1-1-2006

New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet

Lyombe Eko

New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet

LYOMBE EKO*

I. INTRODUCTION

One of the most contentious issues in Internet governance at the national and international levels is bias-motivated or hate speech. This type of communication is characterized by vitriolic expressions of hatred towards individuals or groups on the basis of their race, ethnicity, religion, national origin, or sexual orientation.[1] In the Internet medium, bias-motivated speech, and symbols are problematic because expressions like "freedom of speech," "bias-motivated expression," or "hate speech," spring, in the words of Pierre Bourdieu and Loic Wacquant, "directly from the peculiarities and historical conflicts specific to particular [political and intellectual] universes."[2] The result is that these expressions have different meanings, interpretations, and historic

*Associate Professor, School of Journalism and Mass Communication, University of Iowa. The author may be contacted via email to leo-eko@uiowa.edu.

1. BLACK'S LAW DICTIONARY 1407 (7th ed. 1999). *See also* Doe v. Univ. of Mich., 721 F. Supp. 852, 852, 856 (E.D. Mich. 1989); UWM Post v. Bd. of Regents Univ. of Wis. Sys., 774 F. Supp. 1163, 1163, 1165-67 (E.D. Wis. 1991); Dambrot v. Cent. Mich. Univ., 839 F. Supp. 477, 481-82, 484 (E.D. Mich. 1993). (Universities propagated the concept of hate speech and set its parameters. Courts have generally declared hate speech codes unconstitutionally vague and overbroad.) *But cf.* Jon B. Gould, *The Precedent that Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345 (2001) (suggesting that many colleges and universities retained or created hate speech policies which contradicted national court cases).

2. *See* Pierre Bourdieu & Loic Wacquant, *La Nouvelle Vulgate* [*The New Vulgate*], LE MONDE DILPOMATIQUE (Fr.), May 2000, at 7.

resonances in different countries. Indeed, freedom of speech does not have a universally accepted definition.[3] France and the United States have historically had different legal, political, and cultural approaches to freedom of speech.[4] Both countries have applied the respective legal doctrines developed for traditional speech and mass media to the Internet. This has inevitably led to a conflict of laws over bias-motivated or hate speech on the Internet.

The aim of this article is to survey the historical and political roots of French and American regulation of freedom of speech in general, and hate speech in particular, on the Internet. I submit that the contrasting freedom of speech regimes of France and the United States are the result of specific historical events and different political cultures.[5]

The first section of this article will discuss legal actions that led to the clash of American and French free speech cultures on the Internet. The second section will discuss the historical and political origins of the French free speech regime, and how it is applied to Internet-mediated communication in general, and hate speech in particular. The third section will discuss the historical and political origins of the American free speech regime and the application of this regime to Internet-mediated hate speech. The fourth section will compare and contrast the salient features of the

---

3. *See* Douglas W. Vick, *Exporting the First Amendment to Cyberspace: The Internet and State Sovereignty*, *in* MEDIA AND GLOBALIZATION: WHY THE STATE MATTERS 3 (Nancy Morris & Silvio Waisbord eds., 2001) (suggesting that the concept of freedom of speech is culture-specific). *See also* WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 5 (2nd ed., Foundation Press, Inc. 1995) (stating constitutional provisions for freedom of speech are different in most constitutions of the world).

4. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 121 (Henry Reeve trans., Oxford University Press 1955) (1835) (suggesting that America has no centralized control of information and that compared to France, American laws facilitate expansion of the press). *See also* Lyombe Eko, *The Law of Privacy in the United States and France: One President's Impeachable Offense is Another's Invasion of Privacy*, 22 COMM. & L. 1, 15-18 (Dec. 2000) (suggesting that in France, unlike in the United States, the private lives of politicians take precedence over freedom of the press).

5. *See* DE TOCQUEVILLE, *supra* note 4, at 119, 121 (suggesting that the media cultures are different in both countries due to their different political systems). For more recent studies of French political and cultural uniqueness, *see generally*, THE FRENCH EXCEPTION 1 (Emmanuel Godin & Tony Chafer eds., 2005) (suggesting that there is a "French Exception" evident in the political, cultural, and intellectual life of the nation); Philippe Poirrer, *French Cultural Policy in Question 1981-2003*, *in* AFTER THE DELUGE: NEW PERSPECTIVES ON THE INTELLECTUAL AND CULTURAL HISTORY OF POSTWAR FRANCE 301 (Julian Bourg ed., 2004) (suggesting that the French "trace the history of French government management of culture.").

free speech regimes of the United States and France with special reference to Internet content.

As a comparative endeavor, this article is classificatory rather than normative or prescriptive.[6] It is not aimed at suggesting an ideal online free speech regime or even to vindicate one. Comparative studies are important because they spur reflection, which, in the words of Jean-Jacques Rousseau, "is born of the comparison of ideas."[7] Comparative studies also help us maintain what William Twining calls "a sense of scale and proportion; [thereby] avoiding the dangers of [jurisprudential] parochialism."[8] Comparative analyses give us a global view of Internet content management in different cultures, and show how cultural specificities manifest themselves in Internet content regulation. Comparisons of the philosophical, legal, and ideological specificities of the major legal systems of the world are important for the appreciation of regulatory diversity and for the improvement of international understanding. Comparative communication law and policy studies thus allow us to understand and appreciate other legal systems and world views. They also provide, in the words of Pierre Legrand, an opportunity "to grant hospitality to alterity . . . [to recognize the right of] alterity to exist as alterity."[9]

II. CONFLICT OF LAWS OVER INTERNET CONTENT

In 1996, *l'Union des étudiants juifs de France* (The Union of French Jewish Students) (UEJF) sued nine French Internet service providers – including the French subsidiary of an American company, Compuserv – for hosting, disseminating or granting Internet access privileges to racist and anti-Semitic content,

---

6. *See* Otto Pfersmann, *Le droit comparé comme intérpretation et comme théorie du droit* [*Comparative Law as Interpretation and as Theory of Law*], REVUE INTERNATIONAL DE DROIT COMPARÉ [R.I.D.C.] 275 (2001) (Fr.) (suggesting that comparative law is not transnational law, it is merely the description of legal systems of given countries with the help of general principles).

7. *See* JEAN-JACQUES ROUSSEAU, THE FIRST AND SECOND DISCOURSES & ESSAY ON THE ORIGIN OF LANGUAGES 261 (Victor Gourevitch ed. & trans., Harper & Row 1986) (1750).

8. WILLIAM TWINING, GLOBALISATION & LEGAL THEORY 184 (2000).

9. Pierre Legrand, *The Same and the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240, 254 (Pierre Legrand & Roderick Munday eds., 2003).

contrary to French laws against the display or publication of such material.[10] The UEJF claimed that the service providers and hosts should be held criminally and civilly liable for making the objectionable Internet sites available to French citizens, and failing to block the sites when the UEJF complained about their content. In a bid to avoid criminal and civil liability, the nine Internet access providers agreed to cease and desist hosting or providing access to websites containing racist, Nazi, neo-Nazi, Third Reich and other memorabilia that contravened French Penal Code provisions against hate speech and hate symbols.[11] A French Superior Court judge ruled that since it was technically impossible to block or filter foreign-based Internet sites, the nine ISPs could not be held criminally or civilly liable for objectionable United States-based content accessed by French citizens.[12] However, the objectionable sites were taken down shortly thereafter.[13]

The 1996 UEJF suit turned out to be a prelude to further online hate speech litigation that would eventually lead to a conflict of French and American Internet law, culminating in the now famous *Yahoo! v. UEJF & LICRA* cases heard in French[14]

---

10. *See* Yves Etudes & Annie Kahn, *Vers une tutelle pour l'Internet français* [*Towards French Tutelage of the Internet*], LE MONDE (Fr.), June 9-10, 1996, at 28 (reporting UEJF actions against French ISPS and hosts).

11. *See* NOVEAU CODE PENÁL [N.C. PÉN], art. R. 645-1 (2003) (Fr.) (criminalizing the display of flags, emblems, symbols and other indicia of groups found guilty of genocide and crimes against humanity).

12. *See* Michel Alberganti, *La justice reconnait l'impossibilité de bloquer des sites d'Internet* [*Court Recognizes Impossibility of Blocking Internet Sites*], LE MONDE (Fr.), June 14, 1996, at 20.

13. This was the first of a number of cases against French or American ISPs who either provided French citizens access to objectionable sites, or hosted the sites in the United States destined for French citizens. *See also* UEJF contre Costes, Altern-B et AUI [UEJF v. Costes, Altern-B & AUI], Tribunal de grande instance [T.G.I.] [Superior Court] Paris, Jul. 10, 1997 (Fr.), *available at* http://www.canevet.com/jurisp/970710.htm (holding that sites containing racist and anti-Semitic speech that were hosted in the United States did indeed violate French law; however, the case was dismissed on other grounds, and the sites were removed from the Internet shortly thereafter).

14. The so-called "*affaire Yahoo!*" was heard and adjudicated by the Superior Court of Paris on three different occasions. LICRA & UEJF v. Yahoo! Inc. & Yahoo! France, No. 00/05308, Tribunal de grande instance [T.G.I.] [Superior Court], Paris, May 22, 2000, The Clerk of the Chief Justice Christine Bensoam Jean-Jacques Gomez, (Fr.), *available at* http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (Richard Salis, trans.); UEJF & LICRA v. Yahoo! Inc. & Yahoo! France, No. 00/05308, Tribunal de grande instance [T.G.I.] [Superior Court], Paris, Aug. 11, 2000, M. Jean-Jaques Gomez, (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=219; LICRA & UEJF v. Yahoo! Inc. & Yahoo! France, No. 00/05308, Tribunal de grande instance [T.G.I.]

and American courts from 2000 to 2005.[15] In April 2000, two French organizations set up to fight racism and anti-Semitism – *la Ligue Internationale Contre Le Racisme* (The International League Against Racism) (LICRA), and the UEJF – jointly sent a "cease and desist" letter to Yahoo!'s Santa Clara, California headquarters, informing the global Internet company that display of Nazi and Third Reich memorabilia on its Yahoo! Auctions portal, and Nazi-related discussions on its websites, violated French law. A third group, *le Mouvement contre le racisme et pour l'amitié entre les peuples* (The Movement Against Racism and For Friendship Among Peoples) (MRAP), soon joined the suit. The groups demanded that the offensive material be removed forthwith.[16] Legal action promptly followed in French courts. In May 2000, Judge Jean-Jacques Gomez of the High Court of Paris ruled that the Nazi, Third Reich, and other German World War II era memorabilia and relics displayed on Yahoo! Auctions, directly contravened French Penal Code provisions against hate speech and hate symbols, and constituted "an offense to the collective memory of a nation."[17]

In order to forestall the reach of French law into its Sunnyvale, California-based servers and Web portals, and to avoid execution of the French Court's orders in the United States, Yahoo! filed suit in the U.S. District Court for the Northern District of California, San Jose Division. Yahoo! sought a declaratory judgment to the effect that the First Amendment of the United States Constitution precluded enforcement within the United States of the French court order intended to regulate the

---

[Superior Court], Paris, Nov. 20, 2000, M. Jean-Jaques Gomez, (Fr.), *available at* http://www.juriscom.net/.

15. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme (LICRA), 169 F. Supp. 2d 1181 (N.D. Cal. 2001) [hereinafter *Yahoo! I*], *rev'd*, 379 F.3d 1120 (9th Cir. 2004) [hereinafter *Yahoo! II*], *vacated and reh'g granted*, 399 F.3d 1010 (9th Cir. 2005) [hereinafter *Yahoo! III*], *rev'd*, 433 F.3d 1199 (9th Cir. 2006) (remanding and ordering dismissal of Yahoo!'s suit).

16. *Yahoo! I*, 169 F. Supp. 2d at 1184.

17. *See* UEJF & LICRA v. Yahoo! Inc., Tribunal de grande instance [T.G.I.] [Superior Court] Paris, May 22, 2000, The Clerk of the Chief Justice Christine Bensoam, (Fr.), *available at* http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (Richard Salis, trans.). *See also* Acacio Pereira, *Yahoo!: droit national contre réseau mondial* [*Yahoo!: NationalLaw Versus Global Network*], LE MONDE (Fr.), Aug. 13, 2000, at 1, 5 (reporting that the Yahoo! case pitted French national law against the Internet).

content of Yahoo!'s speech over the Internet.[18] The issue before the federal district court was whether it was consistent with the Constitution of the United States for France to regulate speech by an American corporate citizen within the United States on the grounds that such speech was illegal in France and could be accessed by French Internet users.[19] The court said that it was not.[20]

While the court expressed its deep respect for the historical motivations of the French government in enacting the hate speech laws Yahoo! was found to have violated, it found that no American court could enforce the French court orders without violating the First Amendment.[21] The Court reasoned that inasmuch as the French Court order forbade the sale or distribution of certain items on Yahoo! Auctions on the basis of their association with a discredited, inhuman political organization, and banned the display of websites based on the authors' viewpoints with respect to the Holocaust and anti-Semitism, a U.S. court could not constitutionally make such an order.[22] The court noted that the First Amendment bars the government from regulating speech based on viewpoint without showing a compelling governmental interest such as averting imminent violence.[23] The court concluded that enforcement of the French High Court ruling on Yahoo!'s servers in the United States would infringe upon the company's First Amendment rights, and granted the requested declaratory judgment.[24]

LICRA and UEJF appealed to the Ninth Circuit Court of Appeals. In a *coup-de-théatre* worthy of Moliére or Beaumarchais, a three-judge panel of the Ninth Circuit held that the district court did not have jurisdiction, and reversed.[25] The Ninth Circuit panel held that the case was not ripe because American courts could not obtain jurisdiction over LICRA and UEJF until they availed themselves of an American forum by requesting a U.S. district court to enforce the French High Court judgment of 2000.[26] This

18. *Yahoo! I*, 169 F. Supp. 2d at 1186.
19. *Id.*
20. *Id.* at 1191-1192.
21. *Id.* at 1192-93.
22. *Id.* at 1184, 1189.
23. *Id.* at 1189.
24. *Id.* at 1194.
25. *Yahoo! II*, 379 F.3d 1120, 1126-27 (9th Cir. 2004).
26. *Id.*

ruling was essentially procedural and addressed neither of the substantive issues, viz, Yahoo!'s First Amendment claims, and concerns about the extraterritorial overreach of French laws.[27] Presumably, Yahoo!'s First Amendment rights would come into play when LICRA and UEJF attempt to enforce the French High Court judgment in an American court.[28]

In the meantime, the French defendants seem content to have the French court judgment hang indefinitely like a censorious sword of Damocles over Yahoo!'s head.[29] With the Yahoo! decision, the French courts effectively brought the Internet within the ambit of centuries of culture-specific, censorious regulation and control of media content. The painful events of World War II were essentially used as the thin edge of the wedge of French governmental content-based regulation of the Internet.[30] Unfortunately, the Ninth Circuit panel unwittingly and unknowingly helped France transfer 1400 years of stringent, national, content-based regulation from the traditional mass media to the global platform of the Internet. Yahoo! sought and was granted a rehearing *en banc*.[31] The full court of the Ninth Circuit heard the case *de novo*.[32]

The sharply divided court's per curiam opinion confined itself to the niceties of procedural law, essentially turning a deaf ear to the First Amendment pleas of Yahoo!.[33] The court held that while

---

27. *Id.*

28. *Id.* at 1126.

29. *Yahoo! I*, 169 F. Supp. 2d at 1189.

30. France has actively regulated Internet content since the mid 1990s. *See* Eko, *supra* note 4 at 14 (suggesting that the first time the French legal system was faced with the reality of the Internet was in 1996 when a book, published after the death of late President François Mitterand and subsequently banned in France for tarnishing his memory, was placed on the Internet despite the banning order. A cybercafé owner who had disseminated the illegal book was arrested for deserting his family, and his computers and servers were seized while he was in jail. The cybercafé owner claimed his arrest and incarceration, as well as the seizure of his computer equipment, was due to his dissemination of the banned book). *See also* Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL'Y 448, 469 (2001) (suggesting that the Yahoo! case was part of France's culturist content regulation of the Internet).

31. *Yahoo! III*, 399 F.3d 1010 (9th Cir. 2005), *vacating and granting reh'g en banc*, 379 F.3d 1120 (2004).

32. Yahoo! Inc. v. LICRA, No. 01-17424 (9th Cir. argued and submitted Mar. 24, 2005) (en banc), http://www.ca9.uscourts.gov/.

33. Yahoo! Inc v. LICRA., 433 F.3d 1199 (9th Cir. 2006).

the lower court properly exercised personal jurisdiction over LICRA and UEJF, the case was not ripe for adjudication because Yahoo! had taken no affirmative steps to "obtain an indication from the French court whether it believes that Yahoo! is in compliance, in 'large measure' or otherwise, with the terms of its interim orders."[34] Thus, a justiciable First Amendment issue failed to exist.

Ironically, the Ninth Circuit's dismissal of Yahoo!'s First Amendment claims is based on a misinterpretation of the French court ruling and orders of May 22 and November 20, 2000.[35] In its original complaint to the Superior Court of Paris,[36] LICRA asked the court to order Yahoo! Inc. "to take all necessary measures to prevent the display and sale, on Yahoo.com, of Nazi objects on French territory."[37] On the same day, UEJF sued Yahoo! in the same court, on the same issue of Nazi paraphernalia on Yahoo.com.[38] UEJF asked the court to order Yahoo! Inc. to:

> *[D]étruire toute donnée informatique stockée directement ou indirectement sur son serveur et cesser corrélativement tout hébergement et toute mise à disposition sur le territoire de la République à partir du site Yahoo!.com*[39]
>
> Destroy all computerized [anti-Semitic] material stored directly or indirectly on its server and to *correlatively* cease hosting and making available [anti-Semitic literature] on the territory of the [French] Republic.[40]

The two cases were consolidated and after oral arguments, Judge Jean-Jacques Gomez: ordered Yahoo! Inc. to:

> *[P]rendre toutes les mesures de nature à dissuader et à rendre impossible toute consultation sur Yahoo.com du service de ventes aux enchères d'objets nazis et de tout autre site ou service qui constitue une apologie du nazisme ou une contestation des*

---

34. Yahoo! Inc v. LICRA, 433 F.3d 1199, 1216 (9th Cir. 2006).

35. *See* LICRA & UEJF v.Yahoo!, *supra* note 14.

36. No. 00/05308, Tribunal de Grande Instance de Paris (Superior Court of Paris, April 10, 2000).

37. See LICRA & UEJF v. Yahoo!, *supra* note 14.

38. No. 00/05309, Tribunal de Grande Instance de Paris (Superior Court of Paris, April 10, 2000).

39. LICRA & UEJF v. Yahoo! Inc and Yahoo! France, *supra* note 14.

40. Translation by author.

crimes Nazis.[41]

> Take all steps necessary to dissuade and render impossible, all visits to Yahoo Auctions where Nazi memorabilia is available, as well as to any other site or service which makes apology for Nazism, or denies Nazi crimes.[42]

This first part of the court order clearly directs Yahoo! Inc. (not Yahoo! France) to disable the part of Yahoo! Auctions that featured Nazi memorabilia. This provision lacks any geographical or jurisdictional scope and makes no mention of France or French territory. Thus, the Ninth Circuit erroneously read a geographical limitation into the order. Indeed, the French court indicated it wanted the order to apply to all anti-Semitic material on Yahoo!'s servers, not just material available to users in France. The French court stated, ironically, in the preamble to its orders that Yahoo! Inc. was at liberty to restrict Nazi material on its servers without prejudice to its First Amendment rights:

> Attendu qu'en tout état de cause la société Yahoo! refuse d'ores et déjà sur son service enchères les ventes d'organes humains, de drogue, d'ouvrage ou d'objets en rapport avec la pédophilie, de cigarettes, ou d'animaux vivants, toutes ventes qu'elle exclut d'office et à juste titre du bénéfice du premier amendement de la constitution américaine garantissant la liberté d'opinion et d'expression.[43]

> Whereas, in any case, Yahoo! Auctions already forbids the sale of human organs, drugs, materials and objects linked to pedophilia, cigarettes, or live animals; it automatically excludes all these objects, and rightly so, under privileges it enjoys under of the First Amendment of the American Constitution, which guarantees freedom of opinion and expression.[44]

> *Attendu qu'il lui en coûterait très certainement fort peu d'étendre ses interdits aux symboles du nazisme et une telle initiative aurait la mérite de satisfaire à une exigence éthique et morale que partagent toutes les sociétés démocratiques. . .*[45]

---

41. LICRA & UEJF v. Yahoo! Inc and Yahoo! France, *supra* note 14.

42. Translation by author.

43. LICRA and UEJF v. Yahoo!, No. 00/05308, Order of November 20, 2000, *supra* note 14.

44. Translation by author.

45. LICRA and UEJF v. Yahoo!, No. 00/05308, Order of November 20, 2000, *supra*

> Whereas, it would certainly cost it (Yahoo!) very little to extend its prohibitions to symbols of Nazism; [and] such an initiative would have the merit of satisfying an ethical and moral exigency shared by all democratic societies. . .[46]

This exhortation by the French Superior Court shows that it clearly intended Yahoo! to include Nazi memorabilia on the list of items banned from Yahoo! Auctions.

The opinion of the Ninth Circuit was thus based on a misreading of the French court orders. The majority based its facile dismissal of Yahoo!'s First Amendment claims on the grounds that "the French court's orders require, by their terms, only a limitation on access to anti-Semitic material *by users located in France.*"[47] Unfortunately, this misintreprets the court order. The phrase "*from French territory*"[48] does not appear in Part I of either the May 2000 or November 2000 French court orders addressed to Yahoo! Inc.

Ironically, the concurring opinion of three of the Ninth Circuit judges demonstrates a grasp of the big political and cultural "picture" of the Yahoo! cases.[49] Their concurring opinion correctly points out that "both French court orders at issue in this case constitute actions of state. . .while LICRA and UEJF were private French litigants, they were acting as non-governmental, anti-racist associations and institutional partners with the French government in fighting anti-Semitism. . .Justice Gomez's opinion sets forth the moral judgment of France itself."[50] However, the judges strenuously and nimbly skirt the First Amendment issue (raised ironically by the French court), and essentially put their imprimatur on the French government's imposition of its content-based regulatory regime on the Internet.[51]

The five dissenting judges rightly scoffed at the legal gymnastics of the majority, accusing it of applying "First Amendment precedents exactly backwards. . .[T]he majority

---

note 14.

46. Translation by author.

47. Yahoo! v. La Ligue Contre Le Racisme et L'Anti-sémitisme, 433 F.3d 1199, 1216, 1221, 1222 (2006) (emphasis in the original).

48. *Id.* at 1202.

49. Ferguson, J., O'Scannlain, J., and Tashima, J.

50. Yahoo! Inc v. LICRA, 433 F.3d 1199, 1226 (9th Cir. 2006) (Ferguson, J.; O'Scannlain, J., & Tashima, J. concurring).

51. *Id.* at 1227.

effectively imposes an exhaustive requirement on Yahoo! to litigate this issue in France, confirm that it is still not in compliance with the orders. . .and obtain a 'final adverse judgment' before the majority will consider this case ripe."[52]

The Ninth Circuit essentially granted a *nihil obstat* to the extra-territorial application of France's vague, overbroad, and highly elastic content-based regulation of online speech. The result is that the court unwittingly put its imprimatur on France's political attempts to atone for centuries of anti-Judaic bias at the expense of the First Amendment rights of Yahoo!. Nevertheless, the court indicated that it would be unconstitutional in the United States for the French court to order Yahoo! to block American users from accessing anti-Semitic material.[53]

The long-running Yahoo! affair–arguably we have not seen the last of it–exemplifies the varying conceptualization and regulation of freedom of speech in general, and Internet content in particular, under French and American law. The research questions that guided this study were as follows:

1. What are the historical and political origins and contexts of the Internet regulatory regimes of France and the United States?
2. What are the characteristics of French and American regulation of bias-motivated speech and expression on the Internet?

III. HISTORICAL BACKGROUND OF FREE SPEECH AND HATE-SPEECH LAW IN FRANCE

When the French High Court handed down its decision in *UEJF & LICRA v. Yahoo! Inc. & Yahoo! France* in 2000, the judge framed the unprecedented case in historical terms. He called Yahoo!'s display of the Nazi and Third Reich memorabilia, "an offense to the collective memory of a nation."[54] The U.S. District Court for the Northern District of California also acknowledged

52. Yahoo! Inc v. LICRA, 433 F.3d 1199, 1236 (2006) (Fisher, J., Hawkins, J., Paez, J., Clifton, J., & Bea, J., concurring in part and dissenting in part).

53. *Id.* at 1222.

54. UEJF & LICRA v. Yahoo! Inc., Tribunal de grande instance [T.G.I.] [Superior Court] Paris, May 22, 2000, The Clerk of the Chief Justice Christine Bensoam, (Fr.), *available at* http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm (Richard Salis, trans.). *See also* Pereira, *supra* note 17 at 1, 5.

the role of history in the French High Court's Yahoo! decision.[55] In its ruling granting Yahoo! a declaratory judgment against execution of the French High Court's orders in the United States, the court expressed its deep respect for the historical motivations of the French government in enacting anti-racist and anti-Semitic laws.[56] For its part, the Ninth Circuit Court of Appeals held that as a nation, France had the sovereign right to enact hate speech laws against the distribution of Nazi propaganda in the traditional media and on the Internet in response to its terrible experiences at the hands of Hitler's *Wehrmacht* during World War II.[57] Additionally, LICRA and UEJF had the right, under French law, to bring suit in France against Yahoo! for violation of French speech laws.[58]

Thus, all three courts that heard the Yahoo! case viewed the content-based, anti-racist, and anti-Semitic speech laws as legacies of sensitive and painful events in recent French history. I submit that terrible as the unspeakable atrocities of the Nazis may have been, they are not the main driving force behind stringent French Internet content regulations. Indeed, French regulation of freedom of speech in general, and bias-motivated speech and expression in particular on the Internet can best be understood in the context of 1400 years of French history.

Contrary to what the French High Court and the Ninth Circuit Court of Appeals would want us to suppose, French content regulations predate by centuries, the country's terrible experiences at the hands of the Nazis during World War II.[59] The

---

55. *Yahoo! I*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

56. *Id.* at 1186.

57. *Yahoo! II*, 379 F.3d 1120, 1126-1127 (9th Cir. 2004).

58. *Id.*

59. For a comprehensive survey of the history of the press in France, see 1 CLAUDE BELLANGER, JACQUES GODECHOT, PIERRE GUIRAL & FERNAND TERROU, HISTOIRE GÉNÉRALE DE LA PRESSE FRANÇAISE [GENERAL HISTORY OF THE FRENCH PRESS] 33, 36, 65, 166 (1972). The French press was repressed for centuries while printing and dissemination of information was strictly controlled for centuries under the absolute monarchies of the Old Regime. In the fifteenth century, printed news bulletins dealt exclusively with the life of the king, the royal family, and military exploits. In 1509, French kings started granting printers written "privileges" to print specific documents for limited periods of time. In 1547, King Henri II promulgated the highly censorious Edicts of Fontainebleau and Châteaubriant in an effort to stop the ideas of the Protestant Reformation from entering France. In 1571, the Order of Moulins made it a criminal offense for booksellers to open book shipments from outside the country in the absence of governmental inspectors. The first French newspaper, *La Gazette*, was started in 1631

fact is that the Yahoo! decision is connected to, and was in fact the latest manifestation of hundreds of years of an institutional free speech logic that has resulted in what François Furet calls "the supremacy of law over rights."[60] With the Yahoo! decision, the French courts effectively brought the Internet within the ambit of centuries of censorious content-based regulation of speech and expression. This article traces that history.

The French freedom of speech regime is the result of centuries of power struggles between political groups and factions.[61] It is also the result of centuries of governmental suppression of the press, as well as fourteen centuries of uneasy race and ethnic relations in France.[62] The period from the *ancien*

---

after King Louis XIII granted the publisher and his family a monopoly privilege to publish. In 1789, a qualified freedom of the press was recognized in France for the first time in article XI of the revolutionary Declaration of the Rights of Man and of the Citizen. *See also* 3 CLAUDE BELLANGER, JACQUES GODECHOT, PIERRE GUIRAL & FERNAND TERROU, HISTOIRE GÉNÉRALE DE LA PRESSE FRANÇAISE [GENERAL HISTORY OF THE FRENCH PRESS] 241 (1972) (stating that it was 1881 when the French press became a "Fourth Estate," under the Law of 29 July 1881 on Freedom of the Press. This law marked the conclusion of centuries of governmental repression of the press from the Old Regime to the one-hundred-year French Revolution). Today France has an interventionist free speech regime in which the government takes affirmative steps to create a democratic free speech environment and referee the activity with a view to punish and eliminate abuses of that freedom. *See* Robert Picard, *Press Freedom in Europe*, *in* INTERNATIONAL COMMUNICATION: CONCEPTS AND CASES 7, 13 (Kwadwo Anokwa et al. eds., 2003) (stating that in France "whatever is not specifically forbidden is permissible").

60. *See* FRANÇOIS FURET, REVOLUTIONARY FRANCE: 1770-1880, at 537 (Antonia Nevill trans., Blackwell Books 1992) (1988).

61. Since the French Revolution of 1789, France has been divided politically into a left-right binary political culture. Political groups, parties, and associations ranging from Marxists to Bonapartists, monarchists to republicans, and all political tendencies in between have influenced French politics or taken their turn at the helm of state. *See* JEAN SÉVILLIA, LE TERRORISME INTELLECTUEL DE 1945 Á NOS JOURS [INTELLECTUAL TERRORISM FROM 1945 TO THE PRESENT] 253, 256 (2000) (suggesting that France's influential leftist intellectual class is intolerant towards those who differ with its politics and philosophy). *See also* PETER FYSH & JIM WOLFREYS, THE POLITICS OF RACISM IN FRANCE (2d ed. 2003) (discussing the rightwing National Front), *and* SERGIO LUZZATTO, L'IMPÔT DU SANG: LA GAUCHE FRANÇAISE À L'ÉPREUVE DE LA GUERRE MONDIALE (1900-1945) [THE PRICE OF BLOOD: THE FRENCH LEFT AND THE CHALLENGE OF WORLD WAR (1900-1945)], at 20 (1996) (discussing the changing ideology of the French left).

62. *See* LIONEL KOCHAN, THE MAKING OF WESTERN JEWRY, 1600-1819, at 44 (2004) (stating that in France, Jews were either expelled or segregated for hundreds of years and denied citizenship in France until the Revolution of 1789). *See also* HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440-1870, at 173, 193-94 (1997) (stating that though it was illegal to sell slaves in France, the French government allowed slavery and the slave trade in its African and West Indian territories.

regime to the present has been marked by the subordinate status of Jews and peoples of African descent in French society.[63] This long saga of inequality is the key to understanding stringent French Internet hate speech laws and regulations.

The contemporary communication regime of France is thus the reflection and crystallization of the following historical phenomena:

A. The so-called "*Question juive*" (the Jewish Question): defined simply as the role and place of Jews in the different European societies in general, and France in particular,[64]

B. The so-called "*Problème noir*" (The Black Problem): the enslavement, trafficking, and colonization of peoples of African descent in the French colonies and territories of Africa and the Caribbean, as well as the role and place of the descendants of slaves in post-colonial France,[65]

C. The circumscribed press heritage of the French Revolution of 1789,[66]

D. Hitler's conquest of France in 1940, and the genocidal

Indeed, King Louis XIV's galleys were powered by slaves.).

63. *See* KOCHAN, *supra* note 62, at 44 (stating that in France, Jews were segregated into ghettos and denied civil rights until the Revolution of 1789). *See also* SHELBY T. MCCLOY, THE NEGRO IN FRANCE 25-26 (1961) (stating that French citizens were allowed to bring slaves to France if they certified that the slaves were brought into the country for purposes of converting them to Roman Catholicism or teaching them a trade).

64. *See* KARL MARX, *On the Jewish Question, reprinted in* KARL MARX: SELECTED WRITINGS 46-48, 59 (David McLellan ed., Oxford University Press 2000) (1977) (suggesting that the Jewish question manifested itself in different ways in each European country. In 19th Century Germany, it was a theological question, namely, Judaism v. a Christian state. In France, it was a constitutional question: the incomplete political emancipation of the Jewish citizens of the country. Marx was responding to Bruno Bauer, a radical atheistic theologian who had written that "*die Judenfrage*" (the Jewish Question) was a religious question that had no place in society. Bauer suggested that in order to live together, Jews and Christians must renounce their respective religions, which tended to separate them. All Germans, not just Jews, needed emancipation from religion, Bauer said. Marx's response to Bauer conceptualized the Jewish Question as a global problem that also existed in France and the United States). *See also* ALBERT EINSTEIN, OUT OF MY LATER YEARS 248 (rev. reprint ed., Carol Publishing Group 1995) (1956) (suggesting that the Jewish Question is political abuse that arises out of antagonistic attitudes produced in non-Jews by Jews).

65. *See* 1 & 2 BARON DE MONTESQUIEU, *In What Manner the Laws of Civil Slavery Relate to the Nature of the Climate, in* THE SPIRIT OF THE LAWS 235, 238 (Thomas Nugent trans., 1949) (1748) (suggesting that all men are born equal and that slavery is unnatural). *See also* ROUSSEAU, *supra* note 7, at 83 (criticizing European notions of Africa as an immense, impenetrable continent whose people are "laden with vices").

66. *See* discussion *supra* note 59.

crimes committed against Jews and other minorities in France by Nazi Germany, and the collaborationist Vichy regime,[67] and

E. France's international struggle against Anglo-American language and mass mediated culture in the post World War II era.[68]

A. The Jewish Problem (Le Problème juif).

In 1995, newly elected French President, Jacques Chirac, made a speech in which he accepted responsibility, on behalf of the French state, for the nation's participation in atrocities against its Jewish citizens and Jewish refugees in France during World War II.[69] The specific event Chirac was apologizing for was the notorious *'Rafle du Vél' d'Hiv'* (the Vélodrome d'Hiver Sports Complex roundup) in which 13,000 Jewish men, women and children were rounded up in Paris on July 16-17, 1942 by the French Vichy regime, in collaboration with the occupation forces of Nazi Germany, and deported to German concentration camps.[70] In total, 75,000 Jews were deported from France; only 2,500 of the deportees survived the camps.[71]

Chirac's unprecedented admission of French state participation in the atrocities against its Jewish citizens was the culmination of a gradualist approach taken by the French government, and the French Catholic church, with respect to admission of its role in the Holocaust.[72] In effect, it was only in

---

67. *See* ROBERT O. PAXTON, VICHY FRANCE: OLD GUARD AND NEW ORDER, 1940-1944, at 181-83 (Columbia Univ. Press 2001) (1972).

68. *See* Nick Hewlett, *France and Exceptionalism*, *in* THE FRENCH EXCEPTION, *supra* note 5 at 3, 13 (suggesting that globalization of American culture and the "anglicization of the French language" led to a discourse of French nationalism and anti-Americanism).

69. *See* STUART EIZENSTAT, IMPERFECT JUSTICE, LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, at 315-317 (2003). *See also Our Trespasses*, 345 ECONOMIST 57 (1997).

70. Annette Wieviorka & Francoise Rosset, *Jewish Identity in the First Accounts by Extermination Camp Survivors from France*, 85 YALE FRENCH STUDIES 135, 136 n.3 (1994). *See also* PAXTON, *supra* note 67, at 181-183.

71. *See* Wieviorka & Rosset, *supra* note 70, at 139.

72. *See* RAPPORT AU PREMIER MINISTRE [REPORT TO THE PRIME MINISTER], J.O No. 211 of September 11, 1999. Reporting on a commission set up to indemnify Jews whose properties were seized as a result of anti-Semitic laws. Noting that as early as 1944, the provisional government of France, under General Charles de Gaulle, abrogated all anti-Semitic legislation and made plans to return all confiscated Jewish properties to their rightful owners; however, it took more than 50 years for these plans to be acted upon).

1993, more than half a century after the Holocaust, that French President François Mitterrand signed a decree making July 16, "a national day for the commemoration of racist and anti-Semitic persecutions carried out under the authority of the so-called 'Government of the French State' (Vichy)."[73] In 1995, Mitterrand went one step further. He "solemnly recognized the indescribable debt France owed the 76,000 deported French Jews."[74]

Chirac's 1997 *mea culpa* on behalf of the French state was followed two years later by the Roman Catholic Bishops of France, who issued a "declaration of repentance" in front of a gathering of 600,000 Jews.[75] The Roman Catholic Church leaders confessed the involvement of the Church, through its acquiescence and silence, in the persecution of French Jews during World War II.[76] The Bishops said that for centuries, an "anti-Judaic" tradition had prevailed in the church, giving way to hatred, and diminishing the capacity of the church to resist the diabolical anti-Semitism of the Nazis.[77]

In 1997, a commission was created to compensate Jews whose property had been plundered in World War II during the Nazi occupation of France.[78] Additionally, the French government set up a commission to investigate the "despoliation of Jews in France" during the Nazi Holocaust.[79] In 2000, the commission issued a report which identified 64,000 Jewish names associated with 80,000 bank accounts that belonged to Jewish Holocaust

---

73. Decree of Feb. 3, 1993, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 4, 1993, L27 36.

74. *See* Report to the Prime Minister on Decree No. 99-778 of Sept. 10, 1999, Instituting a Commission for the Compensation of Victims of Plunder that took Place under Anti-Semitic Legislation in Force During the [Nazi] Occupation, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 11, 1999, No. 211.

75. *See Our Trespasses*, *supra* note 69, at 57.

76. *Id. See also* MICHÈLE COINTET, L'EGLISE SOUS VICHY: LA REPENTANCE EN QUESTION [THE CHURCH UNDER VICHY: QUESTIONABLE REPENTANCE] 18 (1998) (suggesting that the repentance of the bishops was questionable since the leaders of the church had actively collaborated with the Vichy regime and provided it moral and social support). *But see* PAXTON, *supra* note 67, at 185(suggesting that outside the immediate Vichy circle, the French Catholic hierarchy publicly opposed the deportation of Jews to concentration camps in 1942).

77. *See Our Trespasses*, *supra* note 69, at 57.

78. Decree No. 99-778 of Sept. 10, 1999, Journal Officiel de la République Française [J.O.] [Official Gazette of France], September 11, 1999.

79. *Id.*

victims.[80] French banks agreed to compensate validated claimants, and voluntarily contributed $100 million to a French Holocaust foundation.[81]

These public confessions and acts of national contrition were the high point of a period of national reflection during which the French nation was supposed to come to terms with its sobering past.[82] In effect, even before France collapsed in the face of Hitler's *Wehrmacht,* the country had kept an intricate database, the so-called *fichier juif,* of all its Jewish citizens.[83] This database facilitated the Vichy government's arrest, internment, and deportation of Jews to concentration camps even before the Nazis asked the Vichy government to be part of the solution to the "Jewish problem."[84] The infamous "Velodrome d'Hiver" round up of 1942 was perhaps the most notorious of the internments and deportations.[85]

The Jewish Question is an ancient European problem that, at its core, is concerned with the role and place of Jews in the different European societies.[86] The "anti-Judaic" tradition that the French Catholic church confessed to is at the core of the Jewish

---

80. *See* NORMAN G. FINKELSTEIN, THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING 229 (2d. ed. 2003).

81. *Id.*

82. *See* ANTHONY D. KAUDERS, DEMOCRATIZATION AND THE JEWS: MUNICH, 1945-1965, at 276 (2004) (suggesting that France came to terms with the Vichy regime of Marshall Pétain in the 1980s). *See also* Roger Cohen, *France Confronts its Jews, and Itself,* N.Y. TIMES, Oct. 19, 1997, § 4, at 1.

83. *See* Le Centre Historique des Archives Nationales [Historical Center of the National Archives], *Fiche d'orientation: Les sources conservées aux Archives nationals relatives à la spoliation des Juifs de France* [*Guide to National Archives Holdings on the Despoiling of French Jews*] (1998), *available at* http://www.archivesnationales.culture.gouv.fr/chan/chan/notices/aj38f9.htm. (Archives of the Vichy regime's *Commissariat aux questions juives* (Commission on Jewish Questions) whose policy of "Aryanization" was aimed at eliminating Jewish influence from the French economy through the seizure and sale of their businesses, companies and private properties to French 'Aryans'" These archives contain very detailed personal information on all Jewish adults and children.).

84. *See* HENRI AMOUROUX, POUR EN FINIR AVEC VICHY: LES OUBLIS DE LA MEMOIRE [COMING TO TERMS WITH VICHY: THE OVERSIGHTS OF MEMORY] 444 (1997) (suggesting that Vichy France and Nazi Germany were parallel genocidal "Jew crushing machines," and that the French anti-Semitic machine was the first to go into gear as early as 1938).

85. *See* EIZENSTAT, *supra* note 69, at 317.

86. *See* KAUDERS, *supra* note 82, at 20 (suggesting that in Germany, the Jewish question had to do with people's attitudes towards Jews: they were either philosemitic or anti-Semitic).

question, which is defined as fourteen centuries of dehumanization and persecution of the French Jewish community due to its perceived spiritual separation and non-assimilability into the mainstream Gallic, Latin, and Roman Catholic, culture of France.[87]

Karl Marx (himself a Jew) pointed out that in nineteenth century France, the Jewish question was a constitutional issue, "a question of the incompleteness of political emancipation" of Jews, which manifested itself as a failure of the French state to grant Jews political and human rights.[88] This was because the "Jewishness" of Jews represented religious and theological opposition to the French state, whose citizens were overwhelmingly Roman Catholic.[89]

The Jewish question actually predates the modern French nation state. The "anti-Judaic" tradition of the French Roman Catholic Church goes back to the sixth century A.D., when the Roman Empire collapsed, and the Gaullo-Roman nation that was to become France rose from its ashes.[90] A few historical facts are illustrative: the Franks (a Germanic people led by Clovis and his descendants) swept over Gaul and created a kingdom of Franks.[91] Records show that there were Jewish communities in the early Kingdom of the Franks.[92] In the sixth century, Clovis, King of the Franks, converted to Roman Catholicism. He was baptized on Christmas day, 496 AD, together with 3000 of his soldiers.[93] With

87. *See* EINSTEIN, *supra* note 64, at 248, 252 (suggesting that the Jewish Question is political abuse that arises out of antagonistic attitudes produced in non-Jews by Jews and that the Nazis considered Jews nonassimilable because they could not be "driven into uncritical acceptance of dogma"); *see also* JAY R. BERKOVITZ, RITES OF PASSAGES: THE BEGINNINGS OF MODERN JEWISH CULTURE IN FRANCE, 1650-1860, at 16 (Univ. of Penn. Press 2004).

88. *See* MARX, *supra* note 64, at 46, 48-49.

89. *See* FURET, *supra* note 60, at 87.

90. *See* JOHN WACHER, THE ROMAN EMPIRE 268-269 (1987) (stating that at the collapse of the Roman Empire, the Franks set up a royal house that occupied what is now modern France). *See also* PHILLIPPE DELORME & LUC DE GOUSTINE, CLOVIS 496-1996: RESEARCH ON HIS XVTH CENTENARY 45 (1996).

91. *See* WACHER, *supra* note 90.

92. *See* H.H. BEN-SASSON, ET AL., A HISTORY OF THE JEWISH PEOPLE 397 (H.H. Ben-Sasson ed., Harvard University Press 1976) (1969).

93. *See* GREGORY BISHOP OF TOURS, HISTORY OF THE FRANKS 41 (Ernest Brehaut trans., Octagon Books 1965) (594 A.D.). *See also* RENÉE MUSSOT-GOULARD, LE BAPTEME QUI A FAIT LA FRANCE [THE BAPTISM THAT CREATED FRANCE] 131 (1996) (stating that the conversion and Baptism of King Clovis and 3000 of his soldiers, was the "founding event" of Roman Catholic France).

flaming zeal and military conquests, Clovis founded a Catholic kingdom that ultimately evolved into contemporary France.[94] At its founding, this Frankish kingdom of "baptized peoples,"[95] the "eldest daughter"[96] of the Roman Catholic Church, forcefully baptized Jews,[97] and was extremely hostile towards those who refused to convert to Christianity despite the forced baptism.[98] Indeed, anti-Semitism soon became one of the hallmarks of 6th century Gaul.[99] According to Gregory, Bishop of Tours, Jews who refused to convert or "put aside the veil of Mosaic law and interpret the Scriptures in their spiritual sense, and with pure hearts contemplate in the sacred writings, Christ, Son of the living God. . .,"[100] faced the ire of the Church. Years later, King Gunthram also ordered all Jews to be forcibly baptized into Roman Catholicism.[101]

Ironically, attitudes toward the Jewish community in early Christian Gaul were based on early Church history and tradition, which celebrated Christian victimhood, martyrdom, and sainthood.[102] According to the New Testament, the Jews had rejected Jesus Christ (the Jewish Messiah), dismissed the Christian

---

94. *See* GREGORY, *supra* note 93 at 155. In 1996, the French government officially recognized the baptism of King Clovis as the founding event of the nation by celebrating the 1500th anniversary of the baptism of King Clovis.

95. BEN-SASSON, *supra* note 92, at 397-398, 412. *See* MUSSOT-GOULARD, *supra* note 93, at 164.

96. *See* DELORME & DE GOUSTINE, *supra* note 90, at 172.

97. *See* GREGORY, *supra* note 93 at 155 (stating that King Chilperic ordered "many Jews to be baptized." However, many of them continued to practice their religion to the chagrin of the King and the Church).

98. *See* GREGORY, *supra* note 93, at 189 (stating that King Gunthram is said made the following statement about Jews who had welcomed him with shouts of "long live the king:" "Woe to the Jewish tribe, wicked, treacherous and always living by cunning. . . [T]hey cried out their flattering praises today. . .[because] they wish me to order their synagogue, long ago torn down by the Christians, to be built at the public cost; but by the Lord's command I will never do for it.").

99. *See* GREGORY, *supra* note 93, at 82 (Bishop Gregory paints one of the earliest portraits of a corrupt and debauched bishop who was alleged to be subservient to "Jewish exploiters").

100. *See* GREGORY, *supra* note 93, at 113-14 (Gregory records an incident in Clermont in which a Jew poured stinking oil on another Jew who had converted to Christianity. The Christians in the town destroyed the synagogue and the majority of Jews converted to Christianity out of fear. Those who refused to be baptized were forced to leave the city.).

101. *See id.* at 155.

102. *See generally* S. BARING-GOULD, LIVES OF THE SAINTS xii (1914) (suggesting that in Church history, believers have always shown respect to the martyrs).

Holy Trinity as blasphemy and idolatry,[103] and persecuted the early Church to the point of creating its first martyrs.[104] Having positioned itself from its very beginning as a victim of Jewish persecution, the Church religiously and gladly returned the favor in Gaul and elsewhere. The first major Jewish massacre in France occurred in 1096 in Rouen before the first Crusade.[105] Christian Crusaders on their way to fight Moslem "infidels" in the Holy Land massacred Jews, accusing them of crucifying Christ, under whose banner the Crusaders were going to war.[106]

During the Middle Ages, a period thoroughly dominated by the Roman Catholic Church, the Jewish question became more acute than ever before in Gaul. Jews lived under harsh restrictions.[107] When Pope Innocent visited Gaul in 1128, some Jewish leaders who were described by one Abbott Suger as "members of that blind synagogue of the Jews of Paris,"[108] came to pay their respects to the Holy Father. They offered him a scroll of the Torah.[109] The Pope is reported to have prayed the following prayer in response to the visit and the gift: "May Almighty God take away the veil (of Mosaic Law) from your hearts."[110]

The anti-Judaic underbelly of French culture continued to rise to the surface from time to time. During the Middle Ages, Catholic church membership and French citizenship were synonymous. Two noted French kings, Philip V (The Fair), who ruled from 1285-1314, and his son and heir, Charles IV, who reigned from 1322-1328, expelled practicing Jews from Roman Catholic France during their reigns.[111] This was because Jews were viewed as an

---

103. *See* BEN-SASSON ET AL., *supra* note 92, at 385.

104. *See Acts* 7:51, 7:54-7:59 (martyrdom of St. Stephen); *Acts* 9:1-4, 22:4-22:5 (Saul's persecution of the Church) (King James).

105. *See* G.A. CAMPBELL, THE CRUSADES 63-64 (1935) (describing the massacre of Jewish men, women and children under the guise that they had crucified Christ in whose name they were going on the crusade. Ironically, the blood thirsty crusaders were said to have the attitude of the newly converted King Clovis centuries earlier, who, upon hearing that Jews had crucified Christ, is said to have exclaimed "Would that I had been there with my Visigoths (Franks).").

106. *See* BEN-SASSON, *supra* note 92, at 413; *see also* CAHNMAN, *supra* note 106, at 45-46.

107. *See* SUGER, ABBOTT OF SAINT DENIS, THE DEEDS OF LOUIS THE FAT, (1078-1137), at 148-149 (Richard Cusimano & John Morehead trans., 1992) (1151 A.D.).

108. *See* SUGER, *supra* note 107, at 148-149.

109. *Id.* at 148-149.

110. *Id.*

111. Elizabeth A.R. Brown, *Philip V, Charles IV and the Jews: The Alleged Expulsion*

obstacle to the cultural and religious hegemony of Roman Catholicism.[112] The last expulsion of Jews from France took place in 1394.[113]

The result is that between 1394 and 1615 when this expulsion was affirmed, Judaism in France was practically transformed into a private, underground religion confined to Papal territory in the South of France, where many "Papal Jews" were forcefully converted to Roman Catholicism.[114] Jewish communities were driven deeper underground when the Protestant Reformation reached France in 1512 and a series of French kings turned their ire on the protestant Huguenots.[115] France subsequently went through a series of religious wars in which Jewish communities were caught in the Catholic-Protestant cross-fire.[116] During the Renaissance in France, the rebirth of learning also saw a rebirth of anti-Semitism. Some *philosophers* like Voltaire, who championed human rights and freedom from the shackles of dogmatic religion, were often hostile towards Jews who refused to renounce their religion and culture, and worship at the altar of secularism, rationalism, and humanism.[117]

i) The French Revolution and the Emancipation of the Jews

The French Revolution of 1789 swept away most of the vestiges of the *ancien regime.* The Revolution was the crystallization of philosophical and ethical ideals rooted in natural law doctrines,[118] the philosophical liberalism of the 18th century

---

of 1322, 66 SPECULUM 295 (1991).

112. BERKOVITZ, *supra* note 87, at 14.

113. *Id.* at 14.

114. *See* KOCHAN, *supra* note 62, at 44.

115. BERKOVITZ, *supra* note 87, at 15. *See also* EUROPEAN HISTORY 75 (C. Emmott ed. 1971).

116. BERKOVITZ, *supra* note 87, at 15. *See also* EUROPEAN HISTORY, *supra* note 115, at 75.

117. *See* ARTHUR HERTZBERGER, THE FRENCH ENLIGHTENMENT AND THE JEWS 248, 280 (1968) (suggesting that the French Enlightenment had an anti-Jewish pedagogy).

118. *See, e.g.*, René Descartes, *Regles pour la Direction de L'Esprit [Rules for the Direction of Our Native Intelligence], in* OEUVRES PHILOSOPHIQUES [PHILOSOPHICAL WORKS] (Ferdinand Alquié ed., Éditions Garnier Frères 1963). *See also* JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 11 (rev. ed., Westview Press 1990) ("Natural law theories maintain that there is an essential (conceptual, logical, necessary) connection between law and morality.").

Enlightenment, and specifically the ideas of the *philosophes*: Voltaire,[119] Rousseau,[120] Diderot,[121] Montesquieu,[122] and others.[123] This philosophical bag of ideas was embodied, for the first time, in the most important pronouncement of the French Revolution: the Declaration of the Rights of Man and of the Citizen, of 26 August 1789.[124]

The main characteristic of the Declaration is that it had very pronounced universal, humanistic values. The French Revolution thus spurned what Jacques Derrida describes as an "ethico-political" culture, a system with a pronounced moral philosophical bent.[125] This movement was based on the premise that human beings have natural, inalienable, and sacred rights, and that ignorance, contempt, and obliviousness towards these human rights were the root cause of public unrest and government corruption.[126] The Declaration of the Rights of Man and of the Citizen essentially set the philosophical guidelines for the protection of the moral interests and human dignity under French law.[127]

In keeping with the universalistic, libertarian, and egalitarian

---

119. *See generally* FRANÇOIS MARIE AROUET DE VOLTAIRE, TREATISE ON TOLERANCE (1673).

120. *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762).

121. *See* Nelly S. Hoyt & Thomas Cassirer, *Introduction, in* DENIS DIDEROT ET AL., ENCYCLOPEDIA, at vii-xxxvii (Nelly S. Hoyt & Thomas Cassirer trans., Bobbs-Merrill Co. 1965) (1765) (stating the Encyclopedia was one of the main vehicles for the expression of Enlightenment ideas).

122. *See* BERKOVITZ, *supra* note 87, at 13 (advancing the principle of the separation of the powers of government). *See also* JOHN MERRILL ET AL., TWILIGHT OF PRESS FREEDOM 11 (2001).

123. *See, e.g.*, JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE 84, 93 (Gateway Edition 1968) (1690) (stating government must be based on the consent of the governed). *See also* A. FOUILLÉ, J. ET AL., MODERN FRENCH LEGAL PHILOSOPHY 51-52 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., Boston Book Company (1916).

124. Declaration of the Rights of Man and Citizen, Article XI (France, August 26, 1789).

125. *See* JACQUES DERRIDA, FORCE DE LOI [FORCE OF LAW] 45 (1994).

126. *Id.*

127. *See* CHRISTIAN DADOMO & SUSAN FARRAN, FRENCH SUBSTANTIVE LAW 213 (1997) (stating that under French law, the moral interests of a person include privacy, security, tranquility and the dignity). Generally speaking, French law has a very pronounced underpinning of secular morality. Acts are judged in terms of their conformity or nonconformity to moral law, that is to say, good morals. Under French law, courts can investigate the morality of a person, a witness can testify to the morality or good character of a person, and government officials can issue a "certificat de moralité (attestation of good character) to a person.

human rights creed, rhetoric and agenda of the French Revolution, the Constituent Assembly enacted legislation in 1790 and 1791 granting the 39,000-strong French Jewish community legal equality with other French citizens.[128] For the first time in centuries, this most Catholic of Roman Catholic countries recognized the humanity, equality, and citizenship of French Jews.[129] As a result, French Jews enthusiastically supported the Revolution and participated in celebrations marking the arrival of a republican government.[130] Despite considerable opposition from sections of French society to the acceptance of Jews as equal citizens,[131] the Jacobins, whose revolutionary republic (1792-1794) was to culminate in the infamous Reign of Terror, advanced an ideology of national solidarity – Liberty, Equality and Fraternity – that recognized the universal brotherhood of all people regardless of color, race or religion.[132] Indeed, under Jacobin rule, equality and fraternity soon became more important than liberty.[133]

However, these developments did not solve the Jewish question. In the wake of the French Revolution, open and violent anti-Semitism, provoked in large measure by widespread Jewish usury, became prevalent in Alsace and Southwestern France where Jewish communities were concentrated.[134] Emperor Napoléon Bonaparte, who had seized power, thought Jewish religious distinctiveness and cultural separation was contrary to

---

128. *See* BEN-SASSON, *supra* note 92, at 413. *See also* CAHNMAN, *supra* note 106, at 87.

129. *See* LE JOURNAL REVOLUTIONNAIRE D'ABRAHAM SPIRE [ABRAHAM SPIRE'S REVOLUTIONARY NEWSPAPER] 131 (Simon Schwartzfuchs ed., 1989) (translating a report by a Yiddish newspaper, the *Zeitung*, of the revolutionary National Assembly's decree granting Jews French citizenship after centuries of religious oppression).

130. *See* Ronald Schechter, *Translating the "Marseillaise": Biblical Republicanism and the Emancipation of Jews in Revolutionary France*, 143 PAST & PRESENT 108 (1994).

131. *See* BEN-SASSON, *supra* note 92, at 413; *see also* CAHNMAN, *supra* note 106, at 90.

132. *See* MARC BOULOISEAU, THE JACOBIN REPUBLIC 32 (Jonathan Mandelbaum trans., Cambridge University Press 1983) (1972) (suggesting that the humanity and citizenship of Jewish people was recognized despite deportation orders against "unassimilated" Ashkenazim in eastern France).

However, the decision of the Constituent Assembly was not welcomed by all sections of French society. As late as the 1940s, some Anti-Semitic French writers supported the thesis that the revolutionaries of 1789 and sections of the press were duped or bribed into supporting French citizenship for Jews in the name of liberty, equality and fraternity. *See* LUCIEN PEMJEAN, LA PRESSE ET LES JUIFS [THE PRESS AND THE JEWS] 10-12 (1941).

133. *See* BERNARD SPOLSKY, LANGUAGE POLICY 65 (2004) (suggesting that under the Jacobin government, equality was more important than liberty).

134. *See* A DOCUMENTARY SURVEY OF NAPOLEANIC FRANCE 224 (Eric A. Arnold, Jr. ed. & trans., Univ. Press of Am. 1994).

the country's Unitarian ideology.[135] He therefore subjected Jews to special legislation: the 1806 "Decree on Jewish Usury."[136] This decree was essentially an attempt to forcefully integrate Jews into French culture. In 1808, the *Code Napoléon* essentially withdrew from the unassimilated, Yiddish-speaking (Ashkenazi) Jews of Alsace, the civil rights they had been granted by the Constituent Assembly in 1791.[137] Though the Grand Sanhedrin of the Jewish community accepted civil marriage and state control over Jewish religious practices, Napoleon continued to express doubts about the fundamental loyalty of Jews to the French nation.[138] Furthermore, while Catholic priests and Protestant pastors were paid by the state under the new revolutionary dispensation, rabbis were not.[139] A subsequent law gave the central government power over Jewish affairs and decisions to build synagogues.[140] This state-imposed cultural assimilation did not solve the Jewish question either. Anti-Semitism remained a factor of French politics and culture.

French anti-Judaic sentiment reared its head once again at the end of the nineteenth century when a number of political and ideological "affaires" (scandals) erupted on the political scene, fueled by a vocal, anti-Semitic section of the French press. The most infamous of these scandals was the "*Affaire Dreyfus*" (1894-1906), which rocked and divided the French political, judicial,

---

135. *See* KOCHAN, *supra* note 62, at 286 (stating that Jews essentially had no choice but to adopt "Chiristian" names because a Napoleonic decree ordered them, on pain of expulsion, to adopt "fixed" first names and family names which could not be taken from the Old Testament or from any town).

136. *See* A DOCUMENTARY SURVEY OF NAPOLEONIC FRANCE, *supra* note 134, at 224-226.

137. *See* FURET, *supra* note 60, at 233.

138. *See* FIRST DECREE ORDERING EXECUTION OF THE REGULATION ON JEWS OF MAY 30, 1806; MAR. 17, 1808 [hereinafter FIRST DECREE], *reprinted in* A DOCUMENTARY SURVEY OF NAPOLEONIC FRANCE, *supra* note 134, at 280. These two Napoleonic decrees created an Assembly of Jewish Notables which was asked to answer 12 questions on behalf of the Jews of France. This included questions like: did French-born Jews consider France their fatherland, would they willingly serve if called upon to do so, and did they consider French Christians their brothers. *See also* F. MALINO, THE SHEPHARDIC JEWS OF BORDEAUX: ASSIMILATION AND EMANCIPATION IN REVOLTIONARY AND NAPOLEONIC FRANCE (1978).

139. *See* FIRST DECREE, *reprinted in* A DOCUMENTARY SURVEY OF NAPOLEONIC FRANCE, *supra* note 134, at 280, 285.

140. *See* SECOND DECREE ORDERING EXECUTION OF THE REGULATION OF JEWS OF MAY 30, 1806; MAR. 17, 1808 [hereinafter SECOND DECREE], *reprinted in* A DOCUMENTARY SURVEY OF NAPOLEANIC FRANCE, *supra* note 134, at 285.

intellectual, journalistic, and military establishments.[141] Stories alleging treasonous actions of a Jewish military officer, Captain Alfred Dreyfus, appeared in the conservative newspaper, *Le Figaro*, and the nationalist, *La Libre Parole* (*Free Speech*), sparking political and military controversy.[142] The newspaper reported that Captain Dreyfus had been arrested for passing French secrets to the German embassy in Paris.[143] *La Libre Parole* pointed to the Dreyfus Affair as an illustration of the disloyalty of French Jews.[144]

The French press essentially fabricated the Dreyfus affair, which resulted in the unjust trial and imprisonment of Captain Dreyfus. The affair also resulted in the exile of novelist and polemicist, Emile Zola, who had risen to the officer's defense.[145] In the final analysis, the *Affaire Dreyfus* was fueled by a latent undercurrent of anti-Semitic ideology in public opinion that had been fanned into flame by the French press. Ultimately, the affair marked the massive entry of French intellectuals into politics. It also marked their willingness to "defend the dignity of individuals, or minority groups. . . whose rights were threatened by the army, the church, public opinion and even political parties."[146] The successful engagement of intellectuals in the affair made anti-Semitism, in the press and elsewhere, an aberration. Thereafter, content regulation of the French press became possible, even acceptable.

B) Le Problème Noir (The "Black Problem") in French History and Jurisprudence.

The second historical phenomenon or ethnic "problem" that has influenced French mass media and Internet law and policy is known as *le problème noir* (the black problem). It can be defined as a Western philosophical and theological construction and an articulation of the "difference" and humanity – or lack thereof – of

---

141. *See* Michel Winock, *L'Affaire Dreyfus*, in DICTIONNAIRE DES INTELLECTUELS FRANÇAIS [DICTIONARY OF FRENCH INTELLECTUALS] 371 (Jacques Julliard & Michael Winock, eds., 1996).

142. *See* PIERRE MIQUEL, L'AFFAIRE DREYFUS [THE DREYFUS AFFAIR] 7 (1959).

143. *Id.*

144. *Id.* at 22.

145. EMILE ZOLA, THE DREYFUS AFFAIR: 'J'ACCUSE' AND OTHER WRITINGS, at xiii-xxi (Alain Pages ed., Eleanor Levieux trans., Yale Univ. Press 1996).

146. *See* Winock, *supra* note 141, at 371.

peoples of African descent.[147] The black problem was succinctly, if ironically set forth in the 18th century by Montesquieu, the first major philosopher to attack slavery:

> On ne peut se mettre dans l'esprit que Dieu, qui est un maître très sage, ait mis une âme, surtout une bonne âme dans un corps tout noir. . .il est impossible que nous supposions que ces gens-la soient des hommes; parce que, si nous les supposions des hommes, on commencerait à croire que nous ne sommes pas nous mêmes chrétiens.[148]

> It is hardly imaginable that God, who is a very wise Being, could have put a soul, especially a good soul, in a body that is so black. . .it is impossible for us to suppose that those creatures are human beings, because if we suppose that they are human, we would begin to believe that we ourselves are not Christians.[149]

By the nineteenth century, Europeans grudgingly accepted that Africans had souls.[150] However, as a result of the racial theories advanced by writers like Gobineau, French intellectuals and ordinary citizens believed, like most Europeans, that people of European ancestry were "mentally and aesthetically superior" to peoples of African descent.[151] Ultimately, the black problem became the posture of France and its citizens towards Africa, and peoples of African descent, with whom the French have been associated for centuries through slavery, the slave trade, colonialism, and post-independence linguistic and cultural

---

147. The so-called "black problem" has been "tackled" by many Western philosophers. *See, e.g.*, GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 93 (J. Sibree trans., Willey Book Co. 1944) ("[T]he Negro, as already observed, exhibits the natural man in his completely wild and untamed state. . .there is nothing harmonious with humanity to be found in this type of character."). *See also* MCCLOY, *supra* note 63, at 25 (defining the "Black Problem" as the disparity between the non-existence–in theory–of slavery in France, and French governments' legal recognition of slavery and the slave trade in the French colonies of Africa and the West Indies).

148. MONTESQUIEU, *supra* note 65, at 238-239.

149. Author's translation. *See also id.* at 238-239.

150. *See* THOMAS, *supra* note 62 at 44, 398 (suggesting that since one of the ideologies for slavery and the slave trade was conversion of Africans, as early as the 17th century, Spain and Portugal required that newly captured slaves be baptized and given Christian names before or during the passage to Europe).

151. *See* JACQUES PORTES, UNE FASCINATION RÉTICENTE: LES ETATS-UNIS DANS L'OPINION FRANÇAIS, 1870-1914 [A RETICENT FASCINATION: THE UNITED STATES IN FRENCH PUBLIC OPINION 1870-1914], at 104, 123 (Université de Paris I Panthéon-Sorbonne 1987).

associations.[152]

Of all the European colonial powers, France had the most ambiguous, most contradictory, and perhaps the most hypocritical posture towards slavery and the slave trade. As a Roman Catholic kingdom,. France, together with other European powers, received official blessing to go into African slavery and the slave trade from Pope Eugene IV, whose 1442 bull (letter), *Illius Qui*, proclaimed that enslaving Africans had the blessing of a crusade, if the aim was to convert the natives to Christianity.[153] This papal blessing brought the African slave trade under the ambit of the "just war" principle.[154] The Papal letter stated that all Europeans who lost their lives in this "crusade" to convert Africans, would have full remission of their sins.[155] Under Roman Catholic Church doctrine of that century–Popes Nicholas V and Calixtus III also issued bulls to that effect–Africans could be enslaved for the salvation of their wretched souls in the afterlife![156]

Nevertheless, France had a very restrictive policy towards slavery on French soil. France boasted that slavery was never officially allowed, and never really existed on French soil though it flourished in French colonies and territories and enriched France.[157] In 1571, King Charles IX issued a decree stating that all people living in France were free and any slave who reached France and became baptized into the Roman Catholic Church would be freed.[158] The decree was aimed at preventing slavery from taking root and becoming institutionalized in France. However, slavery and the slave trade thrived in French colonies

---

152. French humanitarians and philosophers found slavery and the *traite des nègre* (negro slave trade), which were legal in French colonies and territories (including Louisiana) morally repugnant, indefensible and intellectually problematic. *See, e.g.*, MONTESQUIEU, *supra* note 65, at 235-238. *See also* ROUSSEAU, *supra* note 7, at 83 (criticizing European notions of Africa as an immense, impenetrable continent whose people are "laden with vices" and so needed to be civilized and Christianized).

153. *See* JUNIS P. RODRIGUEZ, CHRONOLOGY OF WORLD SLAVERY 56-57 (ABC-CLIO, Inc. 1999).

154. *Id.* at 57.

155. *Id.*

156. *See* THOMAS, *supra* note 62 at 64-5, 666 (stating that Pope Nicholas V issued the bulls, *Dum Diversas* in 1452, and *Romanus Pontifex* in 1454, while Pope Calixtus III issued the bull Inter Caetera in 1456. About 400 years later, Pope Gregory XVI issued an abolitionist bull prohibiting Christians from carrying out the slave trade.).

157. *See generally* SUE PEABODY, THERE ARE NO SLAVES IN FRANCE 3-10 (Oxford Univerity Press 1996). *See also* DIDEROT ET AL., *supra* note 121, at 263.

158. *Id.*

and overseas territories. King Louis XIII allowed slavery and the slave trade to continue provided that slave owners who acquired new African slaves–including those who had been Islamized in Africa before their capture.[159]–instruct them in the Catholic religion.[160] French ports like Nantes, Bordeaux, La Rochelle, Le Havre, and Saint-Malo, became major slave ports that sent out slave ships and generally supported the economic infrastructure of the slave trade.[161]

In 1673, to satisfy the demand for labor in French-owned sugar cane plantations in the Caribbean–Martinique, Guadeloupe, and St. Christophe–King Louis XIV gave French colonial companies exclusive rights to export slaves from Africa to the Caribbean.[162] In 1685, King Louis XIV issued a royal edict, the *Code Noir*, or Black Code which regulated slavery and the slave trade in French colonial territories, including Louisiana.[163] An edict of 1716 allowed slave owners in French colonies to bring their slaves to France for purposes of giving them religious instruction and teaching them a trade.[164] In 1777, King Louis XVI promulgated the *Declaration pour la police des Noirs* (Declaration on Policing of Blacks), barring the entry of blacks into France.[165]

In the 18th century, France's hypocritical, two-track policy on slavery came under attack from the country's intellectuals. As the country whose philosophers pioneered revolutionary political concepts like human rights, France had, for close to three centuries, wrestled with the issue of how to reconcile the high ideals of Christianity, civilization, democracy, freedom, equality and human rights, with slavery, the slave trade, racism, and racial discrimination. A well-known French philosopher, Baron De Montesquieu, wrote against slavery, arguing that slavery and the slave trade was contrary to human rights doctrines.[166]

---

159. *See* DIDEROT ET AL., *supra* note 121, at 263.

160. *See* DIDEROT ET AL., *supra* note 121, at 266.

161. *See* THOMAS, *supra* note 62, at 253-254.

162. DIDEROT ET AL., *supra* note 121, at 269-273. (The Code required *inter alia,* that masters to instruct their slaves in the Catholic religion and specified that the children of slaves were also slaves.)

163. *Id.* at 262.

164. *See* MCCLOY, *supra* note 63, at 25.

165. *See* PEABODY, *supra* note 157, at 118, 120.

166. *See* MONTESQUIEU, *supra* note 65, at 2. *See also* 3 BELLANGER ET AL., *supra* note 59.

The Revolution of 1789 brought things to a head. One of the most difficult decisions faced by the Constituent Assembly was the application of the democratic universalism of the Declaration of the Rights of Man and of the Citizen of 1789 to all men and women–including free, mixed-race people and African slaves in French colonies. The Revolution abolished slavery very "reluctantly and belatedly."[167] Actually, in 1790, the deputies first voted not to abolish slavery.[168] However, with the backing of Parisian abolitionist societies, led by Brissot de Warville's *Société des Amis des Noirs* (*Society of Friends of Blacks*), Robespierre and other revolutionaries argued that the noble sentiments of the Declaration of the Rights of Man and of the Citizen clashed with racism, slavery, the slave trade and anti-Judaic policies and practices.[169]

On May 15, 1791 the Constituent Assembly passed a decree stipulating that every person, whether black or white, who lived on French soil, was a free person with all the rights of citizenship.[170] Free colored or mixed race persons in French colonies and territories were also granted civil liberties.[171] However, the decree was initially deemed inapplicable to slaves.[172] But following much wrangling in France, and many bloody slave uprisings in France's Caribbean colonies, the French National Convention officially abolished slavery in all French colonies in 1794.[173]

However, in a bid to revive France's colonial empire and protect its commercial interests, Napoleon Bonaparte restored slavery in the French colonies in 1802.[174] His slavery re-establishment decree was met with resistance in many colonies including Haiti.[175] Nevertheless, slavery remained legal in French

---

167. *See* THE OXFORD DICTIONARY OF THE FRENCH REVOLUTION 411 (William Doyle ed., 2d. ed. 2002).

168. *Id.*

169. *Id.*

170. *Id.* at 412-413.

171. *Id.* at 411.

172. *Id.*

173. *See* ELI SAGAN, CITIZENS AND CANNIBALS, THE FRENCH REVOLUTION, THE STRUGGLE FOR MODERNITY AND THE ORIGINS OF IDEOLOGICAL TERROR 65 (Rowman & Littlefield Publishers 2001). *See also* H. MORSE STEPHENS, A HISTORY OF THE FRENCH REVOLUTION 485 (Charles Scribner's Sons 1902).

174. *See* Madeleine Rebérioux, *Le Génocide, le juge et l'historien*, 138 L'HISTOIRE 92, 413 (1990) (Fr.).

175. THE OXFORD DICTIONARY OF THE FRENCH REVOLUTION, *supra* note 167, at

colonial territories for another half century. Slavery was officially abolished in French colonies and territories in 1848, sixty-nine years after passage of the Declaration of the Rights of Man and of the Citizen.[176] Clearly the colonial and economic interests of France outweighed the niceties of the human rights ideals and pronouncements of the Revolution of 1789.

In 1948, as part of the activities commemorating the centenary of the abolition of slavery and the slave trade in French colonies, three expatriate African and Caribbean intellectuals, Léopold Sedar Senghor, Aimé Césaire and Léon-Gontran Damas, launched a black cultural consciousness movement, *la Négritude*.[177] This intellectual movement, which emphasized the specificity of the black experience and the contribution of African civilizations to universal culture, left its mark on French intellectual, legal, and political circles.[178] Though France maintained its African and Caribbean colonies until the 1960's, slavery, the slave trade, colonialism and black consciousness (*la négritude)* continue to affect French society. In 1990, a piece of legislation, *la Loi Gayssot*, gave anti-racist organizations, which defend the memory of slaves and the honor of their descendants, standing to sue for racial grievances.[179] Two of these anti-racist organizations, *La Ligue Contre Le Racisme et l'Anti-Sémitisme* (*The League Against Racism and Anti-Semitism*) (LICRA) and *Le Movement contre le racisme et pour l'amitié entre les peoples* (*Movement Against Racism and For Friendship Among Peoples*) (MRAP) were co-plaintiffs in the suit brought against Yahoo! for displaying Nazi and Third Reich Memorabilia and relics on the Yahoo! Auctions Internet portal.

C) The French Revolution & Freedom of the Press in

413.

176. *See* Law of May 20, 1802 Establishing Slavery in the Colonies, *reprinted in* A DOCUMENTARY SURVEY OF NAPOLEONIC FRANCE, *supra* note 134, at 132.

177. *See* LÉOPOLD SÉDAR SENGHOR, LIBERTÉ I: NEGRITUDE ET HUMANISME [LIBERTY I: BLACK CONSCIOUSNESS AND HUMAN RIGHTS] (Editions du Seuil 1964).

178. *See* Laurence Proteau, *Présence Africaine* [*African Presence*], *in* DICTIONNAIRE DES INTELLECTUELS FRANÇAIS [DICTIONARY OF FRENCH INTELLECTUALS], *supra* note 141, at 915-917 (stating the Negritude movement was supported by eminent French intellectuals like Albert Camus, Andre Gide, Jean-Paul Sartre and others).

179. *See* Law No. 90-615 of July 13, 1990, Journal Officiel de la Republique Française [J.O.] [Official Gazette of France], July 14, 1990, art. 48-1, p. 8333. (The law is named after a former Minister of from the French Communist Party, Jean-Claude Gayssot.)

Contemporary France.

In France, the free speech regime is the direct result of the imposition of an idealistic human rights regime based loosely on the American Declaration of Independence. However, the French Revolution created only a conditional right of freedom of expression.[180] Though the Declaration guarantees freedom of speech and of the press – "the free communication of thoughts and opinions is one of the most precious rights of man"[181] – the right is qualified by the next clause, which states that people are free to speak, write, and print freely, *on condition that they answer for any abuse of this freedom.*[182] Furthermore, the Declaration states that "the exercise of the natural rights of each person has no bounds but those which assure to other members of society, the enjoyment of these same rights."[183] Thus, under French law, people have inalienable rights, but these rights are subordinated to what rights the legislature considers necessary for public security.[184] The French Revolution soon developed a culture of legalized oppression, which Jean-François Fayard calls "legalistic legitimation. . .[which] legislated, codified and gave, to the point of absurdity, judicial structure to pure and simple criminal acts. . .[and political] purges."[185] The result is that the almost one-hundred-year Revolution resulted in a political culture in which the law took precedence over individual rights, including the right of freedom of speech and expression.[186] Indeed, under successive political regimes, freedom of the press was highly circumscribed by bureaucratic requirements such as prior governmental authorization to publish, censorship, censorious taxation, administrative sanctions, and even outright bans.[187] These

180. *See* FRANÇOIS FURET & RAN HALEVI, LA MONARCHIE REPUBLICAINE [THE REPUBLICAN MONARCHY] 7, 241 (1996).

181. Declaration of the Rights of Man and Citizen, *supra* note 124.

182. *Id.*

183. *Id.*, arts. IV, V, XI.

184. *Id.*

185. *See* JEAN-FRANÇOIS FAYARD, LA JUSTICE REVOLUTIONNAIRE: CHRONIQUE DE LA TERREUR [REVOLUTIONARY JUSTICE CHRONICLE OF THE REIGN OF TERROR] 265 (Editions Robert Laffont 1987).

186. *See* FURET, *supra* note 60, at 537.

187. *See id.* at 271, 291, 322, 444; *see also* 3 BELLANGER, ET AL., *supra* note 59, at 9 (stating that French press law was made up of 42 different, often contradictory, and mostly repressive laws, decrees and statutes).

authoritarian measures were allegedly aimed at stopping the press from "abusing" its freedom.[188]

Though the press had became a *de facto* "Fourth Estate" during the convocation of the Estates General that triggered the Revolution in 1789,[189] real freedom of the press appeared in France almost a century after it had been in existence in the United States. In 1881 the French Parliament passed a series of laws codified as the Law of 29 July 1881 on Freedom of the Press.[190] This law, which has been amended from time to time, transformed the press into a *de jure* Fourth Estate.[191]

Though it marked a turning point in French press history, the law of 1881 enshrined governmental and other controls over the content of speech. Indeed, Chapter IV of the Law of July 29, 1881 On Freedom of the Press is entitled "Crimes and Offenses Committed by the Press or by any Other Means of Publication."[192] The law contains many provisions that have compromised freedom of the press for more than a century. However, in the 1990s, as France anguished over its role, as a nation in the Holocaust, the law began to reflect this national soul-searching.[193] Article 24 of the 1881 law on Freedom of the Press was amended to include media justification (*apologie*) for war crimes, crimes against humanity,"or other crimes and offenses of collaboration with the enemy."[194] The law specifically criminalizes writings, printed matter, drawings, engravings, paintings, emblems, images and other audiovisual material sold or exhibited in public places or meetings, or through any other media of audiovisual communication, if the material justifies war crimes, crimes against humanity, or collaboration with

188. FURET, *supra* note 60, at 271, 291, 322, 444. *See also* 3 BELLANGER, ET AL., *supra* note 59, at 9.

189. *See* Michel Winock, La Naissance du quatriéme pouvoir (Birth of the Fourth Estate), LE MONDE, Aug. 18, 1988, at 2.

190. *See* Law No. of 29 July 1881 on Freedom of the Press, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881, p. 4201 (as amended).

191. *See* 3 BELLANGER, ET AL., *supra* note 59, at 11 (suggesting that the press in France became a free, Fourth Estate only after passage of the Law of 1881).

192. Law of 29 July 1881, J.O. July 30, 1881, p. 4201.

193. *See* Brian Jenkins, *Introduction: Contextualizing the Immunity Thesis*, *in* FRANCE IN THE ERA OF FASCISM: ESSAYS ON THE FRENCH AUTHORITARIAN RIGHT 1, 4 (Brian Jenkins ed., 2005) (suggesting that coming to terms with the role of the French government in the Holocaust has been difficult).

194. Law of 29 July 1881, J.O. July 30, 1881, art. 24.

the enemy.[195] Furthermore, the law now stipulates that it is a criminal offense to use any media outlet to incite discrimination, hatred, or violence toward a person or a group of persons because of the origin, and membership or non-membership, of these persons in an ethnic group, a nation, race, or specific religion.[196] The law further provides for criminal prosecution of those who use media outlets to deny the existence of crimes against humanity committed by organizations declared criminal under international law – such as the Jewish Holocaust, slavery, and more recently, the Armenian genocide.[197] Under the provisions of this law, Holocaust denial by Nazi and racist groups on the Internet is a criminal offense.

The Law of July 29, 1881 on Freedom of the Press was amended and considerably weakened by the so-called *Loi Gayssot,* a law against racist, anti-Semitic and xenophobic acts.[198] This law, which does not define the term, "xenophobic acts," is one of the broadest and most imprecise content-based laws in the world.

Under the provisions of the *Loi Gayssot*, social groups or associations formed to fight racism and anti-Semitism may exercise a right of reply (*droit de réponse*) to objectionable media content if they act on behalf of consenting individuals or groups of persons "who are the object of imputations touching on their honor or reputation by reason of their origin or their membership or non membership in a specific ethnic group, nation, race or religion."[199] Finally, groups and associations whose vocation is to "defend the moral interests and the honor of the Resistance [to World War II Nazi occupation of France] or deported persons" can be co-plaintiffs in cases involving an apology for war crimes, crimes against humanity or crimes concerning collaboration with the enemy in the commission of these crimes.[200] This right has also been extended to veterans and "victims of war."[201] The anti-racist

195. *Id.*
196. *Id.*
197. *Id.*
198. *See* Law No. 90-615 of July 13, 1990 Aimed at Suppressing Racist, Anti-Semitic and Xenophobic Acts [Loi Gayssot], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1990, p. 8333 (The law is named after a former Minister of from the French Communist Party, Jean-Claude Gayssot.).
199. *Id.* at art. 13-1.
200. *Id.* at art. 48-2.
201. Law No. 91-1257 of Dec. 17, 1991, Journal Officiel de la République Française

groups and organizations that sued Yahoo! for violating Art R-645-1 of the French Penal Code by displaying Nazi memorabilia on its auctions portal, had standing to sue under this provision of the Loi Gayssot.[202] The French government has used the controversial *Loi Gayssot,* which also criminalizes denial of the Holocaust and other crimes against humanity, to suppress speech that does not comport with its official posture on racism, Nazism, Holocaust denial, genocide and crimes against humanity.[203] It is notable that these laws were passed as a result of several high profile trials and convictions of French government officials, more than half a century after the fact, who participated in the implementation of the Vichy government's homegrown genocidal, anti-Semitic policies, or for collaborating with the Nazis in World War II.[204]

The French Human Rights League (*La Ligue des droits de l'homme*) has condemned the *Loi Gayssot,* charging that it grants judges the final word on historical truth.[205] Indeed, French anti-racist laws have been used to punish individuals and groups whose speech or academic research questioned historical details of the Holocaust.[206] Under the law, expressions of this nature are considered incitement to disturb public order or cause a breach of the peace.[207]

French laws governing freedom of speech and of the press have been extended to the Internet.[208] Indeed, France has been at

---

[J.O.] [Official Gazette of France], Dec. 19, 1991 (codified as Law of 29 July 1881 on Freedom of the Press, J.O. July 30, 1881, art. 48-3 (as amended)).

202. *See* Law No. 90-615 of July 13, 1990 Aimed at Suppressing Racist, Anti-Semitic and Xenophobic Acts [Loi Gayssot], J.O. July 14, 1990, art. 13 (codified as Law of 29 July 1881 on Freedom of the Press, J.O. July 30, 1881, art. 48-2 (as amended)).

203. *See* Florent Brayard, *Negationnisme [Holocaust Denial], in,* DICTIONNAIRE DES INTELLECTUELS FRANÇAIS [DICTIONARY OF FRENCH INTELLECTUALS], *supra* note 141, at 829.

204. *See* Jenkins, *supra* note 193, at 1, 4 (suggesting that the well-publicized trials of Klaus Barbie, Paul Touvier and Maurice Pappon for crimes against humanity made the issue salient in contemporary France).

205. *See* Rebérioux, *supra* note 174, at 92.

206. *See, e.g.*, Michel Delberghe, *M. Bernard Notin retrouve ses functions d'enseignant à l'université Lyon-III [Bernard Notin regains his position as instructor at University of Lyon-III],* LE MONDE (Fr.), January 16, 1993, at 14 (reporting that French economics professor Bernard Notin was disciplined by the French educational authorities for publishing a refereed journal article questioning the scientific facts about World War II Nazi German gas chambers).

207. *Id.*

208. *See* Law No. 2004-575 of June 21, 2004 on Confidence in the Digital Economy (1), Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22,

the forefront of nations seeking to regulate the content of the Internet for historical and cultural reasons.[209] Laws regulating computer data storage and processing require that all websites in existence, or about to be created and hosted, in France be officially registered with a government agency.[210] Another law enumerates the responsibilities of Internet Service providers towards their clients.[211] These include the duty to inform them of the existence and availability of technical means (software) that can assist them in blocking access to racist and anti-Semitic Web sites declared illegal or objectionable by the government.[212]

Furthermore, under the law, Internet Service Providers (ISPs) are required to obtain personal information from their clients so as to enable the ISPs and Internet hosts to know the identities and addresses of their clients for purposes of law enforcement.[213]

2004, art. 6(7). Under this law, Internet Service Providers are required to assist law enforcement officers in eliminating online material that justifies crimes against humanity, incites racial hatred or can be classified as child pornography. *See also* UEJF contre Costes, Altern-B et AUI [UEJF v. Costes, Altern-B & AUI], Tribunal de grande instance [T.G.I.] [Superior Court] Paris, Jul. 10, 1997, (Fr.), *available at* http://www.canevet.com/jurisp/970710.htm (holding that hate speech on the Internet was a violation of article 24 bis of the law of 29 July 1881 on Freedom of the Press (as amended in 1994). However, the case was dismissed on other grounds.).

209. *See* Eudes & Annie, *supra* note 10, at 28. As early as 1996, the French Senate passed a law creating the Comité superieur de la télématique [The Higher Committee for Telematics] [CST] to supervise the activities of Internet access providers. In the subsequent years several French government agencies were empowered to "coregulate" the Internet. These agencies include the Commission nationale de l'informatique [CNIL] [National Commission of Information], the Agence de Regulation des telecommunications [ART] [Agency for the Regulation of Telecommunications], and the Conseil supérieure de l'audiovisuel [CSA] [Higher Audiovisual Council]).

210. Law No. 78-17 of Jan. 6, 1978 on Information Technology, Databases and Freedoms, Journal Officiel de la République Français [J.O.] [Official Gazette of France], Jan. 7, 1978, arts. 15, 16. This law has been applied to the Internet. Under its provisions, a "Declaration of Processing of Personal Information within the Framework of a Webpage" has to be made to the Commission nationale de l'informatique [CNIL] [The National Commission on Informatics and Freedom].

211. *See* Law No. 86-1067 of September 30, 1986 On Freedom of Communication, Journal Officiel de la République Français [J.O.] [Official Gazette of France], Aug. 2, 2002, *amended by* Law Léotard, Journal Officiel de la République Français [J.O.] [Official Gazette of France], Aug. 2, 2000, arts. 43-7 & 43-8.

212. Internet Service Providers required to inform subscribers of the availability of "technical means" of restricting access to, or blocking certain online content, and offering subscribers these services. *See, e.g.,* Law No. 2000-719 of Aug. 1, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 2, 2000, p. 11903 (amending Law No. 86-1067 of Sept. 30, 1986 on Freedom of Communication).

213. *See* Law No. 2004-575 of June 21, 2004 On Confidence in the Digital Economy

However, French ISPs are neither criminally nor civilly liable for the content that is saved on, or transmitted through their servers, if they exercise no editorial control over it.[214] The theory behind these Internet regulations is that Internet content that offends the memory of the country, descendants of slaves, survivors of the Jewish Holocaust and the Armenian Genocide, deported persons, and members of the Resistance [to World War II Nazi occupation of France), is an abuse of the freedom of speech guaranteed by the Declaration of the Rights of Man and of the Citizen, and the Law of 1881 on Freedom of the Press.[215]

Thus, the legacy of conditional freedom accorded the media in 1789, is still in force today. Indeed, the Constitution of the 5th Republic, which came into force in 1958, had a pronounced "return to the ideals of 1789" theme.[216] The Declaration of the Rights of Man and of the Citizen of 1789, together with the preamble to the Constitution of 1946, which is said to "complete it through an unprecedented statement of political, economic and social principles,"[217] are incorporated by reference in the Constitution of 1958, which is the supreme law in France.

D. Legacy of World War II and the Nazi Holocaust

The Second World War was one of the most catastrophic periods in French history. During the period leading up to World War II, "politico-literary" newspapers dominated the French media scene.[218] These included several influential extreme right-

(1), Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004, art. 6(5).

214. *See* Law No. 86-107 of September 30, 1986 on Freedom of Communication, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 31, 1986 (amended by Loi Leotard, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 2, 2000, art. 43-8). Provisions that made ISPs criminally and civilly liable for objectionable content on their servers if they failed to act promptly to block access to such content pursuant to a court order, were declared unconstitutional by the French Constitutional Court in 2000.

215. See Law No. 90-615 of July 13, 1990, J.O., July 14, 1990 (codified as Art. 48-2 of the Law on Freedom of the Press of 1881).

216. *See* Georges Vedel, *Qu'est-Ce La Constitution? [What is the Constitution?]* (1998), *available at* http://www.conseil-constitutionnel.fr/dossier/quarante/q01.htm.

217. The French Constitutional court has held that the human rights and social principles expressed in the Declaration of the Rights of Man and of the Citizen of 1789 and the Preamble of the Constitution of 1946, respectively, are incorporated in the Constitution of 1958. *Id.*

218. *See* 3 BELLANGER, ET AL., *supra* note 59, at 588-591.

wing publications like *Je suis partout* (*I am Everywhere*), and *Gringoire*, a very influential, polemical newspaper.[219] The extreme right wing press played on the historic anti-Judaic undercurrent of French society and fanned the flames of anti-Semitism in France.[220] Both periodicals were pro-Fascist, anti-Semitic, anti-Marxist and pacifist.[221] They were also anti-British and supported Hitler during the Munich crises of 1938.[222] *Je suis partout*'s editorial line is said to have been marked by Germanophilia, as well as being "favorable to the cause of Hitler. . .and its pacifism bordered on treason."[223] As for *Gringoire*, it is said to have influenced French public opinion and "the echo that its campaigns found in [French] public opinion helped increase the disarray of the French people [in the face of Hitler and Nazi Germany]."[224] Thus, before the start of World War II, these newspapers had "normalized" anti-Semitism in France, and called for professional and other restrictions against Jews who were derisively called "*métèques*" (aliens), who had invaded and conquered the French bar, French banks, cinema, the medical profession, and the clothing industry.[225] France entered World War II in September 1939 and nine months later, Hitler had made his triumphal march through Paris.[226]

Hitler's conquest of France in 1940 brought the country, its Jewish citizens and non-French Jewish refugees, under the direct control of the Nazis and their vassal, the Vichy regime. The Nazis infiltrated the French press, and most of the newspapers became propaganda instruments.[227] In 1941, *Je suis partout*, which had not been published for a year, reappeared and began advocating and defending total collaboration with Nazi Germany.[228] The Vichy government of Marshall Pétain was instrumental in rounding up

---

219. *Id.*
220. *Id.*
221. *Id.*
222. *See id.*
223. *See id.* at 590, 621.
224. *Id.* at 588-591.
225. *See* AMOUROUX, *supra* note 84, at 437-438 (stating that some of the harsh restrictions placed on Jews during World War II had were suggested by the press even before the start of the conflict, e.g. a pre-war 1939 exhibition entitled "the Jew in France" claimed to show that these "aliens" had invaded all the liberal professions in France).
226. *See* ANTON W. DEPORTE, EUROPE BETWEEN THE SUPERPOWERS 43 (2d ed., Yale Univ. Press 1986).
227. 3 BELLANGER ET AL., *supra* note 59, at 622.
228. *Id.* at 590.

and deporting thousands of French Jews and non-French Jewish refugees to concentration camps.[229]

The Nazi conquest, dismemberment, and pillage of France during World War II left an indelible mark on the country. However, it was only one of the factors that led to the enactment of the country's draconian post World War II hate speech laws. Indeed, Nazi Germany's conquest of France in 1940, and the unspeakable atrocities of the Holocaust are not, in and of themselves, sufficient explanations for France's unique free speech regime. Hitler's lightning-fast triumph over France was a catalyst that brought latent, centuries-old, French anti-Semitic sentiments to the surface. In the words of Robert Paxton, "defeat [by Nazi Germany] sharpened a defensive xenophobia that had been already growing through the 1930s" in French society.[230] Indeed, the "collective (World War II) memory" of France includes Nazi war crimes, as well as crimes against humanity committed by the French state against its Jewish citizens and by the Vichy regime against Jews from other European countries.[231]

Therefore, the courts that heard the Yahoo! case–the Superior Court of Paris, the United States District Court for the Northern District of California, and the United States Court of Appeals for the 9th Circuit–all erroneously construed the Holocaust and other Second World War-era Nazi atrocities as the impetus for French laws against bias-motivated Internet content regulations. As we have seen, the World War II-era Holocaust was just one of the factors affecting French Internet content regulation. The fact is that France had an ancient anti-Semitic and racist problem that predated the Nazis and World War II. It seems that with the passage of statutes like *la Loi Gayssot*[232] in the 1990s, the

---

229. *See* LUCY DAWIDOWDICE, THE WAR AGAINST THE JEWS 490 (1975).

230. *See* PAXTON, *supra* note 67, at 173-175 (suggesting that long before Nazi German pressure, Vichy France set in motion, with the acquiescence of the Vatican, its specific brand of xenophobic and cultural anti-Semitism. Jews who did not assimilate and adopt France's Roman Catholic culture were purged from governmental service and all professions influencing cultural life.).

231. *See* PETER CARRIER, HOLOCAUST MONUMENTS AND THE NATIONAL MEMORY CULTURES IN FRANCE AND GERMANY SINCE 1989, at 51 (2005) (suggesting that French memory of Vichy has passed from "collective obsession to relative reconciliation").

232. Law No. 90-615 of July 13, 1990 Aimed at Suppressing Racist, Anti-Semitic and Xenophobic Acts [Loi Gayssot], Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1990, at 8333.

French legislature decided that censorious content-based regulation of the traditional media and the Internet is a necessary and sufficient atonement for the nation's centuries'–long "anti-Judaic" and racist past.[233]

E. The Ideological Clash Between France and the United States Over Globalization of Anglo-American Media and Culture.

France and the United States have fundamental philosophical differences over the very nature of the Internet and of electronic commerce.[234] The differential regulation of Internet content in France and the United States, as exemplified by the *Yahoo!* case, is also influenced by a clash of both countries over cultural and media technology issues. French Internet content regulation is part of its policy of international Francophone cultural differentiation and protection, in the face of ubiquitous Anglo-American media and culture. Under the *exception culturelle* (*cultural exception*) policy, France does not want its Francophone culture subsumed under the undifferentiated "Western" media and culture.[235]

Thus, since the 1970s, French law and policy have classified the French language, as well as the French media and telecommunications infrastructure, as part of its cultural heritage that should be jealously protected against Anglo-American domination.[236] Under French law, the media are not goods like

---

233. In 2001, France officially recognized slavery as a crime against humanity for the first time. *See* Law No. 2001-434 of May 21, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 23, 2001 at 8175. *See also* Madelaine Rebérioux, *Contre la Loi Gayssot sur le racisme* (*Against Gayssot's Law on Racism*), LE MONDE (Fr.), May 21, 1996, at 1 (suggesting that the French government was restricting academic freedom by prescribing and putting the weight of law behind an "official version" of historical truth, to the exclusion–and criminalization– of contrary views).

234. Eko, *supra* note 30 at 445, 448 (suggesting that France originally rejected the Internet because it was seen as an instrument for the propagation of Anglo-American culture and values). *See also* Stephen Korbin, *Territoriality and the Governance of Cyberspace*, 32 J. INT'L BUS. STUD. 687, 692 (2001) (suggesting that when France asserts jurisdiction over the stateless platform of the Internet rather than over its own citizens, its activities are problematic).

235. *See generally* THE FRENCH EXCEPTION, *supra* note 5 (suggesting that there is a "French Exception" evident in the political, cultural, and intellectual life of the nation).

236. *See* Law No. 94-88 of February 1, 1994 (La Loi Toubon), Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 2, 1994, arts. 2 & 12. The law created an international television broadcaster, Canal France International, whose mission was to "improve knowledge and defense of the French language while showcasing Francophone culture around the world." Additionally, a minimum of 40 percent of

other marketable good.[237] This culturalist perspective has also been applied to the Internet.[238] The French government has always defended what Armand Mattelart calls "cultural sovereignty"[239] This refers to the right of countries, including those of the Third World, to control the instrumentalities of communication as well as the messages they transmit within their national territories.

Information control is problematic in the age of Internet and global communication. In the 1990s, some French scholars claimed that information flows, including Internet content, were beginning to erode state sovereignty.[240] Leila Bouachera put the Francophone cultural protectionist posture succinctly:

> "mastery of information constitutes henceforth, a new attribute of sovereign power . . . Information sovereignty includes the right to restrict or place certain conditions on information access and communication to certain countries . . . A state can only have pretensions of sovereignty the moment it is in a position to control all informational activities that take place on its territory or outside its territorial limits, when the information concerns it. . ."[241]

Since France views the Internet as a cultural rather than a commercial platform, it regulates the medium within its cultural and linguistic protectionist policies, which seek to safeguard French national identity, language,[242] and culture on the Internet,[243]

---

the music broadcast on French radio stations had to be music by French or Francophone artists. Today, the law regulates French language content in everything from advertising to radio and television programming). *See also* BARBER, *supra* note 236, at 171 (discussing French attempts to keep English words out of the French language).

237. *See* Sophie Meunier, *The French Exception*, 79 FOREIGN AFF. 104 (2000) (suggesting France's antipathy towards globalization and its Anti-Americanism are intended to preserve French language and culture.)

238. Eko, *Many Spiders, One Worldwide Web*, *supra* note 30, at 448.

239. ARMAND MATTELART, LA MONDIALISATION DE LA COMMUNICATION [GLOBALIZATION OF COMMUNICATION] 92 (3d. ed., 2002). *See also* Armand Mattelart, *L'Information Contre L'Etat [Information Against the State]*, LE MONDE DIPLOMATIQUE (Fr.), March 2001, at 28 (suggesting that American information technologies and governmental policies have instituted competitive liberalism that have undermined state tutelage, law and sovereignty).

240. *See* Leila Bouachera, *La Souveraineté informationelle entre utopie et projet* [Informational Sovereignty between Utopia and draft], LE MONDE (Fr.), Feb. 1, 1996, at 15 (suggesting that the transnational flow of information poses certain challenges for state sovereignty).

241. *Id.*

242. Commission générale de terminologie et de néologie [General Commission on Terminology and Neology], Vocabulaire du Courrier électronique [Vocabulary of

through legislative action. To this end, since the early 1990s, the French government has sought to create a "French Internet," by bringing information networks that operate in France or whose information or data was accessible to French citizens, under the tutelage of a governmental agency.[244]

To some French scholars, excessive Internet commercialism, of which the Yahoo! Auctions portal was an insidious example, has led to a clash between two freedoms: the freedom of expression of citizens versus the freedom of commercial (read corporate) expression.[245] In other words, the clash is viewed as one between human rights and corporate rights.[246] Indeed, France is one of the most vocal advocates of de-commercialization of the Internet. President Jacques Chirac said France must be vigilant and "refuse to allow the new services of electronic commerce to be considered virtual goods. . .subject to the laws of the marketplace. . ."[247] He suggested that the Internet compromised global cultural diversity.[248] Additionally, a number of French courts have held that under French law, the Internet is a communication medium, not a marketplace.[249] Indeed, French law outlaws all online auctions.[250] Thus, Yahoo! and its subsidiary, Yahoo! Auctions, by virtue of

---

Electronic Mail], Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 20, 2003, *available at* http://www.culture.gouv.fr/culture/dglf/cogeter/20-06-03-courriel.htm (presenting officially approved French equivalents for the original English terminology for e-mail and related communication technologies).

243. *See* Law No. 94-88 of February 1, 1994 (La Loi Toubon), Journal Officiel de la République Française [J.O.] [Official Gazette of France], February 2, 1994, arts. 2 & 12. *See also* BARBER, *supra* note 236, at 171 (discussing French attempts to keep English words out of the French language).

244. *See* Kahn, *supra* note 10 at IV.

245. *See* MATTELART, LA MONDIALISATION DE LA COMMUNICATION, *supra* note 239, at 94-95.

246. *Id.*

247. *See M. Chirac Défends la Diversité Culturelle [Monsieur Chirac Defends Cultural Diversity]*, LE MONDE (Fr.), Nov. 18, 1999, at 36.

248. *Id.*

249. *See* Alain Hazan, *La Distribution Sélective et Internet [Selective Distribution and the Internet]*, LE MONDE INTERACTIF (Fr.), Nov. 8, 2000, at 6 (reporting that courts in Nanterre, Pontoise and Versailles have ruled that French luxury perfume makers and cosmetic companies who have a selective clientelle can forbid third companies from selling their perfumes and cosmetic products on the Internet because the Internet is not a real marketplace).

250. *See* Alain Hazan, *Des enchères sur Internet interdites en France [Internet Auctions Prohibited in France]*, LE MONDE INTERACTIF, May 17, 2000, at IV (Fr.) (reporting that online auctions are banned in France).

their global reach, are viewed as part of the Anglo-American cultural and commercial behemoth, America, Inc., that is the nemesis of French language and culture.[251] This was one of the reasons why Yahoo! Auctions had such a negative reception among the French cultural elite. This anti-commercial posture of French Internet regulation is the direct opposite of the free market ideological and philosophical posture of the United States. The fact that more efficient American communication technologies–the telegraph, and the Internet–had supplanted earlier French bureaucratic communication technologies–Chiappe's optical telegraph,[252] and France Telecom's Minitel[253]– only increased the cultural rivalry between the two countries.

IV. THE AMERICAN FREEDOM OF SPEECH REGIME AND THE INTERNET

The American free speech regime is the product of compromises reached during the writing and ratification of the American Constitution and the Bill of Rights. The First Amendment (1791) guarantees freedom of speech and the press, stating that:

> "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 to peaceably assemble, and petition the Government for a redress of grievances."[254]

First Amendment jurisprudence has evolved into a unique free speech regime whose major characteristic is the theory that the United States is a marketplace of ideas.[255] Furthermore, the

---

251. *See* ARMAND MATTELART, THE INFORMATION SOCIETY 138 (2003) (suggesting that the United States wants to create a "frictionless [global] capitalism" which would transform the world into a community of consumers).

252. *See* MATTELART, LA MONDIALISATION DE LA COMMUNICATION, *supra* note 239, at 7 (suggesting that the Chiappe optical telegraph was the first modern instrument of international, long distance communication which was supplanted by the U.S. government-funded telegraph invented by Samuel Morse in 1844).

253. *See* 1 MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 373 (2d ed., Blackwell Publishers Inc. 2000) (suggesting that the French online service, Minitel, that preceded the Internet, was based on old technology that rendered it too inflexible).

254. U.S. CONST. amend. I.

255. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT

U.S. Supreme Court has held that all content-based regulations[256] should be subjected to greater scrutiny than content-neutral regulations.[257] In order for a court to uphold a content-based regulation, a state must show that "the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[258] In sum, freedom of speech and of the press as practiced in the U.S. "leads us to exercise great caution before silencing viewpoints with which we disagree."[259] Jeffrie Murphy and Jules Coleman call respect for individual free speech rights a natural, or respect-based, obligation as "a certain mandatory way in which persons must be treated if their essential humanity is to be respected and preserved."[260] Thus, under the First Amendment, American citizens can bring "claims against certain kinds of interferences"[261] with their rights of freedom of speech. It follows that this fundamental right against government interference cannot be infringed or eviscerated absent a compelling reason to do so.[262] Of course the First Amendment does not demand the government take affirmative steps to promote acceptable speech; it merely forbids the government from injecting itself into the public speech arena and unduly interfering with content that it finds politically or socially objectionable.[263] A number of speech-related cases tested these First Amendment principles.

A. Hate Speech under First Amendment Jurisprudence.

Under American jurisprudence, speech and communicative

THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2, 7-8 (2001) (discussing theories of the First Amendment including Marketplace Theory).

256. Content-based regulations are defined as regulations that approve of certain kinds of speech and frown on others based on the ideas, opinions or viewpoints expressed by the speakers.-Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994).

257. Content-neutral regulations are defined as regulations that are applicable to all speakers irrespective of their point of view. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99-102 (1971) (declaring unconstitutional a statute banning all picketing except labor picketing).

258. Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

259. *See* BUNKER, *supra* note 255, at 8.

260. MURPHY & COLEMAN, *supra* note 118, at 86.

261. *Id.*

262. *Id.* at 87.

263. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("[The] First Amendment generally prevents government from proscribing speech. . .because of disapproval of the ideas expressed.") (citation omitted).

acts–including symbolic speech and expressive conduct–cannot be regulated on the basis of the content of the message.[264] The American First Amendment regime is based on what Don Pember and Clay Calvert call "a preferred position balancing theory" whereby courts give freedom of expression a preferred position and "presume that the limitation on freedom of speech or freedom of the press is illegal."[265] This makes the United States unique in matters of freedom of speech and expression.

In contrast to French law, which bans the display of swastikas and other insignia of groups found guilty of crimes against humanity,[266] the First Amendment protects the public or private display of flags, emblems, insignia, and other indicia of unpopular, discredited, or even genocidal groups such as the Nazi party. Indeed, over the years the U.S. Supreme Court has invalidated several attempts to ban emblems and other indicia of political affiliation.[267] As early as 1931, the Supreme Court struck down a California statute which criminalized the display of flags, badges, banners, or other devices that symbolized opposition to organized government.[268]

Furthermore, on appeal after remand from the U.S. Supreme Court, the Supreme Court of Illinois upheld displaying the swastika (the symbol of Hitler's National Socialist (Nazi) Party and its American progeny, the National Socialist (Nazi) Party of America) as protected symbolic political speech intended to convey to the public the political beliefs of those who displayed it in a controversial march.[269] This decision followed after the U.S.

---

264. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 797-798 (1989) (stating that regulation of the time, place and manner of protected speech must be narrowly tailored to serve legitimate content-neutral government interests unrelated to the suppression of free speech) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); U.S. v. O'Brien, 391 U.S. 367, 377 (1968)).

265. DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 45 (2005). *See also* N.Y. Times v. United States, 403 U.S. 713, 714 (1971) (stating that courts presume prior restraints are unconstitutional).

266. *See* Law of July 29, 1881 on Freedom of the Press, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881, art 24, p. 4201 (as amended).

267. *E.g., R.A.V.*, 505 U.S. at 391-396.

268. *See* Stromberg v. California, 283 U.S. 359, 369-370 (1931).

269. *See* Skokie v. Nat'l Socialist Party, 373 N.E.2d 21, 25-26 (Ill. 1978) (holding that an injunction which prohibited the National Socialist Party of America members from marching, walking or parading in the uniform of the party and displaying the swastika on or off their person, or distributing "hate" literature was an unconstitutional violation of

Supreme Court held that the Nazi Party of America had a right to due process as well as a right to be free from government-imposed prior restraints.[270] As Rodney Smolla aptly put it, "the Supreme Court did not say that the Nazis had a constitutional right to march in Skokie, but only that they had a constitutional right to be free of "prior restraints" against such a march."[271]

These decisions are rooted in the fundamental principle under the First Amendment that the U.S. is a marketplace of ideas in which more speech and less regulation is favored.[272] This free speech jurisprudence permits all speech except obscenity,[273] fighting words,[274] and deceptive and misleading advertisements.[275] In the U.S. the concept of hate crime has recently become a more settled area of law.[276] Many American courts have noted that the motive for criminal behavior is often relevant in the sentencing of criminal conduct.[277] Fighting words are not considered to be speech, and thus not within First Amendment protection.[278] In contrast, restrictions on bias-motivated utterances must still satisfy

---

the First Amendment), *aff'g in part, rev'g in part*, 366 N.E.2d 347 (Ill. App. Ct. 1st Dist. 1977).

270. *See* Nat'l Socialist Party v. Skokie, 432 U.S. 43, 44 (1977) (holding that the Illinois Supreme Court violated the plaintiff's due process rights when it denied both a petition for a stay of the injunction and leave for an expedited appeal, and ordering remand to the state appellate court to provide immediate appellate review or stay the injunction).

271. RODNEY A. SMOLLA, THE FIRST AMENDMENT IN AN OPEN SOCIETY 155 (Alfred A. Knopf 1992).

272. *See* Abrams v. United States, 250 U.S. 616, 630 (1919); *see also* United States v. Rumely, 345 U.S. 41, 56-58 (1953) (holding that under the First Amendment, symbolic speech or expressive conduct is permitted and states cannot impose prohibitions on speech that expresses unpopular ideas); *see also Yahoo! I*, 169 F. Supp. 2d 1181, 1187 ("[T]he fundamental judgment expressed in the First Amendment [is] that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech.").

273. Miller v. California, 413 U.S. 15, 23-24 (1973) (permitting state regulation of material that portrays sex in a patently offensive manner and has no redeeming political, social or scientific value).

274. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (defining "fighting" words as those which by their very utterance inflict injury or tend to incite an immediate breach of the peace).

275. *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980) (stating the government may ban forms of communication more likely to deceive the public than to inform it (citing Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979))).

276. Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 LAW & SOC'Y REV. 567, 575 (2000).

277. *Id.* at 580.

278. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

the requirements of First Amendment guarantees of freedom of speech.[279] Bias-motivated utterances can be criminalized, however, if they are associated with acts of violence or hate crimes.[280]

A number of American court cases show that even vile, repugnant and hateful speech, absent violence or threatening behavior, is protected. In *Near v. Minnesota,* the U.S. Supreme Court held that pre-publication censorship of repugnant anti-Semitic material defies First Amendment guarantees.[281] In *Rockwell v. Morris*, the New York Supreme Court, Appellate Division, held that refusing to issue a permit to a "self-styled American Nazi and. . .a rabid racist" constituted a violation of the Fourteenth Amendment.[282] The court explained, "[T]he unpopularity of [his] views, their shocking quality, their obnoxiousness, and even their alarming impact [was] not enough" to warrant prior restraint.[283]

In *Brandenburg v. Ohio*, the U.S. Supreme Court held that the constitutional guarantees of freedom of speech and of the press do not permit states to forbid or ban mere advocacy of the use of force or violation of the law unless such advocacy is designed to incite or produce imminent lawless action.[284] In his concurring opinion, Justice Douglas suggested that racial animus and bias could be considered a type of belief system that the government had no business regulating.[285]

---

279. *See generally id.* at 386 (stating that content-based regulations are presumptively invalid (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991))). *See also* Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983) (holding that withdrawing funding from a university newspaper which published material offensive to blacks, Jews, feminists, homosexuals, and Christians, was a violation of the First Amendment); Police Department v. Mosley, 408 U.S. 92, 95 (1972). ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

280. *See* Phillips & Grattet, *supra* note 276, at 580; Wisconsin v. Mitchell, 508 U.S. 476, 489-490 (1993) (stating that a defendant's abstract beliefs may not be considered in sentencing, but in an aggravated battery case, the court can enhance the penalty of a defendant because the defendant selected his victim on the basis of the victim's race).

281. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713, 715-716 (1931) (holding that a prior restraint is a violation of the First Amendment).

282. Rockwell v. Morris, 211 N.Y.S.2d 25, 28 (N.Y. App. Div. 1961).

283. *Id.* at 35.

284. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

285. *See id.* at 456-457 (Douglas, J., concurring). ("[A]ll matters of belief are beyond the reach of subpoenas or the probings of investigators. . .[the] government has no power to invade that sanctuary of belief and conscience.").

In *R.A.V. v. The City of St. Paul*, the U.S. Supreme Court stated that the First Amendment bars the government from silencing speech "because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[286] In *Capitol Square Review and Advisory Board v. Pinette,* the U.S. Supreme Court held that the KKK had a constitutional right to place a cross in a public square.[287] The Court found that even speakers or writers motivated by hatred, and ill-will are protected.[288] Thus, when it comes to bias-motivated or hate speech and expressive conduct, the posture of the U.S. Supreme Court is that: "[u]nder the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[289] Thus, the U.S. Supreme Court's posture contrasts sharply with France's content-based regulatory regime.

B. Application of First Amendment Jurisprudence to the Internet.

We now turn to the Internet and survey how the U.S. applies its First Amendment principles to this global, online multi-communication space. As the Internet figuratively erased geographical distances that separated nation states and socio-cultural systems for centuries, it brought to the fore contrasting conceptualizations and regulation of bias-motivated communication. Most countries apply hate speech principles to the internet that are currently in force in the traditional mass media.[290] Since the largest proportion of Internet activity takes place in the

286. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991)).

287. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995) (concluding that "[T]he State may not, [on Establishment clause grounds], ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.") *But see* Virginia v. Black, 538 U.S. 343, 347-348, 362-363 (2003) (concluding that a State, consistent with the First Amendment, may ban cross burning carried out with intent to intimidate).

288. Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (quoting Garrison v. Louisiana, 379 U.S. 64, 73 (1964)).

289. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974).

290. *See* Vick, *supra* note 3, at 8. *See, e.g.,* European Union Council Directive 98/560/CE, 1998 O.J. (L 270) art. 4, annex, art. 2.2.1 (a)-(b) (extending the child protection provisions of the resolution on illegal and harmful content on the Internet to safeguard minors from child pornography on the Internet), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_270/l_27019981007en00480055.pdf.

United States, the U.S. Congress[291] and Supreme Court, through their respective legislative actions and judicial decisions, are increasingly being seen as the *de facto* regulators of the Internet for the entire world.[292] This is unacceptable in the eyes of culturally conscious countries like France.

In 1996, Congress passed the Communications Decency Act (CDA)[293] as part of the Telecommunications Act of 1996.[294] Two provisions of the CDA sought to protect minors from harmful material on the Internet.[295] Several groups filed suit[296] challenging the constitutionality of the two provisions which criminalized 1) the knowing transmission of obscene and indecent material to minors under 18 years of age, and 2) the knowing transmission of material that describes in patently offensive terms, sexual or excretory activities or organs.[297] A U.S. District Court entered an injunction against enforcement of both provisions of the act stating that they violated the First Amendment due to vagueness and over-breadth.[298] The Government appealed to the U.S. Supreme Court, which held that the contested provisions violated the freedom of speech guaranteed by the First and Fourteenth Amendments because they were imprecise, content-based, blanket restrictions on speech that adults have a constitutional right to receive and impart.[299] In this case, the U.S. Supreme Court ruled for the first time that, unlike radio and television whose First Amendment rights are circumscribed by their technical limitations and invasive nature,[300] the Internet enjoys the same amount of First

---

291. *E.g.*, Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). Section 2885(B)(ii) gives the U.S. courts the authority to provide injunctive relief through orders blocking access to a specific, identified, online locations outside the United States, if those locations violates American copyright laws.

292. *See* Vick, *supra* note 3, at 3-5 (suggesting that the U.S. Supreme Court ruling in Reno v. ACLU essentially "[e]xport[ed] the First Amendment" to the rest of the world).

293. 47 U.S.C. § 223 (2001).

294. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

295. 47 U.S.C. §§ 223(a)(1)(B)(ii), 223(d) (2001).

296. *See* ACLU v. Reno, 929 F. Supp. 824, 827 n.2 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997).

297. *Id.* at 828-829.

298. *Id.* at 827.

299. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997).

300. *See* FCC v. Pacifica Found., 438 U.S. 726, 748-751 (1978) (stating that greater government regulation of broadcasting was permissible due to broadcasting's pervasive nature and its unique accessibility to children).

Amendment protection as the traditional print media."[301]

In the mean time, Congress passed the Protection of Children from Sexual Predators Act of 1998,[302] and tried to rectify the constitutional defects of the CDA through the Child Online Protection Act (COPA).[303] Led by the American Civil Liberties Union (ACLU), several groups challenged COPA in the U.S. District Court for the Eastern District of Pennsylvania.[304] The court granted a preliminary injunction against enforcement of COPA.[305] On appeal, the Third Circuit Court of Appeals affirmed the injunction, and stated that the use of the contemporary community standards provision "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute."[306] The U.S. Supreme Court reversed, stating that use of community standards did not render COPA unconstitutional.[307]

On remand, the Third Circuit again affirmed the Eastern District of Pennsylvania, concluding that COPA was not narrowly tailored,[308] nor was it the least restrictive means available to serve the government's stated interest in protecting minors from harmful material on the Internet.[309] The court further held that the undifferentiated, non-specific definition of the term "minors" in COPA failed to meet the First Amendment strict scrutiny and "narrow tailoring" standards due to its vagueness and overbreadth.[310] The Government appealed the case to the U.S. Supreme Court. The court affirmed the injunction against

---

301. *See generally* Reno v. ACLU, 521 U.S. 844 (1997) ("The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

302. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 101, 112 Stat. 2974, 2975 (1998) (making it a criminal offense to use the Internet "with the intent to entice, encourage, offer, or solicit" minors to engage in any sexual activity).

303. 47 U.S.C. § 231(a)(1) (2000).

304. *See* ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003), *aff'd* 542 U.S. 656.

305. ACLU v. Reno, 31 F.Supp.2d 473, 498 (1999), *aff'd* ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003), *aff'd* Ashcroft v. ACLU 542 U.S. 656.

306. ACLU v. Reno, 217 F.3d 162, 173-174 (1999).

307. Ashcroft v. ACLU, 535 U.S. 564 (2002).

308. ACLU v. Ashcroft, 322 F.3d 240, 261-266 (3rd Cir. 2003), *aff'd* 542 U.S. 656.

309. *Id.* at 253, 255, 268.

310. *See id.* at 253-255, 268 n.37 (finding COPA's definition of a "minor" as any person under the age of seventeen as impermissibly vague and that it places at risk too wide a range of speech that is protected for adults).

enforcement of COPA on the grounds that content-filtering and other technological solutions were found by the District Court to be preferable to governmental control of Internet content because filtering imposes selective restrictions on web speech at the level of the receiver, and does not impose blanket restrictions on message senders.[311] Additionally, the U.S. Supreme Court has also held that a blanket ban on computer-generated images of children indulging in sexual activities is unconstitutional.[312] As a general rule, then, censorship of non-obscene material on the Internet is unconstitutional under American jurisprudence.

Despite the popularity of the term "hate speech" as a moniker for expression that is motivated by racial, ethnic or religious animus, there really is no "hate speech" doctrine in American law *per se*. Indeed, the expression "hate speech" only entered American legal language in the 1980s.[313] When considering First Amendment issues, courts have held that only speech which is the legal equivalent of "fighting words" is proscribable under the First Amendment.[314] The practical outcome of the American free speech regime with regard to the Internet is that the U.S. hosts hundreds of websites having content ranging from the ranting and ravings of Cyber-Nazis to the nihilistic dissonance of white supremacist rock music.[315] This is a situation that disconcerts countries like France which have strict content-based regulatory regimes.

V. DISCUSSION

Comparison of the free speech regulatory regimes of France and the U.S. is a study in contrasts. The table below compares the regulatory characteristics of the online speech regimes of both countries. The fundamental difference between both regimes lies, to use the words of François Furet and Mona Ozouf, in each

311. *See* Ashcroft v. ACLU, 542 U.S. 656, 702 (2004).

312. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 241, 256, 258 (2002).

313. *See* PEMBER, *supra* note 265, at 113, 117-118 (stating that courts have generally sided with the opposition to university speech codes in cases contesting the constitutionality of such codes).

314. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (defining "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

315. *See* Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free In Cyberspace?*, 6 COMM. L. & POL'Y 287, 292-293 (2001).

country's "institutional logic."[316] That is, the contrasting philosophical conceptions of the role of free speech in general, and Internet mediated speech in particular, in a democratic society.

316. *See* FRANCOIS FURET & MONA OZOUF, DICTIONNAIRE CRITIQUE DE LA RÉVOLUTION FRANÇAISE [CRITICAL DICTIONARY OF THE FRENCH REVOLUTION] 865 (1988).

Comparison of Internet Content Regulation in France & the United States		
Characteristics	**France**	**United States**
Role of the Internet	Cultural instrument	Global marketplace
Online auctions	Illegal	Legal
Hate Speech/symbols	Illegal	Legal
Role of Civil society groups	LICRA, UEJF, MRAP. Have standing to sue to remove 'hate" speech and expression from the Internet.	ACLU, Free Speech Coalition. Have successfully sued to protect First Amendment rights on the Internet.

In France, the dominant feature of the Internet regulatory regime is that it results from centuries of governmental exercise of power and control over speech, expression, and the instrumentalities of communication. For hundreds of years, European governments actively muzzled the expression of "dangerous ideas and opinions" disseminated through any instrument of inter-personal and mass communication.[317] In France, speech rights are highly circumscribed in situations where speech is considered an "abuse" of the right of Free speech.[318] The Internet is the latest medium to be brought under the French content-control system.

In matters of race, ethnicity, culture, and the Holocaust, the French government actively intervenes in the free speech arena and sanctions speech that is at variance with the officially approved version of historical truth.[319] Additionally, Internet mediated hate speech, as well as online display of the literature,

317. *See* 3 BELLANGER ET AL., *supra* note 59, at 11 (suggesting that before the Law of 1881 on Freedom of the Press, the media were subject to statutory governmental prior restraint, content and view point-based sanctions, criminal libel laws, seizures, and pre-publication financial deposits).

318. *See* Caroline Uyttendaele & Joseph Dumortier, *Free Speech on the Information Superhighway: European Perspectives*, 16 J. MARSHALL J. COMPUTER & INFO. L. 905, 911 (stating that while France does protect free speech, there are punishments for abuse of this freedom).

319. *See id.* at 924.

lyrics, insignia and indicia of groups that have been found guilty of crimes against humanity, such as the Nazi party, are considered illegal abuses of the right of freedom of free speech.[320] French citizens who access such material on the Internet face prosecution if caught.[321] Indeed, the French Human Rights League laments that the government, through the intermediary of the courts, has now arrogated to itself the role of final arbiter of historical truth in contested and controversial historical matters involving race, ethnicity, and the Holocaust.[322] Groups like LICRA and UEJF serve as limited "co-powers" who help the government enforce its policies.

French anti-racist and anti-Semitic laws in the traditional media and on the Internet are part of concerted efforts undertaken by the Fifth Republic in the 1990s, to make amends for centuries of racial and anti-Semitic oppression in France.[323] Indeed, France has decided that official recognition of the racist and anti-Semitic sins of the nation's past[324] and strict control of racist and anti-Semitic speech in the traditional media and on the Internet is the answer to the centuries-long, Jewish question as well as the solution to the black problem.[325] The result is that, as the *LICRA*

---

320. *See* Law of July 29, 1881 on Freedom of the Press, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881, art. 24. (as amended).

321. *See* Law No. 2004-575 of June 21, 2004 On Confidence in the Digital Economy (1), Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004, art. 6(7) (requiring all Internet Service Providers to assist law enforcement officers in eliminating online material that justifies crimes against humanity, incites racial hatred or can be classified as child pornography).

322. *See* Rebérioux, *supra* note 174, at 92.

323. *See* PETER CARRIER, HOLOCAUST MONUMENTS AND NATIONAL MEMORY CULTURES IN FRANCE AND GERMANY SINCE 1989: THE ORIGINS AND POLITICAl FUNCTION OF THE VÉL D'HIV IN PARIS AND THE HOLOCAUST MONUMENT IN BERLIN 71-72 (2005) (suggesting that French politicians often used the terms "France," "the nation," and "the French State,"within the context of the Vel d'Hiv Holocaust memorial, to refer to the French state in general, as an historical entity over time).

324. *See* Law No. 2000-644 of July 10, 2000 Establishing a National Day in Memory of the Victims of the Racist and Anti-Semitic Crimes of the French State and Homage to the "Righteous" People of France, Journal Officiel de la Republique Française [J.O.] [Official Gazette of France], July 11, 2000, p. 10483. *See also* Law No. 2001-434 of May 21, 2001 Recognizing the Slave Trade and Slavery as Crimes Against Humanity, Journal Officiel de la Republique Française [J.O.] [Official Gazette of France], May 23, 2001, p. 8175.

325. *See* Law of July 29, 1881 on Freedom of the Press, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881, art. 24, p. 4201 (as amended).

and UEJF v. Yahoo! France and Yahoo!, case shows, France now has a constitutional regime that values human rights and human dignity over freedom of speech and expression. Indeed, the *Loi Gayssot,* which has been described as hypocritical, "oppressive and over elastic,"[326] has practically eliminated real or imagined "hate speech" in the French public arena.[327] However, it has not succeeded in eliminating hate crimes against Jews, blacks and Moslem immigrants.

Ironically, French criminalization of racist and anti-Semitic speech and expression came amid the electoral success of Jean-Marie Le Pen's racist, anti-immigrant, National Front party.[328] Indeed, Le Pen was stripped of his parliamentary immunity by the European Parliament, tried and convicted for referring to Hitler's gas chambers as a mere "detail of the history of the Second World War."[329]

The resurgence and success of Jean-Marie Le Pen's racist, anti-Semitic, and anti-immigrant party, *Le Front national* (National Front), shows that the banishment of hate speech from public discourse has been ineffective in eradicating ethnic hatred and hate crimes. If anything, the draconian hate speech laws have driven bias-motivated speech and expression underground, where it festers and erupts from time to time, in the form of racial violence against Jews, blacks, and Moslem immigrants.[330]

---

326. *See* Christopher Hitchens, *Minority Report*, 258 NATION 655 (1994).

327. Karen Bird, *Racist Speech or Free Speech? A Comparison of the Law in France and the United States*, 32 COMP. POL. 399 (2000) (suggesting that all racist speech is prohibited in France).

328. *See* Craig Whitney, *French Far-right Leader Convicted of Slighting Holocaust*, N.Y. TIMES, Dec. 27, 1997, at A5. *See also* Craig Whitney, *Le Pen May be Charged for A Remark About the Holocaust*, N.Y. TIMES, Oct. 7, 1998, at A5; Emmanuel Godin, *Does it Make Sense to Treat the* Front National *as a French Exception?*, *in* THE FRENCH EXCEPTION, *supra* note 5, at 61, 65 (reporting that 31 percent of French workers supported the *Front National* in the second round of the 2002 French presidential elections).

329. *See* Whitney, *French Far-right Leader Convicted of Slighting Holocaust*, *supra* note 328. *See also* Whitney, *Le Pen May be Charged for A Remark About the Holocaust*, *supra* note 328.

330. *See* PEMBER, *supra* note 265, at 114; MICHEL WIEVIORKA, LA FRANCE RACISTE [RACIST FRANCE] 309 (1992) (suggesting that violence against immigrants is part of an extreme right, neo-nazi ideology). *See also* Craig R. Whitney, *To Burden of Poverty in France, Add Racism*, N.Y. TIMES, Jan. 16, 1998, at A3 (suggesting that high unemployment, racism and violence against North African immigrants in France adds to the burden of poverty).

Furthermore, in France the Internet is conceptualized as a medium of communication and culture, not a commercial platform. In keeping with its culturalist tradition, France has tried to control the content of the Internet from the very infancy of the World Wide Web.[331] The country has also strenuously attempted to increase French language content on the Internet under the auspices of *L'Organisation de la Francophonie,* the organization of French-speaking countries.[332] This was an attempt to counter what France viewed as the "monolingualism" of the Anglo-American Internet.[333]

Additionally, Yahoo! Auctions carried out individualized online auctions, an activity currently banned in France.[334] Though Yahoo! France did not have an auctions portal, and did not carry the objectionable Nazi and Third Reich Memorabilia, French citizens could access the material through links to Yahoo!'s main Portal.[335] As such, Yahoo! was perceived as indirectly assisting French citizens and residents to participate in illegal online auctions on a platform that also displayed Nazi and Third Reich memorabilia.[336]

By way of contrast, in the U.S., the Internet is conceptualized as a free marketplace of ideas, goods and services. A place where

---

331. *See* Eko, *The Law of Privacy, supra* note 4, at 14 (reporting that a French cybercafé owner who had placed a banned book about President François Mitterand on the Internet, was arrested and his servers seized on trumped-up charges).

332. *See* Eko, *Many Spiders, supra* note 30, at 469-470. *See also* Stephane Mandard, *Désirs et réalites d'une France Numérique* [*Desire and Reality of A Digital France*], LE MONDE INTERACTIF (Fr.), Oct. 24, 2001, at VI (quoting former French Prime Minister, Lionel Jospin as saying that France wanted to: "use new media technology, and in particular the Internet, to reinforce the international presence of France and la Fancophonie").

333. *See* Eko, *Many Spiders, supra* note 30, at 468-469, 473.

334. *See* Art. 313-6 C. PÉN. (Partie Législative) [Penal Code, Legislative Section]; Art. 16 Law No. 2000-916 of July 10, 2000, J.O., July 11, 2000 (stating that unauthorized persons who participate in auctions face a penalty of 6 months imprisonment). *See also* Hazan, *supra* note 250.

335. *Yahoo! I*, 169 F.Supp.2d 1181, 1184 (N.D.Cal. 2001); LICRA & UEJF v. Yahoo! Inc. and Yahoo! France, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, *available at* http://www.juriscom/net/txt/jurisfr/cti/yauctions20000522.htm (Fr.).

336. *See Yahoo! I*, 169 F. Supp. 2d at 1184-5 (stating that the French government required Yahoo! to prevent French citizens from accessing the auction site and imposing stiff penalties for failure to comply); LICRA & UEJF v. Yahoo! Inc. and Yahoo! France, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, *available at* http://www.juriscom/net/txt/jurisfr/cti/yauctions20000522.htm (Fr.).

speech–in the widest sense of the word–cannot be regulated on the basis of its content, especially if the intent of the regulation is to suppress objectionable speech and expressive conduct.[337] Additionally, the U.S. Supreme Court has held that all systems of officially sanctioned prior restraints are constitutionally suspect.[338]

Due to the dominant economic and political position of the U.S. on the world stage, the country's *laissez-faire* approach to online speech regulation has been construed as a deliberate attempt to impose American cultural hegemony and imperialism on France and the rest of the world.[339] By the same token, American courts will refuse to enforce French content restrictions on American companies, if the "foreign order [would violate] the protections of the United States Constitution by chilling protected speech that occurs simultaneously within [its] borders."[340]

VI. CONCLUSION

The "Yahoo! affair," the long-running, yet to be concluded, multifaceted,[341] transnational litigation triggered by the display of Third Reich, Nazi German and other World War II memorabilia on Yahoo! Auctions, demonstrates the differential conceptualization of freedom of speech and of the press in general, and bias-motivated speech in particular, in the United States and France. The Yahoo! affair also brought to the fore, the political, legal, and cultural differences between the United States and France in matters of media content regulation.

France has a qualified, content-based, free speech regime under the Declaration of the Rights of Man and of the Citizen of 1789, the preamble of the French Constitution 1958, the supreme law of the land. Under this limited free speech regime, bias-

337. *See* U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

338. *See* N.Y. Times v. U.S., 403 U.S. 713, 714 (1971) (quoting Bantam Books v. Sullivan, 372 U.S. 58 (1963)).

339. *See* Vick, *supra* note 3, at 4-5, 19 (suggesting the U.S. Supreme Court decision in Reno v. ACLU imposes America's specific meaning of freedom of speech on whole world).

340. *Yahoo! I*, 169 F. Supp. 2d at 1192.

341. *See Justice: Timothy Koogle, Poursuivi pour vente en Ligne d'objets a caractère Nazi a été relaxé [Justice: Timothy Koogle, who was sued for selling Nazi memorabilia online released]*, LE MONDE (Fr.), Feb. 2, 2003 (reporting the release of former Yahoo! CEO, Tim Koogle, who was charged in a French criminal court for justifying crimes against humanity through selling Nazi memorabilia).

motivated speech, and speech that appears to support, justify or cast doubt on the magnitude or significance of historical crimes against humanity, is punishable under the Penal Code and the law on Freedom of the Press.[342] Additionally, the display of flags, banners swastikas, and other symbols and indicia of groups guilty of crimes against humanity is a violation of the law. These laws are also applicable to the Internet and triggered the so-called Yahoo! affair.

In contrast, the United States has a content-neutral free speech regime in which the country is considered a market-place of ideas under the First Amendment. The main feature of this regime is that speech cannot be regulated on the basis of its content. Therefore, all governmental regulation of speech must meet the exacting strict scrutiny test, which requires that in order to justify content-based regulation, states must show that the "regulation is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end."[343] Thus, while French law criminalizes bias motivated speech on the grounds that it is an abuse of freedom of speech, some American jurists believe First Amendment law tolerates it on the grounds that the United States is a marketplace of ideas where even offensive, racist ideas are tolerated.[344] The Internet has thus become a political, cultural and economic crucible on which the norms and values of the world – and these values are taking on an increasing Ango-American coloration–are forged.[345]

Additionally the Yahoo! cases exemplify the international geo-cultural and ideological struggle between the United States and France over the role of the Internet in an interconnected global society.[346] In the face of American political, economic and cultural domination of the world in the post World-War II era,

---

342. Law of 29 July 1881 on Freedom of the Press, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 30, 1881, p. 4201 (as amended).

343. *See* Simon and Schuster, Inc., v. Members of the New York State Crime Victims' Board, 502 U.S. 105, 118 (1991) (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

344. *R.A.V.*, 505 U.S. 377, 436 (1992) (Stevens, J., concurring).

345. *See* MATTELART, *supra* note 251, at 129-130. (suggesting that the global competition over control of information and is geopolitical high stakes game).

346. *See* TOM HANAHOE, AMERICA RULES 212 (2003) (suggesting that globalization is synonymous with Americanization of the global economic order). *See also* Eko, *Many Spiders*, *supra* note 30, at 448, 468-469.

France has sought, through its ideology of *l'exception culturelle* (cultural exception) to differentiate itself from the American dominated "West" and to assert it national cultural specificity.[347] The media in general and the Internet in particular are the battle ground for this geo-cultural struggle. *Yahoo! v. UEJF & LICRA* should be seen in part within this context. Unfortunately, this struggle has resulted conflict of laws and cultures, and ultimately to expensive, time-consuming litigation.

In order to avoid such conflict of laws and national ideologies, countries that exert political control over the content of websites bearing their country domains or operating within their national territories–of which there are many that do besides France– can enter into agreements with global Internet companies such that material disseminated by these companies is tailor-made for audiences in specific countries and jurisdictions through language, content and style parameters. This practice of "thinking globally but acting locally" has been carried out successfully for decades by international advertisers, movie companies, television program producers, record companies and other global media conglomerates.[348] This narrow, jurisdictional tailoring would mean that companies like Yahoo!, which currently operates portals in 12 different languages, could operate within the laws and values of each country in which it does business without compromising its First Amendment rights in the United States. For example, the Internet website or portal of a global corporation whose subsidiary does business in France would be in French, be targeted at the French market, and obey all French Internet laws, including content-based regulations.[349]

---

347. *See* Sue Collard, *The Elusive French Exception*, *in* THE FRENCH EXCEPTION, *supra* note 5 at 30, 31 (suggesting that the "French exception" has multiple meanings one of which is a means of comparing France with other Western democracies).

348. *See* Vick, *supra* note 3, at 17. *See also* SHANTHI KALATHIL & TAYLOR BOAS, OPEN NETWORKS, CLOSED REGIMES: THE IMPACT OF THE INTERNET ON AUTHORITARIAN RULE 36 (2003) (stating that America Online is broadcasting "a Mandarin-language cable channel into southern China; the channel features only politically and culturally inoffensive programming"); DAYA K. THUSSU, INTERNATIONAL COMMUNICATION 172 (2000) (stating that VIACOM-CBS has successfully tailor-made MTV to suit the cultures and tastes of several regions of the world).

349. *See LICRA & UEJF v. Yahoo!* No. 00/05308, Nov. 20, 2000, *supra* note 14 (French Superior court recognized that Yahoo! agreed to work with French anti-racist groups to eliminate, from its servers, objectionable French-language hate speech directed specifically at French users.).

In exchange, France would refrain from attempting to control the content of the servers or portals of companies outside its jurisdiction, as was the case in the Yahoo! affair. As a matter of fact, jurisdictional tailoring is the *de facto* model under which Yahoo! and other Western companies currently operate in China.[350] Under this model, Yahoo! China, a subsidiary of Yahoo!, assists China in blocking objectionable Internet content within its borders. Indeed, Yahoo! China helped the government track down and jail a journalist accused of "divulging state secrets abroad."[351] China has not however, attempted to control the content of Yahoo!'s servers or portals in the U.S.

As the Internet develops into a sophisticated, global, multi-communication, cultural and commercial platform, countries should have the right to insist that content originating from, or tailor-made for, their national territories conforms to national laws and policies governing media content. However, attempting to rectify one country's historic wrongs against its racial and ethnic minorities through control of legal Internet content in other countries is a recipe for global conflict of laws. Such an outcome, however, may be inevitable in the age of globalization, given that the more information and communication technologies evolve, the more governmental ideologies stay the same.

350. *See* KALATHIL & BOAS, *supra* note 348, at 36 (stating that American Internet companies doing business in China toe the line of the communist system).

351. *See* Reporters Without Borders, *Information Supplied by Yahoo! helped Journalist Shi Tao get 10 years in Prison,* http://www.rsf.org/article.php3?id_article=14884 (stating that Yahoo! has recently acquired a large stake in the Chinese Internet company Alibaba).