Maine Law Review

Volume 53 | Number 2 Article 7

June 2001

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HATE SPEECH—THE UNITED STATES VERSUS THE REST OF THE WORLD?

*Kevin Boyle**

I. INTRODUCTION

I am honored to offer this public lecture as one duty of my tenure this semester as the Godfrey Distinguished Professor at the University of Maine School of Law. In my short time here I have certainly learned of the esteem in which Dean Godfrey, whose name my visiting appointment carries, is held by the legal profession, both practicing and academic. I have learned from observation how well he has built the foundations of this wonderful school, in its faculty, students, library staff, and holdings, the last of which are simply first rate in my particular field.

A word about my title: It is hardly the best English, but in telegraph style I was intending to leave open whether there *was* in fact such a contrast between the U.S. approach to control of hate speech and the approach of the rest of the world. A decade ago, I collaborated with a number of colleagues including a visitor this semester to the Law School, Nadine Strossen, on a volume about hate speech.[1] Then the contrast was clear. But things may have changed a decade later—so I thought best to hedge my bets with a question mark!

Well, having had time to catch up with developments—the short answer is things have not changed that much—it is still the United States versus the rest.

The search for a commonly agreed upon international legal understanding of the meaning of free speech or freedom of expression, as an individual human right, was a major international preoccupation from the 1940s to the 1980s.[2] During the

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Professor Boyle has been actively involved in many aspects of international human rights law. Professor Boyle practices regularly before the European Court of Human Rights in Strasbourg. His recent cases include *Jersild v. Denmark*, a case dealing with hate speech, *Tromso v. Norway*, a defamation case, and *Akdivar v. Turkey*, one of a series of cases involving the Kurdish minority in Turkey.

A native of Northern Ireland, Professor Boyle received his L.L.B. degree in 1965 from The Queen's University in Belfast, and a Diploma in Criminology in 1966 from Cambridge University. His recent published works include NORTHERN IRELAND: THE CHOICE (with Hadden, Penguin, London 1994); *Introducing Democracy: Eighty Questions and Answers* (with Beetham), published by UNESCO in 1995, has been translated into 15 languages.

Professor Boyle has been appointed as Special Adviser to the United Nations High Commissioner of Human Rights, Mary Robinson, from September 2001.

This Essay is adapted from the Godfrey Distinguished Visiting Professor Lecture, delivered at the University of Maine School of Law on November 15, 2000.

1. STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992).

2. Stephanie Farrior, *Moulding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1-98 (1996).

Cold War it was, of course, also a highly ideological debate. There were three positions, broadly speaking: the Soviet Union and its allies, who had little enthusiasm for the idea at all; the United States, which believed in it—many thought—too much; and the rest, the other Western democracies and developing countries, who tried to hold the middle ground. These contrasting positions were most vividly displayed over the question of how to deal with 'bad' speech, hate expression, and propaganda for war. The Soviet preoccupation with the issue of hate and war propaganda was in part simply the Cold War dance and the need to take an opposite position to the United States. But it also stemmed from its fears over the new technology of the radio and its awareness of how effectively Goebbels, Hitler's propaganda chief, had deployed it during the war. In the 1990s, we have seen some vindication of the Soviet concerns. In Rwanda in the 1990s, we saw genocidal speech—the use of the radio to systematically mobilise Hutus to kill their Tutsi neighbours.[3] Over 800,000 people died in that genocide encouraged and incited by extremists over the radio.

The Soviet Union is no more—although, as we shall see, its fingerprints are to be found in the international texts that I will discuss. Post Cold War, however, the positions still remain—that of a good faith but clear difference between the United States and other countries. The United States still privileges free speech, including hate speech, over other values while other countries do not.

The robust approach characteristic of the United States was nicely caught in recent civil litigation brought in Idaho by the Southern Poverty Law Center against the Reverend Richard Butler, leader of the Aryan Nations White Supremacist group. In defense to the accusation that his client encouraged violence, Butler's lawyer stated in his pleadings: "[D]emonizing Jews is still legal under the First Amendment. It is still legal in this country to be a bigot. It is still legal to hate. Pastor Butler [therefore] quite properly erects the twin defenses of both free speech and religion contained within the First Amendment."[4]

One new development is that the United States has now ratified or become party to several international human rights conventions that require a very different approach to bigotry and hate. Although, as we shall see, the United States has sought by reservation to contract out of the relevant provisions of these instruments as regards speech, it may not be as simple as that in reality in the longer term.

I ought to define my terms here. Hate speech is in fact an American expression that has gained international currency although it is also termed hate propaganda elsewhere. Hate speech describes a problematic category of speech and related freedoms, such as freedom of association and assembly, that involves the advocacy of hatred and discrimination against groups on basis of their race, colour, ethnicity, religious beliefs, sexual orientation, or other status.

It is important to say that there is no difference between the United States and the international human rights standards as regards *ends*—that is the goal of the control and elimination of hate speech. Hate speech is excoriated in all democratic societies. The differences between countries are over *means*. How best should

3. MARK THOMPSON, FORGING WAR (1999).

4. Jo Thomas, *Courthouse Klan-Fighter Takes on Aryan Nations*, N.Y. TIMES, Aug. 29, 2000, at A14.

society respond to hate speech? How far should we be prepared to suppress it through law and governmental regulation and at what cost to freedom of expression? Is a new international consensus possible now that the United States has joined key international agreements?

My talk will focus on one category of hate speech that denigrates individuals and groups based on their so-called race, including colour, racism, and anti-Semitism. Hate speech can have other targets. We should not forget that Nazi propaganda denigrated the old and the handicapped or disabled, the "useless eaters" as they were called. I say so-called race because we recognise today that the biological classification of human beings into races and racial hierarchy—at the apex of which of course were white people—was the product of pseudo-science of the nineteenth century. At a time when we have mapped the human genome, prodigious research that involved the use of genetic material from all ethnic groups, we know that there is only one race—the human race. Human differences in physical features, skin colour, ethnic, and cultural identities are not based on biological attributes. Indeed the new language of the more sophisticated racists abandons any biological basis for their views. They now emphasize allegedly irreconcilable cultural differences as justification for their extremist views.[5] But we nevertheless seem to be stuck with the anachronistic concept of race.

Why is hate speech a problematic category? The answer is because we are looking at possible conflict between two rights in a democratic society—freedom of speech and freedom from discrimination. Freedom of speech, including freedom of the press, is fundamental to a democracy. If democracy is defined as popular control of the government then unless people are able to express their views freely such control is not possible. It would not be a democratic society. But by the same token, a core element of democracy is the value of political equality. Every one counts as one and no more than one, as Jeremy Bentham said. Political equality is therefore also necessary if society is to be democratic. A society that aims at democracy must both protect the *right to freedom of expression* and *freedom from discrimination.* To achieve political equality we need to prohibit discrimination or exclusion on any ground that denies to some the enjoyment of rights including the right to political participation. To achieve freedom of expression we need to prevent government censorship of speech and the press. In U.S. terms we need the protections of the First, the Fourteenth, and the Fifteenth Amendments. In international terms we need the guarantees of both Articles 16 and 19 of the

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5. Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism, in* DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 176 (Sandra Fedman ed., 2001).

6. International Covenant on Civil and Political Rights, *entered into force* Mar. 24, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 16 provides: "Everyone shall have the right to recognition everywhere as a person before the law."
Article 19 provides:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; the right shall include freedom to speak, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

International Covenant on Civil and Political Rights.[6]

What should a democratic society do when some groups seek to use their freedom of expression to advocate the denial of equality, discrimination, and exclusion of others? What should we do when such groups express hatred and insult their target victims? How does the United States answer those questions and how do other democratic societies answer them? Those are the questions before us.

I would first like to place the subject of hate speech in a wider context; that is to say a historical and international context. Then I shall look at three themes. First, the international and United States approaches to the control of hate speech. Second, a comparison with European standards focusing on Holocaust Denial laws. Third, the latest focus of international and national concern—the alacrity with which hate mongers have taken to the new medium of the Internet.

II. HISTORICAL CONTEXT

In September 2001, the United Nations will hold in Durban a *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.* The host country is South Africa and the symbolism is intentional. From the date in 1985 when Nelson Mandela walked free from Roben Island Prison, we have witnessed the dismantling of the Apartheid State with its pernicious racist ideology. The Apartheid Government dates from 1948, the same year as the Universal Declaration of Human Rights.[7] The Universal Declaration was chaired by Eleanor Roosevelt and has been termed the Magna Carta of humankind. It proclaimed human equality and condemned all forms of discrimination including on grounds of race or colour. Apartheid was a direct challenge to these new international ideals.

The defeat of Apartheid after fifty years of global pressure was one of the great human rights victories of the twentieth century. But it is important to recall that Vervwoed and his National Party did not invent Apartheid. Apartheid was the inheritance of theories of racial supremacy of white skinned peoples based on centuries of European and American practice. Slavery, colonialism, and imperialism were constructed around ideas of justification based on racism—doctrines of racial superiority and inferiority. The great achievement of the United States in the nineteenth century was the emancipation of the slaves and their incorporation as citizens—even if the promise of the Fourteenth and Fifteenth Amendments of equal citizenship had to wait another century to begin to be delivered. But this struggle in the United States was the beginning of what became an international struggle for racial equality that has transformed the world.[8] We can capture that transformation in the world in one sentence. In 1950, half of the population living in the Southern Hemisphere was ruled from Brussels, Lisbon, London, and Paris—and if we add the Philippines—Washington. When the United Nations was established in 1945, there were some sixty states in the world now there are some 190. It has

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(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id.

7. Universal Declaration of Human Rights, G.A. res. 217A(111), U.N. Doc. A/810, at 71 (1948).

8. WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 1-13 (1983).

been the achievement of self-determination of peoples, decolonisation, and statehood that constitutes the most dramatic global change of the last half-century. These changes have propelled the ideal of human equality and the retreat of racism.

But such global changes did not come without resistance. It is not well remembered now, but the first attempt to establish the principle of racial equality as an international principle was made by the Japanese in 1919. The Japanese were the first non–white nation, as it was termed, to be invited to the post First World War conference on establishing the League of Nations in Paris. The Japanese wanted a declaration on racial equality written into the League of Nations Charter. That in turn was a result of the racial discrimination faced by Japanese and other Asian people as immigrants to the West Coast of the United States. The proposal faced enormous hostility from the European colonial powers, especially from the United Kingdom's representatives in Australia, but also from the United States. Woodrow Wilson, who was so much the hero of oppressed people everywhere for his call during the First World War for self-determination and freedom for all peoples, could not agree to the Declaration that all races were to be considered equal without distinction as to colour. Wilson believed that the United States Senate would never ratify the treaty on the League of Nations if it contained any article on racial equality.[9]

The Japanese persuaded a majority of countries to vote for the principle.[10] But, quite without authority, Wilson, who was in the Chair, decided that the vote could not be accepted as it was not unanimous.[11] The reactions across the world were immediate. In the United States, there were protests from African American organizations led by William DeBois.[12] Observers described the riots in Washington and the lynchings and burnings in many parts of the United States as almost a race war.[13]

It is interesting speculation for another time to ask what difference a firm assertion of human equality and a condemnation of racial discrimination in 1919 might have made to the rest of the bloody twentieth century that was to follow. For example, what might have become of Japanese racist nationalism and Hitler's racist National Socialism? Suffice to say that the call for a declaration on racial equality was made again after the Second World War with the creation of the United Nations. It did not come from the defeated Japan but from China, then represented by the Chinese Nationalists.[14] The rejection of the case for a clause in the U.N. Charter on racial discrimination was led by the British and Churchill.[15] The United States went along fearing that such a statement might lead to the scrutiny of American Apartheid—racial segregation in the Southern states.[16] Thus, at the Dumbarton Oaks conference outside Washington, D.C. in 1944, with support predictably from Stalin (a notorious anti-Semite), all human rights language and in particular any reference to race or racial equality was dropped from the proposed Charter. It was

9. PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS VISIONS SEEN 101 (Univ. of Penn. Press 1998).

10. *Id.* at 101.

11. *Id.*

12. *Id.*

13. *Id.*

14. Paul Gordon Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter*, 5 HUM. RTS. Q. 1, 10 (1983).

15. *Id.* at 10-11.

16. *Id.* at 12.

only thanks to the Non-Governmental Organizations (NGOs) and mainly religious organisations at the San Francisco conference that the United States gave into the pressure to include human rights and non-discrimination language in the U.N. Charter. This language was also supported by the Latin American countries, and, as an early maneuver in the Cold War, by the Soviet Union, sensing the Achilles heel of the United States.[17]

What is the relevance of that brief history to the subject of hate speech? It is this: hate speech was once mainstream speech. It was central to European culture. There were no "hate groups" espousing racism and white superiority when it was in fact the official ideology or mainstream idea. Today's racists wear our castoffs, and we have a responsibility for what is done with those castoffs.

Anti-Semitism has a similar history. The prejudice and hatred against Jews came to its apotheosis in the Holocaust but these crimes came out of centuries of prejudice built into mainstream Christianity—Catholic and Protestant. The purveyors of hatred against blacks, Jews, and other groups seek to protest the abandonment of these prejudices. They emerge as organizations of white ideology and the power structures it supported. They reject democratic ideas such as the equality of all citizens, and their hatred is directed at the beneficiaries of those struggles, such as the black population. Hate speech in that sense is political speech; it seeks to restore theories and ideas that were defeated by democratic struggle. Hate speech is also about power and economic competition and that needs to be more clearly recognised in our legal analyses.

It may be that extreme individuals with personal problems are attracted to hate groups but it is mistaken to label the phenomenon as "pathological." It is a struggle of ideas, the ideas of restoring white supremacy—the exclusion of Jews and other hated minorities—versus the idea of equal human dignity for all. It must not be assumed that the struggle against intolerance, against what in Europe has been termed the "light sleepers" (xenophobia, racism, and anti-Semitism), has been won. Intolerance needs constant attention.

III. UNITED STATES AND INTERNATIONAL STANDARDS

With that background let me then review the relevant international standards on hate speech and ask how they compare with United States standards.

First, we may refer to the United Nations International Covenant on Civil and Political Rights.[18] This is one part of what is called the International Bill of Human Rights, now ratified by or binding on over 140 of the world's states. The United States ratified very late, only in 1992, some twenty-three years after this international treaty came into force. The Covenant, along with other human rights treaties ratified by the United States, is part of the Supreme Law of the land under Article 6 of the U.S. Constitution and has the same legal status as federal law.[19] While this Covenant has been declared by the Senate to be a non-self executing treaty, that does not rob it of all force or effect in the law of the United States.[20] The Covenant in my view constitutes a new supplementary Bill of Rights for the

17. *Id.* at 24.

18. ICCPR, *supra* note 6.

19. FRANK NEWMAN & DAVID WEISBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS, 581 (2d ed. 1996).

20. International Covenant on Civil and Political Rights, 138 CONG. REC. S4781, S4783 (daily ed. Apr. 2, 1992) (statement of Sen. Moynihan).

United States and in years to come will be increasingly recognised as such.

The text of Article 19 of the International Covenant sets out a global version of the First Amendment.[21] In clauses 1 and 2, it proclaims the scope of the right to freedom of expression and opinion.[22] In clause 3, it sets out grounds of limitation on free speech which are legitimate for states to invoke.[23]

Immediately you may say, well, that is the difference is it not? Our First Amendment insists that Congress may pass no law abridging Freedom of Speech. It is an absolute right unlike this international text. But the First Amendment is not absolute. It is subject to a number of limitations as recognised in the case law of the U.S. Supreme Court.[24] These are more or less the same as the grounds set out here. Thus, Article 19 allows for limitation on grounds of protection of the rights of others—as does copyright law and libel law in the United States. National security is a ground limiting speech in the Covenant, as it is in U.S. jurisprudence. Limitation or abridgment on grounds of morality and public order is reflected in the control of obscenity and time, place, and manner restrictions in the United States. Public health finds reflection, for example, in commercial speech restrictions such as false and misleading advertisement of health products.

Thus, in principle there are no more grounds of restriction of speech allowed in the international standards than are found in U.S. domestic constitutional practice. The differences between the United States and other countries that are bound by Article 19 arise in the interpretation of restrictions. Unlike many other states, the U.S. courts do give a higher weight to speech than to the counterbalancing interests set out in Article 19, although perhaps not in all contexts. Thus, it is arguable, for example, that the United States is more deferential to state legislative attempts to control obscenity than is the case in some other countries.

However, the real area of difference between U.S. standards and the Covenant is in respect to its Article 20.[25] This provision, which concerns abusive speech, was inserted largely with the support of the Soviet Union. The scope of this Article is a larger subject than we have time to give to it and so let me direct you only to the second limb of Article 20: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[26]

To determine how that duty on a state party to the Covenant comports with U.S. law we need to mention only the latest hate speech decision of the U.S. Supreme Court in 1992, *R.A.V. v. City of St. Paul*.[27] In that case, you will recall a group of white youngsters made a crude cross and set it alight in the garden of their black neighbours. They were convicted under a St. Paul disorderly conduct ordinance, which was aimed, among other things, at the protection of minorities from

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21. *See* ICCPR, *supra* note 6.
22. ICCPR, *supra* note 6.
23. ICCPR, *supra* note 6.
24. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1029-34 (13th ed. 1997).
25. ICCPR, *supra* note 6, at Article 20. Article 20 provides:
    1. Any propaganda for war shall be prohibited by law.
    2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Id.
26. *Id.*
27. 505 U.S. 377 (1992).

such acts. The Court struck down the ordinance on First Amendment grounds. The majority adopted a position that appears to firmly reject any legislative restriction on abusive speech that is not content-neutral and that specifies its purpose as protecting particular groups such as religious, racial, or ethnic minorities. Speech can only be proscribed, whatever its motive, if it amounts to an incitement to imminent violence.[28] We should note that in the *St. Paul* case four of the judges, while agreeing that the ordinance was flawed, rejected this reasoning.

In the light of that precedent, it would seem that the First Amendment would be capable of being read in conformity only with the part of Article 20 of the Covenant that involved advocacy of immediate incitement to violence.[29] In other words, the duty set out in Article 20 to legislate so as to prohibit incitement to discrimination or hostility would not be consistent with U.S. law but would require a new approach to the First Amendment. The U.S. government faced with this situation attached a reservation to its ratification of the treaty—to the effect that: *"Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."*[30]

An independent committee known as the Human Rights Committee, established under the Covenant, monitors how states implement their commitments under the treaty. It has a member of U.S. nationality, the eminent international lawyer, Professor Lou Henkin of Columbia University. When the United States presented its first report in 1994 to that Committee, it was chided for its position on reservations, which the Committee described as designed to ensure that the United States accepts as obligation only what is already the law of the United States.[31] In an earlier document, widely regarded as drawn up in anticipation of the U.S. report, the Committee made a considered and detailed legal statement on the subject of reservations.[32] It concluded that there are certain provisions in the Covenant that reflected customary international law and these may not be the subjects of reservations by states when they ratify. One such is the duty to prohibit the advocacy of national racial or religious hatred. Customary international law binds all states in most circumstances whether or not they consent. There can be no doubt that the Committee is correct that the prohibition on racial discrimination is part of customary international law.[33]

It is not a big step to argue that incitement to such racial discrimination is also in conflict with international customary law. The Supreme Court in the early

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28. An earlier case, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), which upheld a form of group libel law as protection against hate speech, appears to be no longer authoritative.

29. Brandenburg v. Ohio, 395 U.S. 444 (1969).

30. 38 CONG. REC. S47810-01 (daily ed. Apr. 2, 1992) (Reservations to the International Covenant on Civil and Political Rights).

31. Concluding Observations of the Human Rights Committee: United States of America U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/79/Add. 50; A/50/40, paras. 266-304 (1995).

32. Issues Relating to Reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant: 04/11/94, CCPR General Comment 24, Commissioner on Human Rights, Human Rights Committee, 52 Sess., U.N. CCPR/C/21/Add.6 (1994), available at http://www.unchr.ch/tbs/doc.nsf/.

33. The *Restatement (Third) of Foreign Relations Law*, recognized that systematic racial discrimination constitutes a violation of peremptory norms of customary international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, n.11 (1986).

Paquete Habana[34] case held that customary international law or the law of nations is part of the law of the United States.[35]

If the Committee is right as to the rules governing reservations to human rights treaties in international law, then the United States reservation to Article 20 is ineffective. Article 20 is therefore binding on the country. The government of the United States rejects the Committee's position. But it is at least arguable that the failure to prohibit advocacy of national racial or religious hatred is in violation of both the Covenant and customary international law. The *City of St. Paul* judgment on this view could be seen as in conflict with international law both as customary law and as treaty law.[36]

There is one further international human rights agreement that I should mention: the *International Covenant on the Elimination of All Forms of Racial Discrimination* (Race Convention).[37] The Race Convention, which has been in force since 1969, was ratified by the United States in 1994.[38] The United States will make its initial report to its monitoring committee—the Committee on the Elimination of Racial Discrimination—in the Spring of 2001. This Convention has a more radical or far-reaching provision, Article 4,[39] on the question of racist speech than the International Covenant we have been discussing. This is a complex provision I can only touch on briefly. You will recall our two sets of rights that are in issue—freedom of speech and freedom from discrimination. Article 4, as it has been interpreted by the monitoring committee, is distinctive in that it attempts to assert that in any conflict between these freedoms freedom from discrimination is given priority over freedom of speech.[40]

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34. 175 U.S. 677 (1900).

35. *Id.* at 700.

36. *See* William A. Schabas, *Spare the RUD or Spoil the Treaty*, *in* THE UNITED STATES AND HUMAN RIGHTS (David P. Forsythe ed., 2000).

37. 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 [hereinafter Race Convention].

38. *See id.* The treaty entered into force with respect to the United States on Nov. 20, 1994.

39. Race Convention, *supra* note 37. Article 4 provides:

> State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Id.

40. Boyle & Baldaccini, *supra* note 5, at 160-61.

IV. WHAT DOES ARTICLE 4 REQUIRE?

The most challenging duty imposed on states is the requirement to make it an offence punishable by law to disseminate ideas based on racial superiority or hatred. It also requires states to declare illegal and to prohibit racist organisations and to make it an offence to belong to such associations.

This treaty is also part of the Supreme Law of the land in the United States. But the United States has entered a reservation with respect to Article 4.[41] That reservation states that the United States does not accept any obligations to restrict the rights of speech, expression, and association.[42] That would suggest that the United States would not ban, for example, the Ku Klux Klan (KKK) or other hate groups as Article 4 arguably requires. Nor would it legislate to prevent dissemination of racist ideas. But banning the equivalent of the KKK is precisely a step that is under way in Germany, and suppression of ideas is a step taken in Europe as part of efforts to stem anti-Semitism. It is to Europe that I now want to turn.

V. EUROPE AND HOLOCAUST DENIAL

Last Thursday the 9th of November, was the anniversary of Kristellnacht. Kristellnacht, the night of the broken glass, was the name given to the 1938 pogrom against Jewish property and shops in Berlin that foreshadowed the Holocaust. The German Chancellor, Gerhard Schroder, led a 200,000 strong rally through Berlin—the culmination of weeks of appeal to citizens to stand up against hate crimes.

The resurgence throughout Germany and all of Western Europe of anti-Semitism and xenophobia is a matter of deep seriousness for the European democracies.[43] Earlier this year the E.U. states took the extraordinary step of boycotting the Austrian government for several months over the inclusion in the new coalition government of the Austrian far right National Party led by Jorg Heider, someone who has espoused anti–immigrant policies and praised Hitler's economic policies. This week the German government has asked the German Constitutional Court to consider the suppression or banning of the National Democratic Party. It is accused of organizing young people for attacks on foreigners, Jews, and Jewish synagogues.

Concern with anti-Semitism has led a number of countries to criminalise so-called revisionist speech and to pass Holocaust Denial laws. Holocaust denial can be traced back to 1945. The death camps, such as Auschwitz, had hardly been opened to a horrified world before the first writings aimed at minimizing what had happened were produced. This kind of literature became more prominent in the 1970s. The material runs from the crude—a recent one-page leaflet had the words "The holocaust was a HOAX lets make it REAL."—to apparently serious historical research in academic journals such as the impressive sounding Journal for Historical Review. In such publications it is claimed that it was not six million Jews who were killed, only a few hundred thousand; or that gas chambers could not have been used in Auschwitz because they did not have the technology. Alleged

41. 140 CONG. REC. S7634 (daily ed. June 24, 1994).
42. *Id.*
43. NICK FRAZER, THE VOICE OF MODERN HATRED (2000).

documentary evidence in survivors' testimonies or Anne Frank's diary are all fabricated. Hitler never ordered the Final Solution—he was innocent, etc.

The anti-Semitism explicit or implicit in these writings is clear. It was no better exposed than earlier this year when the historian David Irvine, a notorious denier, sued Penguin books and Deborah Lipstadt alleging he had been defamed in her book *Denying the Holocaust: The Growing Assault on Truth and Memory*.[44] She called him an anti-Semite, a Hitler partisan, and a bogus historian. Irvine himself took the stand. The judge, in a 300-page devastating judgment, held that Lipstadt was right—Irvine was all of those.

Five European countries—Belgium, Germany, France, Spain, and Switzerland—adopted different models of legislation but in essence all make it a criminal offence to trivialise or deny the historical facts of the Holocaust or to justify National Socialist genocide. In Germany the offence created was that of disparaging the dignity of the dead. The French law, known as the Gaysott Law, was passed in 1990 following a wave of anti-Semitism and desecration of Jewish cemeteries with swastika paintings. It made it an offence to publicly question the existence of the crimes tried at Nuremberg. This offence was included in a broad statute outlawing all racist, anti-Semitic, or xenophobic acts.

The concern that such laws seriously interfere with freedom of thought and opinion, however repulsive those opinions are, has troubled civil libertarians and courts in Europe. Yet they have been upheld by courts. In 1987, the leader of the Front National, the far right party in France, Jean Marie Le Pen was fined for declaring in a radio interview that the mass gassing of Jews was "*un point de detail.*" Revisionist historian Robert Faurisson, in an interview with a French magazine, criticised the Gaysott Law as threatening freedom of expression but he went on to say that it was his personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps. On the basis of the latter statement he was convicted and fined by the Paris Tribunal de Grande Instance (TGI) in 1991. He then complained to the Human Rights Committee under the International Covenant on Civil and Political Rights, which we have been discussing, that his conviction was a violation of the guarantee of freedom of expression set out in Article 19 of the Covenant.

The Human Rights Committee upheld the conviction as a justifiable interference with his Article 19 rights of free speech.[45] It was persuaded by the French government's argument that Holocaust denial is the main vehicle of anti-Semitism in France. The then U.S. member on the Committee, Mr. Tom Burgenthal, as a survivor of the concentration camps of Auschwitz and Sachsenhausen, recused himself.

The issue of Holocaust denial has also come before the European Court of Human Rights, the international court that operates under the 1950 European Convention on Human Rights, which is celebrating its fiftieth birthday this year. The European Court, which sits in Strasbourg, has been termed a Supreme Court on Human Rights for Europe and has been much influenced on political speech by the U.S. Supreme Court. It has not, however, been influenced by the U.S. approach to

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44. DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1994).

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

hate political speech. There have been a number of challenges to Holocaust Denial laws before the European Court which have failed.[46] The Court has made clear that laws criminalizing such speech are not protected under Article 10 of the European Convention.[47] Thus, to deny that the Holocaust occurred can lead in some countries in Europe to a criminal conviction, and you will have no protection for your freedom of speech before the European Human Rights Court.

We can assume that the United States courts are far away from such a holding in the light of the Skokie judgment.[48] You will recall that in the 1970s, the U.S. Nazi Party planned to hold a rally in Skokie, Illinois, a small town with a large Jewish population.[49] The courts upheld the Party's right to march under the First Amendment.[50] As one judge said, "It is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear."[51] There remains, therefore, an Atlantic Ocean between the First Amendment and Article 10 of the European Convention in respect of hate speech.

VI. INTERNET

In the past, if different countries' laws had different standards on hate speech then they operated as such within their different jurisdictions. However, the revolutionary new medium of the Internet may no longer leave us with that choice. The characteristic of the Net is that it is truly without frontiers of time or space. Information published on the Internet is available for viewing anywhere in the world. Its extraordinary potential as a vehicle of free and mass speech was recognised by the U.S. Supreme Court in 1997 in *Reno v. ACLU*.[52]

Hate groups have been very quick to see the potential of the Net. In a recent

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46. For the most extended scrutiny of such laws by the European Court of Human Rights, see *Case of Lehideux and Isorni v. France*, (55/1997/839/1045) Eur. Ct. H.R. (Sept. 23, 1998).

47. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos. 3, 5, and 8 *which entered into force* on Sept. 21, 1970, Dec. 20, 1971, 2nd Jan. 1990, respectively, 213 U.N.T.S. 222. Article 10 contains the guarantee of freedom of expression:

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

Id.

48. Collins v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978). This case took place in the town of Skokie, Illinois.

49. *Id.* at 680.

50. *Id.* at 702.

51. *Id.*

52. 521 U.S. 844, 850 (1997).

review in the *New York Times* of a film from the Southern Poverty Law Center, "Hate.Com: Extremists on the Internet," the reviewer reports as follows:

> Now I can go to my favorite search engine on the Internet, type in a racist slur and immediately be connected to 76,100 Web matches. Yesterday morning within two clicks of the first match on the list, my computer screen filled with the image of a giant W, superimposed over a sketch of a black man being lynched. Beneath this image was a quote attributed to Abraham Lincoln: "I can conceive of no greater calamity than the assimilation of the Negro into our social and political life as our equal."[53]

The particular concern with the hate on the Internet is that, as I said, it has no boundaries. The result is that the question of whose laws are to apply is in issue. Thus what do we do about the Holocaust Denial laws in Europe? The answer is that the provisions can be flouted by transferring sites to the safe haven of the United States. The U.S. standard, in effect, legislates for the world. The debate we are having over different standards becomes academic. There is only one standard that will prevail: the most favourable to speech, that of the United States.

VII. YAHOO.COM

A good example of the dilemmas that will face us more in the future is provided by a current case in France.[54] The case involves a complaint against Yahoo! Inc., the U.S. Internet portal, and Yahoo France. Anti-racism organisations have brought a complaint before the Paris TGI complaining that a Web site devoted to the auction of Nazi memorabilia is accessible to French Internet users via Yahoo.com. They claimed this was a violation of the Gaysott Law amounting to a banalisation of Nazism. Yahoo.com argued the French Court did not have jurisdiction as the alleged crime was committed in the United States and that its terms of service warn Internet users against misuse of the service for the purpose of inciting racial hatred or discrimination. It also argued that it would be technically impossible to prevent Internet users from France or the rest of Europe from accessing the auction site.

In its interim ruling in May, the TGI rejected these arguments. Yahoo! Inc. was fined and, in response to Yahoo's claim that it would be technically impossible to introduce the orders directed by the Court, the Court ordered the creation of a committee of specialists to investigate the validity of Yahoo's claims, consisting of a French, an American, and another European expert on the Internet.

The Court later heard the conclusions of the specially commissioned report on the feasibility of filtering mechanisms for the Internet. It heard that such mechanisms, at best, could only be 90% effective. On the 20th of November, the Paris Court gave its final ruling against Yahoo ordering it to prevent World Wide Web users in France from visiting its auction sites that sell Nazi memorabilia. Yahoo was given three months to find ways to prevent access, and it will be subject to a daily fine of $13,000 at the end of that period for each day it has not complied. The

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53. Julie Salamon, Television Review, *The Web as Home for Racism and Hate*, N.Y. TIMES, Oct. 23, 2000, at E8.

54. Association Union des Etudiants Juifs de France v. Yahoo! Inc. (unreported, Nov. 20, 2000) (Trib. Gde. Inst. Paris).

company is considering an appeal.[55]

There is a parallel here with U.S. concerns over Internet access to pornography and other harmful materials by minors. Congress appointed a Commission to examine this question with respect to schools and libraries that reported in October 2000. It did not recommend filters such as are presumably being considered by the French Court. It declined to recommend filters because the technology was not yet good enough to block only the material users wanted blocked. The Commission received evidence that even the most popular filtering products blocked innocuous material and allowed adult materials to slip through. The Commission decided that the only way forward was to enforce the laws on obscenity and for parents to educate their children.[56]

The Internet, which is growing rapidly in popularity worldwide, may precipitate a debate about new global standards to regulate abuse of this marvelous medium. But censorship with respect to content, as the Chinese authorities are attempting, is not acceptable and, in fact, short of unplugging the country from the Web appears to be impossible. But it would be desirable to see, at the international level, new efforts to establish codes of conduct about harmful content on the Internet. That content remains a very miniscule amount as compared to the positive material to be found. The Internet can be a powerful tool to fight hate and intolerance.

VIII. CONCLUSION

The majority decision in *City of St. Paul* sets the United States on a collision course with the current international standards on hate speech. I must confess to being more persuaded by the reasoning of the four dissenting judges than by Justice Scalia for the majority. To suggest that a law cannot regulate use based on hostility to the underlying message, for example racism, seems to me to be inconsistent with other content restrictions such as those on obscenity. It is not a stable precedent, and the international human rights conventions that the United States has now become party to may well influence new thinking. It is at least arguable that the right approach by the Supreme Court to the scrutiny of laws controlling hate expression should be similar to the approach the Court takes in regard to obscenity. Such an approach would bring the United States nearer the international norms without, in any meaningful way, abridging its jurisprudence on the protection of freedom of speech.

What should ordinary people—you and I, not governments—do about hate speech? First, stand up to it, in a word. We should not be indifferent or assume it is so marginal that it can be ignored. Hate speech can kill, as too many examples plucked from neo-Nazi violence in Germany to the Timothy Evans of this world to the Rwanda genocide demonstrate. Second, recognise that the speech is intended to reverse or impede the struggle for human equality of treatment. It is speech that is anti-human rights and must be combated. Third, racial hatred is not some aberration that emerged out of our democracy—it is potentially in all of us. Therefore, it is in the positive measures to defeat it that we can make a difference. In other

55. John Tagliabue, *French Uphold Ruling Against Yahoo on Nazi Sites*, N.Y. TIMES, Nov. 21, 2000, at C8.

56. John Schwartz, *Support Is Growing for Internet Filters in Schools*, N.Y. TIMES, Oct. 20, 2000, at A28.

words, it is in the work to build human tolerance to emphasize that we are all equal and at the same time all different—that is the imperative. There is a need for much greater emphasis on education for tolerance of diversity throughout the world. The work of the new University of Southern Maine Center for the Study and Prevention of Hate Violence is a good example of this thinking.

The tendency to believe that suppression is the answer—to disclose my own views—at least where it is not linked to positive action to build equality through education and other measures is wrongheaded. The United States is to be criticized not because of the First Amendment but rather over its failure to do more to reverse the effects of past discrimination. In the most recent nationwide survey on housing discrimination, for example, the Department of Housing and Urban Development (HUD) found that African–Americans encounter discrimination over fifty percent of the time when trying to buy or rent a house.[57] At the same time HUD, as the enforcement agency of the anti-discrimination laws, found 'cause' in less than one half of one percent of all race discrimination cases filed in 1990.[58]

That kind of figure is more shameful and challenging to democracy, frankly, than hate speech. Democracy is both about the struggle for political equality as well as the celebration of free speech. Minorities in many countries can be asked to and can cope with hate if they are confident it is the view of the marginal. It is when they experience the inaction of the majority over their experience of discrimination or the majority's disinterest in their struggle for equality that hate speech hurts. It is sometimes said that the answer to hate speech is more speech. But action speaks louder than words. Action that identifies the democracy unequivocally with the exact opposite goals of the racist, with the struggle of minorities for equality, is the real answer to hate speech.

57. *See* NEWMAN & WEISBRODT, *supra* note 19, at 118.
58. *Id.*