sedition Act provisions seemed directly aimed at those who spoke out against the Federalists. See *The Alien and Sedition Acts: Defining American Freedom*,

President Adams declined to prosecute anyone with it but the very enactment of this law shows how fragile the notion of free speech was. First Amendment advocates objected to the Alien and Sedition Acts, arguing that the government was seeking more power than it can be justified, that treasonable activity was vaguely defined, was defined at the discretion of the president, and would be punished by heavy fines and imprisonment.²¹

During the 19th Century, the anti-Masonic movement, the nativist and anti-Catholic movement attracted the support of reputable statesmen who had only mild sympathy with its fundamental biases, but they used these movements to evoke fear and to condemn what was conveniently tagged as “un-American” or “anti-American”. They exploited those notions to advance their own power.²² In the name of liberty, they sought to undermine freedom of speech and religious freedom.

During the 20th Century, such abuses were manifested during the “red scares” periods in the early 1900s, 1917-1920 and during the 1950s-1960s. The 1918 *Sedition Act* and the 1940 *Smith Act* were particularly notorious. The Sedition Act prohibited to “willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the

Constitutional Rights Foundation, <http://www.crf-usa.org/america-responds-to-terrorism/the-alien-and-sedition-acts.html>

²¹ Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Belknap Press, 1992); “1798 Adams passes first of Alien and Sedition Acts”, *History*, <http://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts>

²² Richard Hofstadter, “The Paranoid Style in American Politics”, *Harper's* (November 1964): 77-86, <http://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/3/>

military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute”.²³ The Act further prohibited to “willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies”,²⁴ to “willfully display the flag of any foreign enemy”,²⁵ or to “willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of war”.²⁶ Furthermore, the Act criminalized to “willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated”, and to “support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein”.²⁷ The *Alien Registration Act* of 1940,²⁸ commonly referred to as the *Smith Act* after Representative Howard W. Smith of Virginia who drafted the anti-sedition section, was used for a number of political prosecutions against isolationists, pro-fascists, and communists in

²³ The Sedition Act of 1918, http://www.pbs.org/wnet/supremecourt/capitalism/sources_document1.htm

²⁴ The Sedition Act of 1918

²⁵ Ibid

²⁶ Ibid

²⁷ The Sedition Act of 1918. See also Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (NY: Norton, 2004).

²⁸ 54 *Statutes at Large* 670-671 (1940). The Act has been amended several times and can now be found at 18 *U.S. Code* § 2385 (2000).

the 1940s and 1950s, including one of the early leaders of the American Civil Liberties Union (ACLU).²⁹

Still the American trust in their government used to be ambivalent and not necessarily negative up until the mid-1950s.³⁰ As a result of the “Red Scare” from the Cold War between the United States and the Soviet Union, Senator Joseph McCarthy directed investigations towards Hollywood and the intellectual community. During the McCarthyism period (1947-1957) basic civil rights of out-of-favour individuals were harmed by the government.³¹ American historian Tom Bender noted in his comments on a draft of this article that after McCarthyism and perhaps because of McCarthyism political speech has become more and more extended with fuzzy boundaries. McCarthy’s “patriotic” activities eroded trust in government. In 1966, public

²⁹ Anthony D. Romero, “Internet Terror Recruitment and Tradecraft: How Can We Address an Evolving Tool While Protecting Free Speech?,” Statement before the Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment (Washington, May 26, 2010).

³⁰ Stephen Earl Bennett, “Were the Halcyon Days Really Golden? An Analysis of Americans’ Attitudes about the Political System, 1945-1965,” in John R. Hibbing and Elizabeth Theiss-Morse (eds.), *What is it About Government that Americans Dislike?:* 47-58; Russell Duncan and Joseph Goddard, *Contemporary America* (NY: Palgrave-Macmillan, 2013). In another book, *Congress as Public Enemy* (Cambridge: Cambridge University Press, 1999), Hibbing and Theiss-Morse make a general claim (p. 18), that Americans tend to dislike virtually all of the democratic processes. They dislike compromise and bargaining, they dislike committees and bureaucracy, they dislike political parties and interest groups, they dislike big salaries and big staffs, they dislike slowness and multiple stages, and they dislike debate and publicly hashing things out, referring to such actions as haggling or bickering.

³¹ Maldwyn A. Jones, *The Limits of Liberty* (Oxford: Oxford University Press, 1992): 517-542; Albert Fried, *McCarthyism, The Great American Red Scare* (NY: Oxford University Press, 1996); Ellen W. Schreker, *The Age of McCarthyism* (Bedford: St. Martin’s, 2001); David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (NY: Oxford University Press, 2005).

trust was restored, reaching a peak of 61% who voiced trust in government. But public trust in government has plummeted since then, to 45% in 1968, 38% in 1972, and continued to drop to 26% in 2008 (see Table 1 below). In eight years (1967-1974), the public became mistrustful of its government. There were attempts to stifle speech during the Vietnam War (1959-1973) and during the days of the Nixon Administration (1969-1974) that ended under the heavy cloud of the Watergate scandal, when Nixon became the only U.S. President ever to resign. These episodes certainly did not relax the growing suspicions towards government. During the 21st Century, the George W. Bush Administration (2001-2009) was criticized for undermining basic civic and human rights under the pretence of the “war on terror”. The war waged on Iraq for unclear motives further undermined American trust in their government. According to a recent Pew Research Report, only 19% of Americans say they are basically content with the federal government.³² In fact, polls have shown that only twice since 1970 the level of trust in government was higher than 40%: in 1986, and in 2002. During significant periods of time, the level of trust was lower than 35% (see Table 1, below).

A CNN poll is most revealing. It compared public trust in government in 1958 and 2011, showing that in 1958 16% of the

³² *Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably* (October 18, 2013), <http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably/>; see also Gallup, *Trust in Government*, <http://www.gallup.com/poll/5392/Trust-Government.aspx>; PewResearch, *Public Trust in Government: 1958-2013*, <http://www.people-press.org/2013/01/31/majority-says-the-federal-government-threatens-their-personal-rights/>. *How Americans View Government -Deconstructing Distrust* (March 10, 1998), <http://www.people-press.org/1998/03/10/how-americans-view-government/>

American public trusted its government “just about always”, compared to 2% in 2011; in 1958 57% trusted its government “most of the time”, compared to 13% in 2011; in 1958 23% trusted its government “only some of the time”, compared to 77% in 2011, and 8% never trusted their government in 2011, compared to 0% in 1958.³³

IV

The First Amendment

The First Amendment is enshrined in the American legal and political culture. It explicitly instructs: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³⁴ This is a sharp and uncompromising statement. Leading American scholars and judges have argued that “no law” means no law. One of the preeminent American justices of the Supreme Court, Hugo L. Black, asserted in a classic article his belief that the Constitution “with its absolute guarantees of individual rights, is the best hope for the aspirations of freedom which men share everywhere.”³⁵ Another iconic legal authority, Alexander Meiklejohn, asserted that the First Amendment declares that with respect to belief, political discussion, political advocacy, political planning, the citizens are the sovereign, and the Congress is their

³³ The American, *Trust in Government*, <http://www.american.com/archive/datapoint-entries/trust-in-government> (no longer available).

³⁴ <http://caselaw.lp.findlaw.com/data/constitution/amendment01/>

³⁵ Hugo L. Black, “The Bill of Rights,” *NY University Law Review*, Vol. 35 (1960): 879.

subordinate agent.³⁶ The First Amendment condemns with its absolute disapproval any suppression of ideas. Meiklejohn coined the saying that “to be afraid of any idea is to be unfit for self-government.”³⁷

According to this view, the public responsibilities of citizenship in the free world are in a vital sense beyond the reach of any legislative control. Consequently, freedom of expression in the American tradition occupies an especially protected position. Generally speaking, expression is perceived as doing less injury to other social goals than action. It has less immediate consequences, and is less irremediable in its impact.³⁸ Only when expression might immediately translate into harmful action, when one is able to prove a clear link between the harmful speech and the resulting harmful action, is it possible to consider restrictions on freedom of expression. This approach sets a very high threshold to satisfy. Only in clear and exceptional cases are there grounds to limit expression.³⁹ Only hate *crimes* are criminalized.

³⁶ Alexander Meiklejohn, *Political Freedom* (NY: Oxford University Press, 1965): 107.

³⁷ *Ibid.*, p. 124.

³⁸ Thomas I. Emerson, *The System of Freedom of Expression* (NY: Random House, 1970): 9, 292. See also Lillian R. BeVier, “The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle,” *Stanford L. Rev.*, Vol. 30, No. 2 (1978): 299-358; Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994), esp. chapter 5; Owen Fiss, “Freedom of Speech and Political Violence,” in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance* (Ann Arbor: University of Michigan Press, 2000): 70-78.

³⁹ Jeremy Waldron, “Dignity and Defamation: The Visibility of Hate,” *Harvard Law Review*, Vol. 123 (2010): 1596-1657; Steven J. Heyman, *Free Speech and Human Dignity* (New Haven: Yale University Press, 2008), esp. pp. 164-183; Frederick M. Lawrence, “The Hate Crime Project and its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement,”

Alexander Meiklejohn, who received the Medal of Freedom for his many contributions to the fostering of American liberties, argued that in a democracy, individuals are sovereign judges of whether their government properly pursues the public good and respects the rights of individuals.⁴⁰ He wrote that any suppression of ideas about the common good, “the First Amendment condemns with its absolute disapproval. The freedom of ideas shall not be abridged”.⁴¹ In order to confer the widest possible tolerance on the most problematic forms of expression, Meiklejohn lumps together different categories of speech as if they were one and the same when in essence they are not. He asserted: “When men govern themselves, it is they – and no one else - who must pass judgment upon un-wisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American”.⁴² The major concern of less tolerant liberals (the majority of whom are non-Americans) is not with the unwise, unfair and un-American (*contra* McCarthy) expressions but with the *dangerous* ones. By utilizing this lumping methodology, Meiklejohn aimed to recruit adherents to his very liberal views.

American liberals are suspicious of their government but they trust the people. American liberals trust the general population to make the correct decisions but not the small number of people who are elected to govern. They think that power tends to corrupt and therefore should be put under continual scrutiny. Meiklejohn believed that the US citizens are fit to govern

GWU Law School Public Law Research Paper, No. 216 (2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921923.

⁴⁰ Alexander Meiklejohn, *Political Freedom* (NY: Oxford University Press, 1965): 16-17.

⁴¹ Alexander Meiklejohn, *Political Freedom*: 28.

⁴² *Ibid.*, p. 27.

themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favour of those institutions as well as everything that can be said against them. People are capable to withstand any challenge. With their debating powers, they will offset any danger. There is no need for legal tests to restrict speech, not even for a very limited test such as the clear and present danger test.⁴³ Meiklejohn articulated forcefully his belief in the American people and in seemingly absolute freedom of expression: “The unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any clear and present – or, even, terrific – danger”.⁴⁴

It is *seemingly* absolute freedom of expression because even Meiklejohn had to acknowledge that some forms of expressions should be excluded from the protection of the First Amendment: “Libellous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must dealt with as such. Sedition and treason may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare.”⁴⁵

With the growing distrust in government, the courts expanded the boundaries of freedom of expression, of association and of demonstration. Two landmark decisions during the 1960s were *NY Times v. Sullivan* (1964)⁴⁶ and *Brandenburg v. Ohio* (1969).⁴⁷ In

⁴³ Alexander Meiklejohn, *Political Freedom*. 75-76.

⁴⁴ *Ibid*: 77.

⁴⁵ *Ibid*: 21.

⁴⁶ *NY Times v. Sullivan* 376 US 254 (1964). On the importance of the decision, see Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (NY: Random House, 1991). Another important precedent is *Garrison v. Louisiana* 379 U.S. 64 (1964) which reiterated *Sullivan* by saying that the Constitution limits state power to impose sanctions for criticism of the official

the *Sullivan* decision, the Supreme Court ruled that the First Amendment protects all statements concerning public officials unless made with malice. The *Brandenburg* decision established that only incitement, harmful speech that is directly linked to harmful acts, is not protected under the First Amendment.

The rise of the civil rights movement was also significant during that period of time. The civil rights legislation of the 1960s, including the *Civil Rights Act* that came into force in 1964, formed the basis for affirmative action programmes that promoted liberty and increased opportunities for vulnerable minorities, disabled people and women. In the *Pentagon*⁴⁸ and *Landmark Communication*⁴⁹ cases which concerned the publication of sensitive information, the US Supreme Court made it clear that it will not allow restraints upon, or subsequent punishment for, publications that publishers had lawfully acquired. By the late 1970s, the Supreme Court refused to provide a hearing for an appeal against the Illinois Supreme Court ruling that allowed Nazis to march in Skokie.⁵⁰ The argument for

conduct of public officials to false statements concerning official conduct made with knowledge of their falsity or with reckless disregard for the truth.

⁴⁷ *Brandenburg v. Ohio* 395 US 444 (1969). Other important precedents of the same period are *Tinker v. Des Moines* 393 U.S. 503 (1969) concerned with the constitutional rights of students in public schools, and *Street v. New York* 394 U.S. 576 (1969) in which the Supreme Court rejected the characterization of flag burning as an act of incitement, holding that Street's conviction for burning the flag furthered no government interest.

⁴⁸ *NY Times Co. v. United States* 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822, 1971 U.S (1971),

<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/decision.pdf>

⁴⁹ *Landmark Communications Inc. v. Virginia* 435 U.S. 829 (1978), <https://supreme.justia.com/cases/federal/us/435/829/case.html>

⁵⁰ *Smith v. Collin* 439 US 916 (1978); R. Cohen-Almagor, *Speech, Media, and Ethics: The Limits of Free Expression* (Houndmills and New York: Palgrave-

viewpoint-neutrality (discussed below) became accepted as a guiding standard.

Much of the First Amendment scholarship is based on the notion that all people have an equal right to express their views and to engage in open public debate.⁵¹ In *R.A.V. v. City of St. Paul*, the Supreme Court said that the government may not regulate speech based on hostility or favouritism towards the underlying message expressed.⁵² The government should not discriminate against certain expressions, thereby effectively driving them from the marketplace of ideas.⁵³ The Supreme Court has reiterated that “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

Macmillan, 2005): Chap. 1; Erik Bleich, “Freedom of Expression versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe,” *Journal of Ethnic and Migration Studies* (November 2013). For further discussion, see Aryeh Neier, *Defending My Enemy* (New York: E. P. Dutton, 1979). Tom Bender commented: “Aryeh Neier, who is an old friend who still suffers psychologically from his family’s escape from Nazi Germany, which included his being separated from his family as a 3 or 4 year old during the process, should consider the psychological costs of such events, but he held absolutely to an Enlightenment idea of freedom of expression. As the head of the American Civil Liberties Union he defended the marchers. He was and remains consistent in that regard.”

⁵¹ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2002); Robert C. Post, “Equality and Autonomy in First Amendment Jurisprudence,” *Michigan L. Rev.*, Vol. 95 (1997): 1517; K. L. Karst, “Equality as a Central Principle in the First Amendment,” *U. Chi. L. Rev.*, Vol. 43 (1975): 20.

⁵² *R.A.V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992).

⁵³ *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105 (1991); *Leathers v. Medlock*, 499 U. S. 439, 448 (1991); *FCC v. League of Women Voters of Cal.*, 468 U. S. 364, 383–384 (1984); *R. A. V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992).

disagreeable,⁵⁴ and that “Viewpoint discrimination is censorship in its purest form.”⁵⁵

V

Hate Speech

A Rasmussen poll conducted in 2008 asked whether it would be “a good idea for the United States to ban hate speech”. 53% of respondents said “No” while 28% of respondents said “Yes”. When asked “which is better, allowing free speech without government interference or letting government decide what types of hate speech should be banned” only 11% chose government intervention. 74% preferred unfettered free speech.⁵⁶ The Americans who are suspicious of their own government more than most other people in the democratic world⁵⁷ prefer to suffer hate speech than let their government serve as a censor.

Ronald Dworkin makes several arguments that may support the bigot’s right to freedom of expression and here I consider four of the main arguments. The first argument is the *argument for fairness*. Democracy is based on majority rule. But there is nothing inherently right in the majoritarian counting-heads principle. Majority decisions can be wrong and they can be unfair. We must provide opportunities for minorities to challenge majority decisions. It is fair to hear all opinions, especially those that wish

⁵⁴ *Texas v. Johnson*, 491 U. S. 397, 406 (1989), at 414.

⁵⁵ *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U. S. 37, 62 (1983).

⁵⁶ Abraham H. Foxman and Christopher Wolf, *Viral Hate* (NY: Palgrave-Macmillan, 2013): 78.

⁵⁷ Gary Silverman, “Europe’s public trust in government plunges”, *Financial Times* (January 20, 2014), <http://www.ft.com/cms/s/0/d5bd10da-812f-11e3-95aa-00144feab7de.html#axzz374ZE4d1p>

to affect society at large.⁵⁸ Being wrong, of course, is not the prerogative only of the majority. Minorities might be wrong as well. The argument for fairness is presented in general terms notwithstanding the *content* of the speech. But, of course, the content of the speech is very much material to society. If the content is patently discriminatory then by definition it is not fair and it is self-contradictory. It does not serve societal general interest in providing fair hearings to all opinions.

The second argument is the *argument for responsibility*. In *Law's Empire*, Dworkin argues that the community as a whole has obligations of impartiality towards its members, and that public officials act as agents for the community in exercising that responsibility. Democratic officials act in the name of the community of which we are all members, bearing a responsibility we all share.⁵⁹ In *Justice for Hedgehogs*, Dworkin emphasizes time and again the importance and moral value of social responsibility. Responsibility seeks coherence and integration.⁶⁰ Responsibility requires that we will be true to ourselves as well as to others. All this sounds very ideal. Dworkin speaks about the “ought” rather than the “is”. In reality, not all people act responsibly for the best interests of society. Dworkin does recognize the possibility of spoilers and briefly discusses ways not to be responsible.⁶¹ But astonishingly he remains committed to his ideal world.

Dworkin presents the claim that terrorist atrocities show the need for a new balance between liberty and security. Those who argue for this new balance say that we must curtail the individual rights we normally respect in the interest of greater protection

⁵⁸ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011): 385-388.

⁵⁹ Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1991): 175.

⁶⁰ Ronald Dworkin, *Justice for Hedgehogs*: 113.

⁶¹ *Ibid.*, pp. 104-107.

from the terrorist menace. But, Dworkin asks, does that opinion match our convictions about “the character and value of personal courage? Courage, we think, requires that we accept increased risks in order to respect principle”.⁶²

The *principle* that guides Dworkin is freedom of expression. It is not responsibility. Responsibility dictates taking the threat of terror most seriously and protecting our society, especially securing those who might be in a more precarious position. Courage, one may argue, is to recognize the need for drawing boundaries of liberty and tolerance. Being risky is neither courageous nor prudent. Courage should lead us to understand that the very principles of democracy might bring about its destruction.⁶³ These cherished principles of liberty and tolerance can be easily exploited and we have the responsibility to fight against abuse. We, as a society, have responsibility to take measures against the threat of terrorism. We, as a society, have responsibility to protect vulnerable minorities from the poisonous venom of the bigot. A balance needs to be struck between freedom of expression and social responsibility. Somehow Dworkin does not recognize that freedom of expression might clash with moral responsibility. He is not cognizant of the possibility that such a conflict might arise and *ipso facto* he fails to provide guidelines as to how we should resolve the dilemma.

The third argument is the *argument for political legitimacy*. Free speech is part of the price we pay for political legitimacy no matter how foul and vicious the hatemonger’s speech is. Dworkin writes: “It is as unfair to impose a collective decision on someone who has not been allowed to contribute to that moral environment, by expressing his political or social convictions or

⁶² *Ibid.*, p. 106.

⁶³ Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994).

tastes or prejudices informally, as on someone whose pamphlets against the decision were destroyed by the police.”⁶⁴

According to this view, the right of the speaker to utter opinions enjoys special status above and beyond the rights of the target group. It is unfair to enforce a collective decision on the hate monger; it is fair to impose degradation on the vulnerable minority. Furthermore, Dworkin fails to see that by permitting wide scope for the bigot to openly utter the degrading speech, a gate is opened to undermine trust in the working of democracy that allows that kind of attack. Dworkin wishes to achieve legitimacy but by affording wide scope for hateful speech he might hinder the legitimacy of the whole political system. We spoil the democratic justification, one may argue, more by insisting on protecting hate speech. As Dworkin has only ideas but no substantive scientific evidence to support the argument about the relationships between tolerance and political legitimacy one way or another, it can be argued that the democratic legitimacy might be hindered equally or worse by permitting hate speech. Moreover, Dworkin’s legitimacy argument helps conferring legitimacy on hate mongers and it undermines minority’s status in society.

Ronald Dworkin argues that hate speech is the price we pay for enforcing anti-discrimination laws. We can legitimise such laws by allowing free debate that includes hate speech.⁶⁵ The state is legitimate if it acknowledges the responsibility and right of

⁶⁴ Ronald Dworkin, “Foreword,” in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009): viii.

⁶⁵ Ronald Dworkin, “Foreword,” in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy*: v-ix. See also Dworkin, “A New Map of Censorship,” *Index on Censorship*, Vol. 35 (2006): 130; Padraig Reidy, “Ronald Dworkin: a new map of censorship“, *Xindex* (February 14, 2013), <http://www.indexoncensorship.org/2013/02/ronal-dworkin-free-speech-censorship/>

citizens to make their own decisions about the ethical values that will shape their lives, and it judges the fates of all citizens as equally important. All people should have an opportunity to affect the decision-making process.⁶⁶ Dworkin does not speak about the scope of the “price”. It seems that he is willing to risk any price in order to protect principle – freedom of expression.

The fourth argument is the *argument for self-government*. Dworkin explains that free speech must be part of any defensible self-government because self-government requires free access to information and, equally of importance, government is not legitimate unless “*all* those coerced have had an opportunity to influence collective decisions” (my emphasis).⁶⁷ Dworkin elucidates that government does not compromise its citizens’ dignity when it forbids them to kill one another. A collective decision to impose a duty not to kill and to threaten a serious sanction for any violation is not in itself an insult to the dignity of the person. On the contrary, preserving dignity requires that government protects you.⁶⁸ Now, why speech that harms the dignity of the person, that undermines peoples’ equal status in society, that degrades them and that could potentially lead to hate crime should be protected? Are the statements “A Good Muslim Is A Dead Muslim” and “Jews should be gassed” merely an expression of (political) opinion that are shielded by the Free Speech Principle? In themselves, those statements are harmful and they might lead to killing.

⁶⁶ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap, 2011): 321-323, 372-373.

⁶⁷ Ibid: 372.

⁶⁸ Ibid: 367. For further discussion, see Susanne Sreedhar and Candice Delmas, “State Legitimacy and Political Obligation in Justice for Hedgehogs: The Radical Potential of Dworkinian Dignity”, *Boston University L. Rev.*, Vol. 90 (2010): 737-758.

The line-drawing of what constitutes intolerable hate is not always simple. On the one hand, statements that assert “Jews are money hungry,” “gays are immoral,” “Blacks go back to Africa,” “Arabs are dirty”, “A Woman’s place is in the Kitchen!”, “Thai women are whores”, “Israel is an apartheid state”⁶⁹ and calls to boycott Israel⁷⁰ are all unpleasant yet I think speech that should be tolerated. It is noted that some of these statements might be actionable hate speech in some countries. The problem is that there is no single definition of hate speech and hate speech legislation varies from one country to another.⁷¹ On the other hand, calls that provoke violence against target groups fall under the definition of *incitement*; here the context is of harmful speech that is *directly linked* to harmful action. However, hate speech is fuzzier than incitement and concretely more damaging than advocacy which is speech designed to promote ideas.

In other words, it is argued that all forms of hate speech should be taken seriously. Generally speaking, two forms of hate speech are distinguished: those that should be countered with positive speech, and those that are closely linked to hate crime and thus can be characterised as incitement. The first form of hate speech is disturbing yet tolerable. When speaking of hate speech I refer to malicious speech that is aimed to victimize and dehumanize its target, often (but not always) vulnerable

⁶⁹ Steve Newman commented that there are Canadian critics of hate speech who see the utterance “Israel is an apartheid state” as code for blatantly anti-Semitic opinions. To these critics, like the former Canadian Minister of Justice Irving Cotler, anti-Zionism is the new antisemitism. The critics believe that people who go around complaining that Israel is an apartheid state are really trying to incite hatred of Jews. Although this might be true, I do not think that such utterances should be banned. I will explain below.

⁷⁰ BDS Movement, <http://bdsmovement.net/>

⁷¹ Erik Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (NY: Oxford University Press, 2011).

minorities. However, hate speech designed to bring about hate crime is beyond the scope of tolerance. *Incitement* should not be tolerated. It is not tolerated also in the United States. I have mentioned the *Brandenburg* decision that established the principle that racist hateful speech is protected as long as it does not produce imminent lawless action.⁷²

Hate speech should be taken seriously because, generally speaking, hate is derived from one form or another of racism, and modern racism has facilitated and caused untold suffering. It is an evil that has acquired catastrophic proportions in all parts of the world. Notorious examples include Europe under Nazism, and since then Yugoslavia, Cambodia, South Africa and Rwanda. Elsewhere I argued that in hate messages, members of the targeted group are characterized as devoid of any redeeming qualities and are innately evil. Banishment, segregation and eradication of the targeted group are proposed to save others from the harm being done by this group. By using highly inflammatory and derogatory language, expressing extreme hatred and contempt, and through comparisons to and associations with

⁷² *Brandenburg* has been cited time and again by American courts. See, for instance, *Hutchin v. State of Florida* 290 So.2d 35 (1974); *Communist Party of Indiana v. Whitcomb* 414 US 441, 94 S. Ct. 656 (1974); *Miller v. State of Delaware* 374 A.2d 271 (1977); *Collin v. Smith* 447 F.Supp. 676 (1978); *Blitz v. Donovan* 740 F.2d 1241, 239 US App. DC 138 (1984); *Herveg et al v. Hustler Magazine* 814 F.2d 1017 (1987); *R.A.V. v. City of St. Paul, Minnesota*, 505 U. S. 377 (1992); *Gay Lesbian Bisexual Alliance v Sessions* 917 F.Supp. 1548 (1996); *Gay Lesbian Bisexual Alliance v Pryor* 110 F.3d 1543 (1997); *Rice v. Paladin Enterprises Inc.*, No. 96-2412, 128 F.3d 233 (November 10, 1997); *Planned Parenthood of the Columbia/Willamette Inc. et al v. American Coalition of Life Activists*, U.S Court of Appeals for the Nine Circuit (May 21, 2002). For further discussion, see Steven J. Heyman (ed.), *Controversies in Constitutional Law: Hate Speech and the Constitution* (New York and London: Garland Publishing Inc., 1996).

animals, vermin, excrement and other noxious substances, hate messages dehumanize the targeted groups.⁷³

Indeed, hate messages undermine the dignity and self-worth of the targeted group members and they erode the tolerance and open-mindedness that should flourish in democratic societies committed to the ideas of pluralism, justice and equality. Hate speech might lead to mental and emotional distress, racial discrimination and political disenfranchisement.⁷⁴ Furthermore, hate speech might lead to hate *crimes*. I reiterate: Hate speech that calls for violent action is akin to incitement and should not be tolerated.

Jeremy Waldron notes that Britain has laws that prohibit racial and religious hatred (Public Order Act 1986) and racial discrimination (Race Relations Act 1976). Are these laws illegitimate? Was their enactment inappropriate and their enforcement morally wrong? Furthermore, almost all democracies have hate speech laws which Dworkin thinks undermine anti-discrimination laws. Are they all wrong and only the United States, which protects hate speech, right?⁷⁵

The differences between the United States and the European continent become abundantly clear when we read Meiklejohn's critique of General Dwight D. Eisenhower. On December 16,

⁷³ Raphael Cohen-Almagor, "In Internet's Way", in Mark Fackler and Robert S. Fortner (eds.), *Ethics and Evil in the Public Sphere: Media, Universal Values & Global Development* (Cresskill, NJ: Hampton Press, 2010).

⁷⁴ Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberly W. Crenshaw (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Co.: Westview Press, 1993): 89-93; Ishani Maitra and Mary Kate McGowan, "On Racist Hate Speech and the Scope of Free Speech Principle," *Canadian Journal of Law and Jurisprudence*, Vol. XXIII, No. 2 (July 2010): 364.

⁷⁵ Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012): 185.

1944, Meiklejohn wrote, Eisenhower issued a proclamation prescribing plans for education in Germany during military occupation. This proclamation, Meiklejohn asserted, would be “utterly intolerable” in the USA.⁷⁶ He criticized Eisenhower in strong words, saying that the nation that had fought for freedom denied freedom of speech to the German teachers. Consequently, German teachers, “unlike Socrates, unlike the teachers of our American schools and colleges, have no political right to teach what they believe true”.⁷⁷

This sounds quite horrible. But what was Eisenhower’s proclamation that made Meiklejohn so upset? It read as follows:

“German teachers will be instructed to eliminate from their teaching anything which: (A) Glorifies militarism, expounds the practice of war or of mobilization and preparation for war, whether in the scientific, economic, or industrial fields, or the study of military geography; (B) Seeks to propagate, revive, or justify the doctrines of Nazism or to extol the achievements of Nazi leaders; (C) Favors a policy of discrimination on grounds of race or religion; (D) Is hostile to or seeks to disturb the relations between any of the United Nations”.⁷⁸

For many non-American liberals, these dictates may seem quite reasonable. But not for Meiklejohn. His liberalism is detached from the horrific European reality of 1944 in which more than 60 million people lost their lives. But it is not only the remoteness from the bloody European scene that shaped Meiklejohn’s reasoning. It is his deep-seated belief in human reason to make the right choices, although just eleven years prior the people of Germany elected the dictator that brought on

⁷⁶ Alexander Meiklejohn, *Political Freedom*: 85.

⁷⁷ *Ibid: Ibid.*

⁷⁸ *Ibid: Ibid.*

Europe the unprecedented destruction and death of WWII. Meiklejohn is prepared to take his chances and allow German children to continue learning Nazism, racism, militarism, bigotry and hatred of other nations. Many Europeans may find this quite extraordinary. Meiklejohn's reasoning would seem odd to many non-American ears. Meiklejohn was probably unaware just how alien his reasoning was from the reasoning espoused by other people so soon after WWII. And if he was aware, it was immaterial for him. Meiklejohn held unshaken belief in the virtue of liberty. Without this liberty, the American spirit would be lost. It did not occur to Meiklejohn that with this absolute, limitless liberty, democracy, liberty and fundamental human rights might be lost. Democracy, liberty and fundamental human rights were lost in Nazi Germany and in the many countries that the short-lived Nazi Empire had conquered.

VI

Viewpoint Neutrality

Some restrictions on speech are content-neutral, meaning that the content of the expression is irrelevant to whether the speech is restricted. Think of trains' quiet cars. The prohibition applies to all kinds of speech irrespective of whether the expression is trivial or ideological, pleasant or offensive. The restriction applies notwithstanding the content of the speech or conversation.

Some restrictions on speech are based on the viewpoint of the speaker. The government may decide to impose restrictions on specific points of view. Sometimes, the government may take initiative to protect one side of a given debate and ban the side to which it objects. Examples are expressions designed to promote Fascism and Nazism. The government may take active steps

against those who promote such ideas because it deems them not only offensive but also dangerous.

Some restrictions on speech are viewpoint-neutral but content-based. For instance, the government may proscribe all political polls during the last 24 hours prior elections notwithstanding the potential results of the poll. The speakers have certain viewpoints which would have been manifested in the poll, but the government applies a restriction across the board and denies utterance irrespective of the viewpoints.

Viewpoint-based restrictions are a subset of the category of content-based restrictions. American First Amendment scholar Cass Sunstein explains that all viewpoint-based restrictions are, by definition, content-based. The government cannot silence one side in a debate without making content crucial. But not all content-based restrictions are viewpoint-based. Content-based restriction need not make the restriction depend on the speaker's view.⁷⁹

In the United States, there is a very strong presumption against viewpoint-based restrictions. All such restrictions are perceived as *prime facie* unconstitutional. American egalitarianism accentuates the concept of neutrality. Methodologically, the idea of neutrality is placed within the broader concept of *anti-perfectionism*. The implementation and promotion of conceptions of what people may perceive as good ways of life, though worthy in themselves, are not regarded as a legitimate matter for governmental action. The fear of exploitation, of some form of discrimination, leads to the advocacy of unrestrained variety and pluralism.

Consequently, the government should not act in a way that might favour some ideas over others. Any attempt to discriminate

⁷⁹ Cass R. Sunstein, *Democracy and the Problem of Free Speech* (NY: Simon and Schuster, 1995): 12.

views would undermine democratic credentials, even if that speech might itself undermine democracy. All people have their own interest in acting according to their own beliefs; everyone should enjoy the possibility of having alternative considerations; there is *no single* belief about moral issues and values that should guide us all and, therefore, each has to enjoy autonomy and to hold their ideals freely.

The government is required to make sure that its actions do not help acceptable ideals more than unacceptable ones; to see that its actions will not hinder the cause of ideals deemed false more than they do that of ideals deemed true. The government is forbidden to act for partisan reasons. The fact that some conceptions of the good are true or valid should never serve as justification for any action. Neither should the fact that a conception of the good is false, invalid, unreasonable or unsound be accepted as a reason for a political or other action. The doctrine prescribes that government refrain from using one's conception of the good as a reason for state action. The government should not hold partisan (or non-partisan) considerations about human perfection to foster social conditions.⁸⁰

In their striving to convince us of the necessity of the doctrine, advocates of neutrality are conveying the assumption that the decision regarding the proper policy is crucial because of its grave consequences. Neutrality entails pluralism, diversity, freedom, public consensus, non-interference, vitality etc. If we do not adhere to viewpoint-neutrality, then we might be left with none of these virtues. This picture leads to the rejection of subjectivity (or perfectionism), while I suggest a rival view that observes conduct of policies on a continuous scale between strict

⁸⁰ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986): 110-111.

perfectionism, on the one hand, and complete neutrality on the other. The policy to be adopted does not have to be either the one, or the other. It could well take the *Aristotelian Golden Mean*, allowing plurality and diversity without resorting to complete neutrality; involving some form of perfectionism without resorting to coercion. For perfectionism does not necessarily imply abuse of power or uniformity of ideas, as neutralists fear.

My mid-ground position is influenced, even dictated, by the above-mentioned Kantian and Millian principles. Any liberal society is based on the idea of respect for others, in the sense of treating citizens as equals, and on the idea of not harming others. Accordingly, restrictions on liberty may be prescribed when threats of immediate violence are voiced against some individuals or groups. Thus I submit that liberal government should adhere to the basic principles that underline liberal democracy rather than to neutrality. It is within state interest to adhere to the basic ideas of respect for others and not harming others and to apply judgement in promoting them in their free speech policies. Viewpoint-neutrality on important social issues that concern the safeguarding of democracy might be very risky. At the heart of ethics are two questions: What should I do? And what sort of person should I be?⁸¹ We humans are capable of discerning between good and evil. Ethics requires us to care about the consequences of our actions and to take responsibility for them.

Liberal thinkers see the aim of a just governmental system as furthering liberty and egalitarian values.⁸² They differ over the

⁸¹ Russ Shafer-Landau (ed.), *Ethical Theory* (Oxford: Wiley-Blackwell, 2013): xi.

⁸² John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971); Ronald M. Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1985); Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven and London: Yale University Press, 1980); Charles Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987).

permissible ways by which the common good may be promoted. In “The Priority of Right,” Rawls writes that even if political liberalism can be seen as neutral in procedure and in aim, *it may still affirm the superiority of some forms of moral character and encourage some moral virtues*.⁸³ Dworkin sees neutrality as derived from every person’s right to equal concern and respect and insists on moral neutrality *to the degree that equality requires it*.⁸⁴

Brettschneider suggests that viewpoint neutrality be complemented by the state’s use of democratic persuasion in defense of free and equal citizenship, accentuating the need to promote democratic values and criticize hateful viewpoints.⁸⁵ I argue that hate speech legislation is warranted to address unequivocal harmful speech that is likely to lead to harmful action. As the American Political Scientist Stephen Newman notes, there is a strong prudential justification for suppressing hateful utterances when there are good reasons to anticipate that the possible harms associated with such utterances are likely to be realized. If the anticipated harms are remote, it is better to deal with hateful expression through education, critical counter-speech and rebuke. While much of the time we can deal with the evil of hate speech via conventional means outside the criminal law, sometimes we do need to rely on the coercive power of the

⁸³ John Rawls, “The Priority of Right and Ideas of the Good,” *Philosophy & Public Affairs*, Vol. 17:4 (1987): 263. For further discussion, see Alan Patten, “Liberal Neutrality: A Reinterpretation and Defense,” *Journal of Political Philosophy*, Vol. 20, No. 3 (2012): 249–272.

⁸⁴ As a result, Dworkin also argues that governments must provide a form of material equality for everyone. They should ensure citizens an initially equal distribution and should assist them to increase their welfare. See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*; *idem*, *Taking Rights Seriously* (London: Duckworth, 1977).

⁸⁵ Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton, NJ.: Princeton University Press, 2012): 75.

criminal law.⁸⁶ Such laws have indeed been adopted in many democracies across the world.⁸⁷

VII

From Hate Speech to Hate Crimes

Those who oppose hate speech regulation argue that it is better to allow hatemongers and racists to release their pent-up emotions, in the form of speech, rather than through violent action. If they give vent to their feelings this way, their targets will be much safer. Further arguments are that regulation of hate speech is ineffective, futile, makes martyrs out of haters and might lead to abuse and the suppression of other forms of

⁸⁶ Stephen L. Newman, “American and Canadian Perspectives on Hate Speech and the Limits of Free Expression,” in S.L. Newman (ed.), *Constitutional Politics in Canada and the United States* (Albany, NY: State University of New York Press, 2004): 153-173, and Stephen L. Newman, “What Not To Do About Hate Speech,” Ronald Beiner & Wayne Norman (eds.), *Canadian Political Philosophy* (Oxford: Oxford University Press, 2001): 207-215. See also R. Cohen-Almagor, “Ethical Considerations in Media Coverage of Hate Speech in Canada”, *Review of Constitutional Studies*, Vol. 6, No. 1 (2001): 79-100, and R. Cohen-Almagor, “Is Law Appropriate to Regulate Hateful and Racist Speech: The Israeli Experience”, *The Israel Studies Review*, Vol. 27, Issue 2 (Winter 2012): 41–64.

⁸⁷ Erik Bleich, *The Freedom to Be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (NY: Oxford University Press, 2011); Michael Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,” in Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012): 241–289; Eric Barendt, *Freedom of Speech* (New York: Oxford University Press, 2007); James Whitman, “Enforcing Civility and Respect: Three Societies,” *Yale Law Journal*, Vol. 109, No. 6 (2000): 1279-1398; Wojciech Sadurski, *Freedom of Speech and Its Limits* (Dordrecht: Kluwer, 1999).

speech.⁸⁸ Those who are making these arguments ignore the direct links between hate speech and hate crimes. The foremost arena to spout hatred nowadays is the Internet. Empowered by technology, bigots can easily interact with like-minded people and spread their hatred freely and easily against their target groups.⁸⁹ Chan *et al* found that online access is increasing the incidence of racial hate crimes executed by lone wolf perpetrators and that positive relationship between Internet penetration and offline racial hate crime is most evident in areas with higher levels of racism, as indicated by higher levels of segregation and higher propensity to search for racially charged words.⁹⁰

In 1999, 21-year-old Benjamin Nathaniel Smith, an avowed Aryan supremacist, went on a racially-motivated shooting spree in Illinois and Indiana over the July 4th weekend. Targeting Jews, African Americans, and Asian-Americans, Smith killed two and wounded eight before taking his own life, just as law enforcement officers prepared to apprehend him.⁹¹ Smith embarked on his killing spree after being exposed to Internet racial propaganda.

⁸⁸ Nat Henthoff, *Free Speech for Me – But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (New York: Harper Collins, 1992): 134; exchanges with Internet expert Mr. Tony Rutkowski (2008); interviews with media and technology expert Mr. Adam Thierer (January 15, 2008), Mr John Morris, Center for Democracy & Technology (February 7, 2008), Ms. Leslie Harris, President/CEO, Center for Democracy & Technology (March 14, 2008); Rep. Rick Boucher (April 16, 2008).

⁸⁹ R. Cohen-Almagor, “Fighting Hate and Bigotry on the Internet”, *Policy and Internet*, Vol. 3: Iss. 3, Article 6 (2011) and R. Cohen-Almagor, “Countering Hate on the Internet”, *Annual Review of Law and Ethics*, Vol. 22 (2014): 431-443.

⁹⁰ Jason Chan, Anindya Ghose and Robert Seamans, “The Internet and Racial Hate Crime: Offline Spillovers from Online Access”, *NET Institute Working Paper No. 13-02* (July 15, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335637

⁹¹ Anti-Defamation League, *Hate on the Internet* (Washington DC.: ADL, December 2003): 22.

He regularly visited the World Church of the Creator (WCOTC) website, a notorious racist and hateful organisation founded in Florida in the early 1970s.⁹² Smith was so consumed by the hate rhetoric of WCOTC that he was willing to murder and to take his own life in pursuit of his debased hate devotion. Smith said: “It wasn’t really ‘til I got on the Internet, read some literature of these groups that... it really all came together”. He maintained: “It’s a slow, gradual process to become racially conscious”.⁹³

The same year there were several other hate-motivated murders. Buford Furrow used to visit hate sites, including Stormfront.org and a macabre site called Gore Gallery, on which explicit photos of brutal murders were posted. Whether inspirational or instructional, the Internet supplied information that clearly helped fuel the explosion of a ticking human time bomb.⁹⁴ Furrow decided to move to action. He drove to the North Valley Jewish Community Center and shot an elderly receptionist and a teenage girl who cared for the young students attending the summer day school. He continued shooting, hitting

⁹² For information on ‘World Church of the Creator’, see <http://www.nizkor.org/hweb/orgs/american/adl/cotc/>; <http://www.wcotc.com/>; http://www.adl.org/poisoning_web/wcotc.asp; <http://www.apologeticsindex.org/c171.html>; Prepared Statement of Howard Berkowitz, Hate Crime on the Internet, Hearing before the Committee on the Judiciary, United States Senate (Washington, 14 September 1999); Teal Greyhavens, “Creating Identity: The Fragmentation of White Racist Movements in America”, *The Spark* (Fall 2007), http://www.whitman.edu/spark/rel355fa07_Greyhavens.html

⁹³ Christopher Wolf, ‘Regulating Hate Speech Qua Speech Is Not the Solution to the Epidemic of Hate on the Internet’, OSCE Meeting on the Relationship Between Racist, Xenophobic and Anti-Semitic Propaganda on the Internet and Hate Crimes (Paris, 16-17 June 2004). Discussion with Wolf, Washington DC (October 19, 2007).

⁹⁴ Brian Levin, “Cyberhate”, *American Behavioral Scientist*, Vol. 45, No. 6 (2002): 959.

three children, one as young as 5 years old, before leaving the facility. Shortly thereafter Furrow fatally shot a Filipino American postal delivery worker because he worked for the federal government and was not White.

Matthew Williams, a solitary student at the University of Idaho, turned to the Internet in search of a new spiritual path. Described as a “born fanatic” by acquaintances, Williams reportedly embraced a number of the radical-right philosophies he encountered online, from the anti-government views of militias to the racist and anti-Semitic beliefs of the Identity movement. He regularly downloaded pages from extremist sites and continually used printouts of these pages to convince his friends to also adopt these beliefs. At age 31, Matthew Williams and his 29-year-old brother, Tyler, were charged with murdering a gay couple, Gary Matson and Winfield Mowder, and with involvement in setting fire to three Sacramento-area synagogues. The police discovered boxes of hate literature at the home of the brothers.⁹⁵ Rabbi Abraham Cooper of the Wiesenthal Center argued that the Internet provided the theological justification for torching synagogues in Sacramento and the pseudo-intellectual basis for violent hate attacks in Illinois and Indiana.⁹⁶

On June 10, 2009, James von Brunn entered the U.S. Holocaust Memorial Museum in Washington DC and opened fire, killing Security Guard Stephen Tyrone Johns before he was stopped by other security guards. Von Brunn, a die-hard white

⁹⁵ Anti-Defamation League, *Hate on the Internet* (Washington DC.: ADL, December 2003): 22.

⁹⁶ Statement of Abraham Cooper, *Hate Crime on the Internet*, Hearing before the Committee on the Judiciary, United States Senate (Washington, 14 September 1999). Discussion with Cooper, Jerusalem (December 17, 2009). For further discussion, see R. Cohen-Almagor, *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway* (NY and Washington DC.: Cambridge University Press and Woodrow Wilson Center Press, 2015).

supremacist anti-Semite, was an active neo-Nazi for decades long before the Internet became a viable public platform during the early 1990s. He utilised the Internet to publish his tracts and to spew hatred. Von Brunn ran a hate website called holywesternempire.org and had a long history of associations with prominent neo-Nazis and Holocaust deniers. For a period of time, he was employed by Noontide Press, a part of the Holocaust denying Institute of Historical Review, which was then run by Willis Carto, one of America's most prominent anti-Semites.⁹⁷

In his self-published book, *Kill the Best Gentiles*, von Brunn railed against a Jewish conspiracy to destroy the white gene pool, offering a plan to remove “the cancer from our Cultural Organism”.⁹⁸ A raging anti-Semite, von Brunn blames “The Jews” for the destruction of the West. I don't intend to quote in length from this hateful long tract. Suffice is to say that Jews, according to von Brunn, belong to “a dark and repulsive force”. The Jews “are a nefarious and perverse sect”. “Satan has prevailed upon them”.⁹⁹ As a Holocaust denier, this angry, 88 year-old man, possessed with hatred, decided to wage an attack on the Holocaust Museum. He was not interested to visit the museum and to see the thousands of documents that reveal the magnitude of the horror. Von Brunn was beyond the point of deliberation, the exchanging of ideas, or speech. He was boiling inside with poisonous rage. In his mind, it was time for violent action and the most appropriate place for the shooting was the museum that served the greatest hoax of all time.

⁹⁷ H. Beirich, “Holocaust Museum Shooter Had Close Ties to Prominent neo-Nazi”, *Southern Poverty Law Center* (June 10, 2009).

⁹⁸ J. W. von Brunn, *“Kill the Best Gentiles!” or “Tob Shebbe Goyim Harog!”* (Easton, Md.: Holy Western Empire LLC 2002): 28.

⁹⁹ *Idem*, pp. 21-22.

On April 13, 2014, 73-year-old American Nazi Frazier Glenn Miller murdered three people at two separate Jewish Community Centers in Overland Park, Kansas. Miller founded the Carolina Knights of the Ku Klux Klan and was its “grand dragon” in the 1980s. In 1985, he founded another white supremacist group, the White Patriot Party.¹⁰⁰ Miller had spouted his venomous hatred against Jews on hate websites, including his own, and in his self-published book, *A White Man Speaks Out*. On Vanguard News Network (VNN) alone, Miller had more than 12,000 posts. The slogan of this anti-Semitic and white supremacist site is “No Jews, Just Right.” VNN founder Alex Linder has openly advocated “exterminating” Jews since December 2009.¹⁰¹

During his long career as an outspoken, blunt racist activist, Miller did not hide his disgust and hatred to Jews whom he described as the greatest threat to white civilization. Jews are “swarthy, hairy, bow-legged, beady-eyed, parasitic midgets.”¹⁰² Adolf Hitler, on the other hand, was “the greatest man who ever walked the earth.”¹⁰³ Miller’s website <http://www.whty.org/>

¹⁰⁰ Heidi Beirich, “Frazier Glenn Miller, Longtime Anti-Semite, Arrested in Kansas Jewish Community Center Murders,” *splcenter.org* (April 13, 2014), <http://www.splcenter.org/blog/2014/04/13/frazier-glenn-miller-longtime-anti-semite-arrested-in-kansas-jewish-community-center-murders/>

¹⁰¹ *Ibid.*; “Hate—and Hitler—in the Heartland: The Arrest of Frazier Glenn Miller,” *The Daily Beast* (April 14, 2014), <http://www.thedailybeast.com/articles/2014/04/14/hate-and-hitler-in-the-heartland-the-arrest-of-frazier-glenn-miller.html>

¹⁰² Heidi Beirich, “Frazier Glenn Miller, Longtime Anti-Semite, Arrested in Kansas Jewish Community Center Murders,” *splcenter.org* (April 13, 2014).

¹⁰³ Emma G. Fitzsimmons, “Man Kills 3 at Jewish Centers in Kansas City Suburb,” *NY Times* (April 13, 2014), http://www.nytimes.com/2014/04/14/us/3-killed-in-shootings-at-jewish-center-and-retirement-home-in-kansas.html?hp&_r=0&assetType=nyt_now

espoused views of white supremacy, virulent anti-Semitism and eschewed racial mixing.¹⁰⁴

In his book, which was freely available to download on his website, Miller warned against Jewish domination of the media, art, music, literature and culture of the Western World, “which has brought upon us the epidemics of drugs, venereal diseases, crime, pornography, ignorance, immorality, and yes, racial hatred.”¹⁰⁵ Miller openly declared “total war” on ZOG (Zionist Occupation Government) because war is the only hope for the survival of the white race. “Together,” Miller wrote, “we will cleanse the land of evil, corruption, and mongrels. And, we will build a glorious future and a nation in which all our people can scream proudly, ‘This land is our land. This people is our people. This God is our God, and these we will defend — One God, One Race, One nation.’”¹⁰⁶ Miller called upon his fellow “Aryan warriors” to strike now: “Strike for your homeland. Strike for your Southern honor. Strike for the little children. Strike for your wives and loved ones. Strike for the millions of innocent White babies murdered by Jew-legalized abortion, who cry out from their graves for vengeance. Strike for the millions of our people raped or assaulted or murdered by mongrels. Strike for the millions of our Race butchered in Jew wars.”¹⁰⁷ Miller was very explicit: “Let the blood of our enemies flood the streets, rivers, and fields of the nation in holy vengeance and justice.”¹⁰⁸ Miller published this call in 1987, and repeated it frequently. For many years, he encouraged his followers to kill blacks, Jews, judges and

¹⁰⁴ <http://www.whty.org/>

¹⁰⁵ Glenn Miller, *A White Man Speaks Out* (1999), <https://heavyeditorial.files.wordpress.com/2014/04/awms0.pdf>

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

human rights activists.¹⁰⁹ Thus it should not surprise anyone that Miller acted upon his own call and went on a racially-motivated killing spree.

A speech that mobilizes a crowd to burn down a building owned by a hated religious group and to murder people praying is not protected speech also in the USA. On June 17, 2015, 21-year-old Dylann Storm Roof entered the Emanuel African Methodist Episcopal Church in Charleston, one of the oldest, most storied black congregations in the South of the United States, and murdered nine people in cold blood. The murderer had a history of anti-black views which he uttered on his social networks and also during the murderous attack.¹¹⁰ People who knew him

¹⁰⁹ Steven Yaccino and Dan Barry, “Bullets, Blood and Then Cry of ‘Heil Hitler’,” *NY Times* (April 14, 2014), <http://www.nytimes.com/2014/04/15/us/prosecutors-to-charge-suspect-with-hate-crime-in-kansas-shooting.html?hp>

¹¹⁰ Hatewatch Staff, “Charleston Shooter’s Alleged Manifesto Reveals Hate Group Helped to Radicalize Him Online, *Southern Poverty Law Center*” (June 20, 2015), <http://www.splcenter.org/blog/2015/06/20/charleston-shooters-alleged-manifesto-reveals-hate-group-helped-to-radicalize-him-online/>; Jacob Siegel, “Dylann Roof, 4chan, and the New Online Racism”, *The Daily Beast* (June 29, 2015), <http://www.thedailybeast.com/articles/2015/06/29/dylann-roof-4chan-and-the-new-online-racism.html?via=newsletter&source=DDMorning> . This brings to the fore another important matter, which I will not consider here. Wannabe murderers need to vent their hostilities. In recent years, they often do it on the Internet. I call it “The Columbine Phenomenon”. For discussion, see R. Cohen-Almagor and Sharon Haleva-Amir, “Bloody Wednesday in Dawson College: The Story of Kimveer Gill, or Why Should We Monitor Certain Websites to Prevent Murder”, *Studies in Ethics, Law and Technology*, Vol. 2, Issue 3, Article 1 (December 2008); R. Cohen-Almagor and Sharon Haleva-Amir, “Why Monitor Violent Websites? A Justification”, *Beijing Law Journal*, Vol. 3, No. 2 (June 2012): 64-71; R. Cohen-Almagor, “People Do Not Just Snap: Watching the Electronic Trails of Potential Murderers”, *Journal of Civil & Legal Sciences*, Vol. 3(1) (2014): 113-118.

testified that he harboured racist views and made violent statements about attacking black people.¹¹¹ Unfortunately, this is one attack in a very long list of similar attacks targeting predominantly black churches in the United States. A number of past cases involved the burning of churches by Ku Klux Klan members including setting on fire the Macedonia Church of God in Christ in Springfield, Mass. (November 5, 2008), the Rising Star Baptist Church, Greensboro, AL (June 2, 1996), the Matthews-Murkland Presbyterian Church, Charlotte, NC. (June 7, 1996), the Macedonia Baptist Church in Manning, S.C. (June 21, 1995), the Rock Hill Baptist Church, Aiken County, SC. (February 19, 1994), the Rocky Point Missionary Baptist, McComb, MS. (April 4, 1993), the Tucker Baptist Church, Union, SC. (October 21, 1992), the Sandhill s Freewill Baptist Church, Hemingway, SC. (October 8, 1991), the Apostolic Faith Assembly Church, Louisville, KY. (January 5, 1990), the Mount Zion

¹¹¹ Frances Robles, “Dylann Storm Roof Photos Found on Website”, *NY Times* (June 20, 2015), http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html?emc=edit_na_20150620&nid=33802468&ref=cta&_r=0; Frances Robles, Jason Horowitz and Shaila Dewan, “Dylann Roof, Suspect in Charleston Shooting, Flew the Flags of White Power”, *NY Times* (June 18, 2015), <http://www.nytimes.com/2015/06/19/us/on-facebook-dylann-roof-charleston-suspect-wears-symbols-of-white-supremacy.html?&moduleDetail=section-news-1&action=click&contentCollection=U.S.®ion=Footer&module=MoreInSection&version=WhatsNext&contentID=WhatsNext&configSection=article&isLoggedIn=false&pgtype=article>; Nick Corasaniti, Richard Perez-Pena and Lizette Alvarez, “Church Massacre Suspect Held as Charleston Grieves”, *NY Times* (June 18, 2015), http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html?_r=0

A.M.E. Church in Longdale, Miss. (June 16, 1964), and the 16th Street Church in Birmingham, Ala. (September 15, 1963).¹¹²

VIII

Conclusion

American society has been willing to pay a substantial price for allowing hate mongers to spread their racist ideology on the streets as well as on the Internet. In 2013 alone (the most recent year for which federal data is available at the time of writing), the FBI identified 3,563 victims of racially motivated hate crimes. Black victims constituted 66% of the total. 21% were victims of anti-white bias. 4.6% were victims of anti-Asian bias, and 4.5% were victims of anti-Native American bias.¹¹³ American egalitarian viewpoint-neutrality enables the pursuit of every idea. Paradoxically it might enable the flourishing of inequality rather than equality. There is correlation between hate speech and hate crime.

¹¹² “Violent History: Attacks on Black Churches”, *NY Times* (June 18, 2015), <http://www.nytimes.com/interactive/2015/06/18/us/19blackchurch.html>; Center for Democratic Renewal, *Black Church Burnings: Research Report Hate Groups Hate Crimes in Nine Southern States* (June 1996), <http://www.hartford-hwp.com/archives/45a/121.html>; “Ku Klux Klan”, *New World Encyclopedia*, http://www.newworldencyclopedia.org/entry/Ku_Klux_Klan; President Obama’s Eulogy at Charleston Shooting Funeral of Clementa Pinckney, *YouTube* (June 26, 2015), <https://www.youtube.com/watch?v=RK7tYOVd0Hs>

¹¹³ FBI, *2013 Hate Crime Statistics*, https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/topic-pages/victims/victims_final. See also Conor Friedersdorf, “Thugs and Terrorists Have Attacked Black Churches for Generations”, *The Atlantic* (June 18, 2015), <http://www.theatlantic.com/politics/archive/2015/06/thugs-and-terrorists-have-plagued-black-churches-for-generations/396212/>

Democracy is founded on two basic principles: respect for others, and not harming others. These principles are the lighthouse according to which democratic morality and policies are formed. As we are able to discern between good and evil, we need to analyse expression per content, observing the consequences of certain expressions and apply judgement when speech might lead to a harmful action.

This article's promotional approach holds that liberal governments should not be neutral regarding different conceptions of the good. A promotional approach of the liberal-democratic values should be in place instead of complete neutrality. Governments should safeguard the basic tenets of democracy which enable and facilitate their operations. It is within our common interest to adhere to the basic liberal-democratic ideas of respect for others and not harming others, and to apply judgement in promoting them in society.¹¹⁴ Thus the promotional approach calls upon governments to safeguard the basic tenets of democracy which enable and facilitate civic life. Sometimes, for whatever reasons (laziness, economic considerations, dogmatism, incuriosity, lack of care, contempt), we refrain from doing the right moral thing. But we should. This is not a free speech issue as we are not free to inflict harm on others. It is about taking responsibility for stopping those who abuse democratic principles for their partisan, vile purposes.

There *is* right and wrong. There *is* a standard, a moral compass that guides our reasoning. Not all views have equal standing in society, just as not all actions have equal standing. As we know it is wrong to kill another person, we also know it is wrong to use racist diatribes in order to incite others to kill. Absolute viewpoint-neutrality should be replaced by the promotional

¹¹⁴ Raphael Cohen-Almagor, *The Scope of Tolerance: Studies on the Costs of Free Expression and Freedom of the Press* (London and New York: Routledge, 2007).

approach which follows the two basic principles of respecting others and not harming others. It is the democratic duty to protect third-parties, vulnerable people. Indeed, often the litmus test for the extent of democratization of any given society is the status of its minorities. The more equal the minorities are, enjoying equal standing in society like any other member, the more democratic the society usually is.

The United States is the only country in the world that permits the operation of a Nazi party. Nazism had brought about an untold suffering on humanity, resulting in millions of life lost in a racially-motivated war, aimed to eradicate certain people deemed inferior according to the Nazi hierarchy of races from the face of the earth. Once a certain speech is designed to undermine the rights of others, it becomes questionable. Questions then arise about its legitimacy. The state ought to weigh the costs of allowing hate speech as well as the risks involved, and balance these considerations against the costs and risks to democracy and free speech associated with censorship. Supporters of free expression may insist on proving a direct link between the harmful expression and the resulting harmful action: the government has to establish a nexus of harm linking the proscribed utterance to some grave and imminent threat of tangible injury. This would require that the government perform a contextual analysis drawing on empirical data. Who was harmed? How were they harmed? It is similar to what we demand of the plaintiff in a libel case. And if the argument also brings in society's right of self-defense, then we should seek evidence of a real threat to individuals. Hate mongers such as von Brunn, Miller and Roof should have been stopped before translating their ideas into action.

Whenever we come to restrict speech, the onus for limiting free expression is always on the one who wishes to limit

expression, and that one should bring concrete evidence to justify restriction. The speech must be dangerous and/or harmful. The danger and/or harm cannot be implicit or implied. If speech would be prohibited only because its danger might be implied from an unclear purpose that is opened for interpretations, then the scope for curtailing fundamental democratic rights is too broad, and the slippery-slope syndrome becomes tangible. The implicit way is not the path that liberals should tread on when pondering restricting of freedom of expression. This does not mean that we should not be vigilant in protecting our democracy and fellow citizens. But mere suspicion (“bad tendency”) will not do to override basic freedoms. In other words, we should not take hate speech lightly and, at the same time, we should not rush to restrict freedom of speech. What I have been advocating in this paper is the Aristotelian Golden Mean between freedom of expression and social responsibility: the default position is freedom of expression but it has to have limits. The Respect for Others Principle and the Harm Principle should help us define the appropriate boundaries, applying our discretion in the context of time and circumstances.^{115,116}

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¹¹⁶ In memory of Jack Pole (March 14, 1922-January 30, 2010), Friend, intellectual, scholar.

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