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COMPASSION, HATRED, AND FREE EXPRESSION

*Ronald J. Rychlak**

I. INTRODUCTION

I am deeply honored to be invited to present the 2007 Judge William C. Keady Distinguished Lecture to the Mississippi Humanities Council. It was my great pleasure to meet Judge Keady when I first moved to Mississippi. I still remember the intimate lunch that I shared with him and another law professor. Later, I spent several years as executive director of the William C. Keady American Inn of Court. Aside from our chapter being named for him, this organization and its values - civility and professionalism in the practice of law - were near to his heart. In fact, he established our inn, the third oldest in the nation.

In deciding on a topic, I wanted to select one that reflected Judge Keady's interests. He wrote opinions on all sorts of legal issues,[1] including some important environmental law cases,[2] but he is probably best remembered today for the important role that he played in the civil rights struggle during the 1960s and 1970s. One cannot diminish the role that he and other federal judges played in those turbulent years.

Looking at the cases that he decided during this era, I was struck by the number of times "civil rights" cases boiled down to issues of free expression: whether protesters were permitted to march;[3] whether employers were retaliating against political activists;[4] whether state college administrators could bar certain speakers,[5] and so on.[6] Of course, as others have

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1. *See, e.g., Environmental Defense Fund, Inc. v. Alexander*, 554 F. Supp. 451 (N.D. Miss. 1981); *Sierra Club v. Bergland*, 451 F. Supp. 120 (N.D. Miss. 1978); *Boone v. Tillatoba Creek Drainage Dist.*, 379 F. Supp. 123 (N.D. Miss. 1974).

2. *Id.*

3. Montgomery County Bd. of Educ., v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971) (school board sought to prohibit black students and parents from protesting); Robinson v. Stovall, 473 F. Supp. 135 (N.D. Miss. 1979) (constitutionality of the Okolona, Mississippi parade ordinance) *aff'd in part, rev'd in part*, 646 F.2d 1087 (5th Cir. 1981); Robinson v. Coopwood, 292 F. Supp. 926 (N.D. Miss. 1968) (reviewing the constitutionality of the municipal ordinance in Holly Springs, Mississippi, requiring that one hour's notice be given to the City Police Department before any protest march).

4. Jordan v. Cagle, 474 F. Supp. 1198 (N.D. Miss. 1979) (employment dispute involving political activity and claim of retaliatory discharge).

5. Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969) (a challenge to the rules and regulations relating to off-campus speakers on college and university campuses in Mississippi); Stacy v. Williams, 312 F. Supp. 742 (N.D. Miss. 1970) (Temporary Restraining Order memorandum in same case).

6. AFL-CIO v. City of Tupelo, 439 F. Supp. 1224 (N.D. Miss. 1977) (right of association and expression in labor unions); Machesky v. Bizzell, 288 F. Supp. 295 (N.D. Miss. 1968) (suit seeking to enjoin protests and boycott of businesses in Greenwood, Mississippi and Leflore County, Mississippi

noted, the Free Speech Movement of the 1960s "was about civil rights."[7] This all came together recently when I was at Western State University College of Law in Los Angeles, and I saw a poster featuring a photograph of Dr. Martin Luther King, Jr. waving to the crowds in Washington D.C. The caption said: "The Bill of Rights guarantees freedom of speech. Otherwise, it might all have been a dream."[8]

The right to free speech stands behind so many of our other rights, yet today we see it threatened on a global scale with incidents like the riots following publication of the Danish cartoons,[9] criminal sanctions for Holocaust deniers in Europe,[10] and Internet restrictions based on content of the speech.[11] Free speech is also central to national debates over hate crime legislation, campus speech codes, and campaign finance reform. If we are going to protect our civil rights, we must protect the right to free expression, and if we are going to protect it, we have to understand it.

II. UNDERSTANDING THE RIGHT TO FREE EXPRESSION

Too often, Americans are confused about the First Amendment right to free speech. They think it means we have the right to use insulting and vulgar language and say whatever we want with no consequences. Such a definition not only misconstrues the right, it diminishes it to the point of triviality.[12] The right to free speech in our Constitution means that *the government* is not supposed to unreasonably interfere with what we say.[13] It does not provide us with immunity for all of our words, and it does not restrict employers or other private actors.

To take one recent example, many commentators and media personnel complained that when radio personality Don Imus was taken off the air for

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because of alleged denial of equal rights) *rev'd*, 414 F.2d 283 (5th Cir. 1969). The plaintiffs in one of Judge Keady's cases involving restrictions on male teachers' facial hair also advanced claims regarding expression, but I'll leave that argument to the litigants! *See* Conard v. Goolsby, 350 F. Supp. 713 (N.D. Miss. 1972).

7. Dale Vree, *The Filthy Speech Movement*, NEW OXFORD REVIEW, September 2007 at 21.

8. The poster was produced by the American Bar Association

9. *See* Editorial, *Those Danish Cartoons*, NEW YORK TIMES, Feb. 7, 2006; *see also* Richard John Neuhaus, *What the Pope Gets Right. . .*, TIME, Nov. 19, 2006 (discussing the riots that took place following the Pope's comments at Regensberg University); Richard John Neuhaus, *The Regensburg Moment,* FIRST THINGS, Nov. 2006 (same).

10. BBC News, *Holocaust Denier Irving is Jailed*, Feb. 20, 2006, http://news.bbc.co.uk/1/hi/world/europe/4733820.stm (after pleading guilty to having said, in 1989, that there were no gas chambers at Aushwitz, Irving was sentenced, in 2006, to three years imprisonment).

11. *See infra* pp. 19-20.

12. Dale Vree, *The Filthy Speech Movement*, NEW OXFORD REVIEW, September 2007 at 21-22 ("[T]he Free Speech Movement in Berkeley in 1964. . . was about civil rights. In its wake, the Filthy Speech Movement was devised as a mockery by beatniks and bohemians. . . . The Free Speech Movement didn't want to have anything to do with them. . . .").

13. Freedom of speech is not absolute in the United States. Federal, state, and local governments may limit speech if they have a compelling interest and if they use the least restrictive means to do so. In fact, categories of "low value" speech such as obscenity, defamation, and "fighting words" are often excluded from First Amendment protection. Furthermore, communications media enjoy lesser constitutional protection than speech communicated in print media. As such, the government can lawfully regulate hate speech on the Internet if it is threatening, harassing, or if it incites the listener to illegal action.

making a vulgar reference to players on the Rutgers women's basketball team, it violated his First Amendment rights.[14] It didn't. There was no governmental interference in that situation.[15] An employer made a business decision. That happens every day.[16] Words, like actions and ideas, have consequences that are often felt in the marketplace.

Similarly, groups like the NAACP recently have been holding funerals and burial ceremonies for the "N-word."[17] These events usually involve no governmental interference with speech. Elimination of vile and vulgar language is a good thing when the speaker is the one who makes the decision not to employ it. There is nothing wrong with encouraging them to do that.[18] Our level of concern must be heightened, however, when governmental officials take similar actions.[19]

The Bill of Rights, the first ten amendments to the Constitution,[20] does not actually grant rights to American citizens. It assumes that the rights

14. *See, e.g.*, Michael C. Dorf, *How the Firing of Don Imus Undermined First Amendment Values: An Analogy to Secondary Boycotts*, FindLaw.com., Apr. 23, 2007, http://writ.news.findlaw.com/dorf/20070423.html (discussing both sides of this debate); Frank Salvato, *You Either Abide by the First Amendment or You Don't*, American Chronicle, April 12, 2007, http://www.americanchronicle.com/articles/viewArticle.asp?articleID=24230.

15. Dorf, *supra* note 14.

16. A more serious threat to the First Amendment took place with a different radio personality, Michael Savage. In response to a week-long fast embarked upon by 35 students and illegal aliens, Savage said: "I would say, let them fast until they starve to death, then that solves the problem." Gerardo Sandoval, a supervisor for the city of San Francisco responded by saying: "The intolerant and racist comments of Michael Savage demand a strong condemnation." He then introduced a resolution in which he condemned Savage for "defamatory language. . . against immigrants" and called Savage's comments "symbolic of racism and hatred." Sandoval pushed for a unanimous endorsement of his resolution, required for it to be approved by the San Francisco board. The vote in favor was 9-1, meaning that it was not approved. Supervisor Ed Jew, whose grandfather emigrated from China, turned in the veto vote, after affirming Savage's First Amendment right to express his opinion. Worldnet Daily, *San Francisco fails in attack on Savage*, August 14, 2007, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=57170. When asked about his vote, Jew said: "as an elected official I swore to defend the Constitution of the United States of America and the First Amendment. That's exactly what I was doing. . . .Theirs was a vote against Michael Savage's rights enshrined in the First Amendment." Judi McLeod, *San Francisco Supervisor who voted to preserve Michael Savage's Right to Free Speech continues to be harassed*, CANADA FREE PRESS, September 4, 2007. Later, Jew was voted off of the council, and the motion to condemn Savage was approved. *See* World Net Daily, *San Francisco supervisors condemn Savage Officials pass resolution against talker for 'hate speech'*, October 2, 2007, http://www.wnd.com/news/article.asp?ARTICLE_ID=57947.

17. *See* Fr. Jerome LeDoux, *Reflections on Life: NAACP buries 'N-word,' all that goes with It*, MISSISSIPPI CATHOLIC, September 14, 2007, at 8.

18. *See id.* (discussing comedian Richard Pryor's decision not to use the N-word). Bill Cosby discussed the campaign against the word on *Meet the Press*, October 14, 2007. So far, it has had mixed results. While one who writes an academic paper or reports a news story is reluctant to use it even while discussing the controversy over its use, it is used all too frequently by African-American artists, athletes, and youth who model the urban gangster lifestyle. I remember as a young boy reading Bob Gibson's autobiography in which he spoke of how the term hurt him, even when used by black comedian Dick Gregory. Gibson, a Hall of Fame pitcher with the St. Louis Cardinals was a hero to me. Had I ever been tempted to use this word, which was never uttered by my parents or any of their friends in my presence, Gibson's words alone would have prevented me from doing so.

19. LeDoux, *supra* note 17, at 8.

20. Because the Ninth and Tenth Amendments are worded differently, commentators will sometimes refer to the first eight amendments as constituting the true Bill of Rights.

exist, and it restricts the government from interfering with them.[21] In a literal sense, however, the Bill of Rights is not a list of rights but a list of restrictions on governmental power.[22]

When I teach Constitutional Law or Criminal Procedure at the University of Mississippi, I do a lecture on the Bill of Rights. Sometimes I even take a framed copy of that document to class. My talk begins by discussing colonial days. In those days, there was no national "American" identity. Most colonists looked upon their colony as their county.[23] To the extent there was something bigger than the colony, it was England. Of course, a great deal of resentment toward England developed even prior to the Revolutionary War. As British authorities cracked down on the colonists immediately before and during the war, the resentment grew.

After the colonies won their independence, it became clear that they needed to form some type of union to facilitate trade and for self-defense. The Constitution was designed to do that, but as drafted it did not contain a Bill of Rights. When the Constitution was sent to the states for ratification, however, it became clear that the document would not be ratified unless the people were assured that this new federal government would be restricted from interfering with their rights, including the right to free speech.

Colonists who had just thrown off King George were worried about creating a new, powerful central authority that might treat them the same way that England had done. They were not prepared to accept a constitution unless it protected their rights. So they reached an agreement. The Constitution was ratified as written, but the first Congress added a Bill of Rights to prohibit the federal government from infringing upon citizens' rights.

This is where, in my Criminal Procedure class, I run down the Bill of Rights. The First Amendment relates to Free Speech, Press, Assembly, Religion, and the Right to petition the government. Of course, the British had denied all of these rights to colonists at different times. The Second Amendment provides for the right to keep and bear arms. The British had taken guns away from the colonists as the Revolutionary War approached. The Third Amendment relates to quartering soldiers in the homes of citizens. The British did that too. In fact, you can go right on down the entire Bill of Rights and see that this document was designed to assure citizens of the young nation that the new central government would be very limited and would not do the same kind of things that the British had done.

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21. The French took the opposite view of rights. In their Declaration of the Rights of Man and Citizen of 1789, the rights of the community took precedence over the rights of individuals. Rights-to speech, religion, and press-are circumscribed by the effects they might have on the public order. Whereas the American Bill of Rights protects the individual against the group, the French Declaration of Rights protects the group against potentially disruptive individuals.

22. In fact, as written, the restrictions apply only to the federal government. The 14th Amendment, enacted following the Civil War, makes most of the limitations applicable to the states.

23. *See generally* Ronald J. Rychlak, *Lotteries, Revenues, and Social Costs: A Historical Examination of State Sponsored Gambling*, 34 B.C.L. REV. 11, 24 (1992).

After the Civil War, the Constitution was further amended to make sure that state governments did not violate the rights of their citizens. The important realization, however, is that the right to free expression as contemplated in our constitutional scheme is simply a right to be free from unreasonable governmental interference, not the right to say whatever you want with no consequences. Still, this is an enormously important right.

III. CAMPUS SPEECH CODES

I first developed a professional interest in the subject of free speech in the late 1980s, when I learned of the various efforts to establish "speech codes" or "free-speech zones" on college campuses. At the University of Mississippi, the raging debate centered on display of the Confederate battle flag. It was widely viewed as a symbol of Ole Miss, but it made many people feel uncomfortable, and it seemed to be hurting the university's national reputation.[24] Any regulation of the right to display the flag, however, would have to survive a constitutional challenge. A flat prohibition would have had serious constitutional problems. Many conversations focused on how to keep people from waving the Confederate flag without offending the First Amendment.

Talking this over with my colleagues, I proposed an answer that seemed to work. We would simply ban all flags from sporting events. They obstructed the spectators' views and posed a potential hazard. The stadium already banned umbrellas; flags were similar. This ban might survive a First Amendment challenge because it regulated conduct, not speech; all flags were treated equally; and there was a rational basis for this restriction.[25]

We went so far as to draft a motion for the faculty senate and revise it at least once. We circulated it to several colleagues to get their thoughts and suggestions. We prepared a cover letter to send to every member of the faculty senate. We thought we had found a proper way in which to ban Confederate flags from sporting events, and we thought that there would be sufficient faculty support for it to pass.[26]

As we were preparing for our presentation to the faculty senate, a colleague to whom we had circulated our proposal came to us and said, "you're restricting free speech." I explained that we were really restricting conduct, not speech, and since we were not singling out a specific flag, we

24. *See id.*

25. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 516 (noting the uncertainty of any university rule bearing on matters of race and free speech).

26. At the meeting at which we had contemplated submitting this proposal, the faculty senate approved a resolution calling for an end to segregated fraternities and sororities (with the sanction being loss of lease) with only one dissenting vote. *See* Allison Wilkins, *Greeks Believe Integration Positive*, DAILY MISSISSIPPIAN, Aug. 22, 1991, at 6A (reflecting mixed student reaction). Later, both the alumni association at the University of Mississippi and the faculty senate passed resolutions requesting that fans voluntarily stop waving the Confederate flag at University sporting events. *Cf.* W. Sterling Wright, *A Few Passing Thoughts on the Issue of Flags*, DAILY MISSISSIPPIAN, Aug. 22, 1991, at 3A (Letters to the Editor) (cautioning supporters of the Confederate flag that these requests are a precursor to a rule prohibiting display of the Confederate flag). Eventually, the university did ban all flags.

needed only to show a rational basis to avoid violating the First Amendment. This regulation, I argued, was clearly constitutional. "Perhaps," he responded, "but you're still restricting free speech."[27]

That accusation recast the entire issue in my mind. He did not accuse us of violating the First Amendment; he said *free speech.* To the extent that we had considered the free speech issue, we had seen only the limitations imposed by the First Amendment. Those limitations were obstacles that a creative lawyer could navigate. Our plan had been designed in contemplation of those obstacles, and we thought we had a way around them. The charge being leveled at us now, however, changed things. No longer was it a simple matter of getting around the First Amendment. Now we had to address the issue at the heart of the matter, *free speech.*

We had been doing that which was politically correct. The Confederate flag offended some students, and getting rid of it as a symbol might help race relations, improve the university's image (possibly the state's as well), and encourage more minority students to consider attending the university. We had not, however, considered the message that we were attempting to stifle—the feelings and emotions that many people were trying to express by waving the Confederate flag. We had only thought about making this campus a nicer place where everyone would get along together. As long as our intentions were good, we thought, our actions were justified.[28] Of course, had this same justification been given by someone who was trying to quiet a war protester or silence a civil rights activist, everyone who supported the effort to stop the flag would have been outraged.

Taking a banner out of a hand because it conveys an offensive message is censorship of the same magnitude as burning a book. We were so concerned about race relations and complying with the First Amendment that we did not consider the true impact of our actions. Even if we could avoid the limitations imposed by the Constitution, we were trying to restrict free expression. The Confederate flag symbolizes many different messages. People who wave it might be expressing racial bigotry, but even offensive speech is entitled to protection.[29] For most of the students and alumni who

27. The comment was made by my friend and former colleague, Tim Hall, now president of Austin Peay University.

28. The end result of racial justice can be seductive. *See* Mark Cammack & Susan Davies, *Should Hate Speech be Prohibited in Law Schools?*, 20 Sw. U. L. Rev. 145, 163-71 (1991) (setting forth seemingly valid reasons why one might want to prohibit certain types of speech).

29. *United States v. Eichman*, 496 U.S. 310, 318-19 (1990) (finding that government may not prohibit speech just because it is offensive); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (same); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); Gerald Gunther, *Good Speech, Bad Speech: Should Universities Restrict Expression that is Racist or Otherwise Denigrating?*, Stanford Lawyer (1990) (referring to the "elementary First Amendment principle that our Constitution usually protects even offensive, harmful expression"); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 435 (Although he concludes that it is proper to control racist speech on campus, Professor Lawrence also agrees that "[t]here are very strong reasons for protecting even racist speech.").

waved the Confederate flag, the message was not intended to be offensive in any way.[30]

We had the best of intentions, but as the former president of Yale, Benno Schmidt, stated, "use of university authority to suppress freedom' is 'typically' the result of 'the best of intentions."[31] Twenty-five years ago, NYU Law Professor Arthur Miller (then at Harvard) cautioned about the dangers of allowing any individual or group to restrict expression, even when it is done for seemingly worthy reasons:

> [S]elf-appointed censors may have an argument to justify their activities, but it's not a very good one. The notion that certain forms of expression—such as dramatic presentations deemed to be sexist—should be suppressed has a seductive appeal to those who strongly oppose the message of the speech and particularly to those who feel personally threatened by its implications. But this is the same attitude that led to the banning of *Ulysses* and *The Rabbits' WeddingFalse* Our experience, especially in light of the legal struggle over government attempts at censorship, informs us of a guiding principle—namely that no one group, and no one set of values, has a monopoly on truth. We cannot trust others, or even ourselves, to decide what is and what isn't harmful to be seen, heard, or understood by the rest of society.[32]

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30. Having been born in Ohio and brought up in the Midwest, I will evermore be a "Yankee" to true Mississippians, but I have spent most of my adult life south of the Mason-Dixon line. I also married a southern "belle." As such, I have devoted a great deal of time to understanding the South. The realization that I was trying to restrict free speech caused me to examine the message behind the flag, and I reached some conclusions that help me better to understand the willingness of southerners to embrace symbols that could easily be seen as vestiges of slavery and a rejection of national values.

Whereas most northern cities have neighborhoods flavored by cultural identities, the same is not true in the South. Southern cities have no European ethnic centers. There is no Greek-town, no Little Italy, and no German neighborhood. Once upon a time, ethnic restaurants were few and far between. There may be racial pockets, but most European descendants have lost any sense of ethnic identity. For the average southerner, the "old country" is neither Poland nor France, it is the Confederacy.

For many southerners, thoughts of the Old South conjure up visions of Rhett Butler and Scarlet O'Hara dancing across a ballroom floor. The civility and decorum depicted in the movie *Gone With the Wind* are a heritage people can point to with pride. While most southerners readily admit that slavery was an evil part of that society, they feel that it is unfair to ask them to abandon their entire heritage. Other countries have also had very dark hours, but no one has tried to prohibit other Americans from celebrating their heritage. To many southerners, the celebration of their culture is no more threatening than, for instance, a German Octoberfest. Accordingly, many who embrace the symbols of the Old South have no intent to offend others by their actions. They are simply celebrating their heritage. While they may be viewed as insensitive to the feelings of some, it is wrong to attribute evil intentions to their actions.

31. George Will, *Curdled Politics on Campus*, NEWSWEEK, May 6, 1991, at 72 (quoting Benno Schmidt). *See generally* D'souza, *Illiberal Education: The Politics of Race and Sex on Campus,* ATLANTIC MONTHLY, Mar. 1991; William A. Henry III, *Upside Down in the Groves of Academe*, TIME, Apr. 1, 1991, at 66; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991) (discussing hate speech and accomodationalist proposals).

32. ARTHUR R. MILLER, MILLER'S COURT 87 (Houghton Mifflin Company 1982).

We may "know" that our position is the most enlightened, that we are not seeking to entrench ourselves in power, and that our opponents do not have any serious academic challenges to our position, but it is still wrong to stifle dissent. It is especially dangerous to give any individual or group the authority to restrict expression; history teaches that such power is rarely used in a judicious manner.[33]

Ole Miss is not the only campus at which the desire to be supportive of all students has come into conflict with free speech. In response to real or perceived acts of bigotry,[34] several students, faculty members, and administrators have called for a prohibition on offensive speech.[35] Such restrictions have been justified based upon a "right to avoid having one's feelings

33. *See* Strossen, *supra* note 25, at 536 ("History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others."). A student at the University of Connecticut was expelled from University dining halls and residences for posting a sign on her door indicating that "bimbos," "preppies," "racists," and "homos" would be shot on sight. Cammack & Davies, *supra* note 28, at 148. Of course, it was the word "homo" that got her into trouble. *Id.* Presumably, bimbos, preppies, and racists were either wise enough to recognize that this was not actually a threat, or it was okay to shoot them. Several schools have punished students for expressing religious objections to homosexuality. Henry, supra note 31, at 67. At the University of Washington, a student was punished for questioning the professor's assertion that lesbians make the best mothers. *Id.* At the University of Michigan, a student asked to be moved to another room when he discovered that his roommate was a homosexual and had pinned up pictures of nude men in the room. After a long administrative hassle, the University finally agreed to move him, but warned him not to disclose the reason why he had been moved at the risk of facing university charges of discrimination on the basis of sexual orientation. D'Souza, *supra* note 31, at 55.

34. *See* Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 176-78 (1990) (detailing several racist incidents on American campuses); *see also* Cammack & Davies, *supra* note 28, at 145 (same); Lawrence, *supra* note 29, at 431-34 (same); David F. McGowan & Ragesh K. Tangri, Comment, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 826 (1991) (same); Tom Morganthau, *Race on Campus: Failing the Test?*, NEWSWEEK, May 6, 1991, at 26-27 (same); David Rosenberg, Note, *Racist Speech, the First Amendment, and Public Universities: Taking a Stand on Neutrality*, 76 CORNELL L. REV. 549, 551-52 (1991) (same).

35. *See* Mary Beth Marklein, *On Campus: Free Speech For You But Not For Me?*, USA TODAY, Nov. 3, 2003, available at http://www.usatoday.com/news/washington/2003-11-02-free-speech-cover_x.htm. Several specific examples are documented in D'Souza, *supra* note 31. *See also* Cammack & Davies, *supra* note 28, at 148 (finding that the invalidation of the University of Michigan's hate speech policy led to cancellation of similar policies by other schools). Doe v. University of Michigan, 721 F. Supp. 852, 856-58 (E.D. Mich. 1989). That code authorized sanctions (ranging from formal reprimand to expulsion) for "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." *Id.* at 856. According to an interpretive guide, examples of conduct that would be sanctionable included a male student remarking that "[w]omen just aren't as good in this field as men"; the exclusion of a person from a party or a study group because of their sexual preference, race, or ethnic identity; laughter at a joke about someone who stutters; or membership in a student organization that "sponsors entertainment that includes a comedian who slurs Hispanics." *Id.* at 858. Of particular relevance to this paper, a student would be deemed a "harasser" if he or she displayed a Confederate flag "on the door of your room in the residence hall." *Id.*; Morganthau, *supra* note 34, at 27 (quoting a Harvard student who displayed a Confederate flag from the window of her dorm room) ("If they talk about 'diversity,' they're gonna get it. . .. If they talk about tolerance, they'd better be ready to have it."); *see also* Arlynn L. Presser, *The Politically Correct Law School: Where It's Right to be Left*, ABA JOURNAL, Sept. 1991, at 52, 55 (quoting Alan Dershowitz) ("How many politically correct students are demanding — in the name of diversity — an increase in the number of evangelical Christians, National Rifle Association members and Right to Life advocates?"). The Michigan code was challenged by a psychology student who feared that his discussion of "controversial theories positing biologically based differences between the [races and sexes]" might subject him

hurt."[36] Campus administrators have been quoted as saying, "'[t]here are higher values than free speech."[37] One college official explained, "'[f]reedom of expression is no more sacred than freedom from intolerance or bigotry.'"[38] With these justifications, almost 200 universities around the country introduced regulations prohibiting offensive speech, both in and out of the classroom.[39] Punishment for violating these rules varied from forced apologies to expulsion.[40]

Many university speech codes ended up being declared unconstitutional,[41] but university administrators are not dumb. They took the same

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to sanctions. *Doe*, 721 F. Supp. at 867-68. It was held unconstitutional on the grounds that it was both overbroad and vague. *Id.* at 864-67. The administration typically attempted to convince the accused student to accept "voluntary" sanctions, with the subtle threat of a formal hearing as the alternative. *Id.* at 866; *see* Walter Shapiro, *Failing to Make the Grade*, TIME, May 6, 1991, at 71 (reviewing Dinesh D'souza, *Illiberal Education: The Politics Of Race And Sex On Campus*, *supra* note 31) (Michigan's speech code called an "affront to civil liberties"). Even Professor Lawrence, who supports controlling racist speech, found the Michigan regulations "clearly overbroad." Lawrence, *supra* note 29, at 478 n.162. The difficulty of preparing a contitutional speech code is illustrated by the fact that, despite this unanimity of opinion on the unconstitutionality of this code, it was prepared with the assistance of the university counsel and several law professors. *Doe*, 721 F. Supp. at 855.; *see generally* McGowan & Tangri, *supra* note 34, at 831-33 (discussing *Doe*); Rosenberg, *supra* note 34, at 554-59 (same).

36. Henry, *supra* note 31, at 66, 67; *see also* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 380-81 (suggesting similar justifications for speech regulations).

37. Ron Grossman, *Academia's Anarchist a Hit in Hyde Park*, CHICAGO TRIBUNE, May 5, 1991, Section 5, at 1, 8 (quoting "more than one college administrator"); *see also* Henry, *supra* note 31, at 67 ("According to a growing number of academic theorists, the First Amendment guarantee of freedom of speech can be legitimately laid aside for worthy reasons."); *cf.* Deborah R. Schwartz, Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733, 799 (1989-90) (arguing that racist epithets, but not racist ideas, are properly subject to restrictions).

38. Henry, *supra* note 31, at 67 (quoting John Jeffries, Associate Dean of the Graduate School of Management and Urban Policy at New York City's New School for Social Research).

39. *Breaking the Code*, NEW REPUBLIC, July 8, 1991, at 7, 8; *see also* D'Souza, *supra* note 31, at 52 (discussing censorship regulation in universities); Henry, *supra* note 31, at 67 (discussing the recent trend in university regulation of speech). For a list of schools that adopted regulations restricting racist speech, *see* Lawrence, *supra* note 29, at 436 n.28, 450 (reprinting Stanford's regulations); McGowan & Tangri, *supra* note 34, at 830 n.26 (estimating that 70% of colleges and universities have adopted restrictions on offensive speech); Strossen, *supra* note 25, at 488 n.14 (noting that 60% of reporting campuses had enacted written policies on bigotry, racial harassment, or intimidation, and 11% more were working on such policies); *cf.* Doe v. University of Michigan, 721 F. Supp. 852, 867-68 (E.D. Mich. 1989) (noting that Yale refused to enact such a code).

40. D'Souza, *supra* note 31, at 54. Even codes that authorize no formal punishment can have a chilling effect on speech. Mark Cammack and Susan Davies refer to the speech code at State University of New York at Buffalo as "admonish[ing] students to adhere to a nonenforceable standard of conduct." Cammack & Davies, *supra* note 28, at 159. That code states that "'remarks based on prejudice and group stereotype will generate critical responses and swift, open condemnation by the faculty.'" *Id.* at 159 n.99.

41. So far, the courts have been unwilling to uphold university speech restrictions. In Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), the court rejected a speech code premised upon the "hostile environment" theory of speech restrictions. Two years later, a similar ruling brought to an end the speech code at the University of Wisconsin. *See* UWM Post Inc. v. Bd. of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991). Similarly, the First Amendment protected a fraternity from punishment for sponsoring an "ugly woman contest," even though the contest's message "ran counter to the views the university sought to communicate to its students and the community." Iota Xi Chapter v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993).

basic definitions and write them into campus regulations prohibiting harassment. According to the documentary file *Indoctrinate U.*,[42] these new provisions have been invoked to punish students for such things as writing an op-ed, publishing political cartoons, and hanging up posters announcing a speech. The Foundation for Individual rights in Education, which tracks matters like this, lists well over 100 recent cases it has handled, and reports that it has represented thousands of students and professors who had their free speech threatened.[43] Sometimes this happens at law schools.

In 2002, Harvard Law School came very close to adopting a restrictive speech code.[44] Harvard Law Professor Charles Ogletree has opined that the "First Amendment was written to protect, . . . [but] the press is now the oppressor, finding fuel in the First Amendment to persecute and condemn."[45] Another Harvard law professor proposed establishment of what has been called an "unHarvard Activities Committee" to monitor politically incorrect and offensive speech.

Professor Alan Dershowitz, saw that there was something wrong with the way his colleagues at Harvard were thinking: "[t]here is something very wrong at Harvard Law School . . . for too many radical professors and students, freedom of speech for those who disagree with them is just 'not their thing'."[46]

Other law schools actually put speech codes them in place. The State University of New York at Buffalo Law School faculty, for instance, adopted a resolution prohibiting students from making "remarks directed at another's race, sex, religion, national origin, age or sexual preference."[47] Students who violated the rule, it was said, were not be protected by the

42. *See* Kevin Mooney, *New Film Exposes Apparent Lack of Academic Freedom in US*, CNSNews.com, Oct. 08, 2007, http://www.cnsnews.com/ViewCulture.asp?Page=/Culture/archive/200710/CUL20071008b.html . For the movie's web page, *see* http://www.indoctrinate-u.com/intro.

43. The web page for the Foundation for Individual rights in Education permits the viewer to examine many recent cases: http://www.thefire.org/index.php/. One of the more interesting cases involves conservative protest of the appearance of Ward Churchill, the former University of Colorado professor who called the people killed in the World Trade Center on September 11, 2001, "Little Eichmanns." *See FIRE Letter to DePaul University President Dennis Holtschneider*, Nov. 23, 2005, *available at* http://www.thefire.org/index.php/article/6620.html.

44. *See, e.g.,* ANDREW PEYTON THOMAS, THE PEOPLE V. HARVARD LAW: HOW AMERICA'S OLDEST LAW SCHOOL TURNED ITS BACK ON FREE SPEECH (Encounter Books 2005) (in 2002, two students and two professors made statements regarded by black students as offensive, resulting in protests and support for the adoption of a speech code that would punish anyone who used words deemed offensive by members of selected minorities; it was not enacted). Cammack & Davies, *supra* note 28, at 145 (noting acts of racist behavior at Columbia Law School, New York University Law School, and State University of New York at Buffalo Law School). In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), the Supreme Court held that even hate speech was a protected form of discourse, necessary to the marketplace of ideas and the pursuit of truth. Shortly thereafter, Howard Law Journal ran a lead article entitled *Regulating Hate Speech at Public Universities After* R.A.V. v. City of St. Paul, 37 How. L. J. 1 (1993) (by Lawrence Friedman).

45. Charles Ogletree, *Perspective On The Simpson Trial; Media Put Justice In Harm's Way; The First Amendment Was Meant As A Shield For The Oppressed, But The Press Has Now Become The Oppressor,* LA TIMES, Oct. 12, 1994.

46. Fox Butterfield, *Parody Puts Harvard Law Faculty in Sexism Battle,* NY TIMES, Apr. 27, 1992, at A10.

47. D'Souza, *supra* note 31, at 55 (quoting the faculty resolution).

First Amendment, because "'our intellectual community shares values that go beyond a mere standardized commitment to open and unrestrained debate."[48]

Restrictions on speech have had serious adverse effects on the academic community. After all, the threat of sanctions can have a serious chilling effect on those involved in academic debate. There is "an enormous unwillingness among students to even argue hypothetically for the 'wrong' side in matters that touch upon [political correctness] because of a fear of being labelled an -ist of some sort: racist, sexist, heterosexist, classist, ableist."[49] Some law professors resorted to allowing students to express "incorrect" arguments on anonymous notes that are then read in class.[50] It has even been suggested that law students should not study judicial decisions reflecting negative racial stereotypes.[51] The President of New York's Bard College explained, "'Nobody wants to listen to the other side. On many campuses, you really have a culture of forbidden questions."[52] Accordingly, universities are being gutted of their primary function, the process of learning. As one college president asked: "'What the hell is a university all about if not open debate?"[53]

During the height of the campus speech code frenzy, I once got worried that I had crossed the line. It was in environmental law class, and we were talking about disposal of hazardous waste. The case we were studying involved a company which had hired another company to dispose of hazardous waste.[54] The disposal company charged only about half of what its competitors charged. The catch was that the company did not properly dispose of the waste; it simply dumped the waste by the roadside out in the country.[55]

It is not very hard to find the disposal company criminally and civilly liable in such a case. That was not in dispute. The issue we were looking at related to the responsibility of the company that produced the waste—the company which had hired the low-cost disposal company.

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48. *Id.* (quoting the faculty resolution). Georgetown University considered disciplinary action against a law student who disclosed that the law school was lowering its standards to admit more African-American students. McGowan & Tangri, *supra* note 34, at 830 n.25; Morganthau, *supra* note 34, at 27; Presser, *supra* note 35, at 53.

49. Presser, *supra* note 35, at 53.

50. *Id.* (This tactic has been employed by N.Y.U. law professor and ACLU president, Nadline Strossen.).

51. Strossen, *supra* note 25, at 529 n.217; *see also* Cammack & Davies, supra note 28, at 146 ("It is our conclusion that it is appropriate, as a matter of educational and liberal theory, to prohibit law students from expressing themselves in the language of racist, sexist, and anti-ethnic insults directed against groups that have traditionally been the subject of ideas or theories of inferiority.").

52. Henry, *supra* note 31, at 66 (quoting Leon Bostein, President of Bard College).

53. D'Souza, *supra* note 31, at 67 (quoting Malcolm Gillis, Vice-Provost at Duke University); see also McGowan & Tangri, *supra* note 34, at 907 (discussing instances where political postures have interfered with classroom discussions).

54. U.S. v. Hoflin, 880 F.2d 1033 (9th Cir. 1989).

55. *Id.* at 1039 (holding government not required to show that defendant knew that facility lacked a permit as element of the RCRA disposal crime); *see also* U.S. v. Hays Int'l Corp., 786 F.2d 1499 (11th Cir. 1986).

The court found responsibility based upon the low price being charged by the disposal company.[56] In other words the court found that the company which produced the waste must have known about the disposal company's business practices. Therefore, it was responsible along with the disposal company.

That is when I said something that could have gotten me into trouble. It was sort of a joke, and it drew a few mild laughs, but it mainly was an observation. I said, "It's like when you were a kid and you looked in the back of comic books. They always advertised those x-ray glasses. They made it seem like you could see through Susie's dress, but you knew that was too good to be true."

I did not mean for this to be a sexist comment. I did not plan it out in advance. It was simply a point that hit me as a funny example of what the court had essentially concluded. If something seems too good to be true, it probably is.

As a few people chuckled, it occurred to me that I had done exactly the kind of thing that was getting professors into trouble all over the nation. If the students went down to the dean's office and reported me, I might have been in trouble. Fortunately, none did.

One might think that I had no room to complain, given that my "infraction" went completely unpunished. But this is not the case. The tyranny of this new sensibility is not limited to those who have been disciplined. The worse impact comes from the self-censorship of teachers that restricts classroom discussions due to the fear of harassment charges.

A good teacher or thinker must be free to think and express ideas. Often the hardest part of learning to teach is learning how to break down your own internal inhibitions. You must step away from the podium. You have to depart from the written text. You must pull together all of those skills that are necessary to logical persuasion—logic, emotion, and credibility.

Emotion, in particular, is important but often overlooked part of learning.[57] If I can get a student emotionally involved in a case, he or she will better focus on the issues and remember the arguments longer. It is not unusual for me to bring up controversial positions, ones which I believe to be incorrect, just to stimulate the debate among the students. These debates, when they work properly, are among the greatest learning vehicles that a teacher has at his or her disposal. To work properly, however, the teacher and the student must be free to explore new avenues, question established solutions, and propose new observations without risking more than the embarrassment which comes from being charged with insensitivity.

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56. *Hoflin*, 880 F.2d at 1039.

57. *See* Ronald J. Rychlak, *The Humorous Origins of the Green Movement: The Three Stooges as Early Environmentalists*, 48 OKLA. L. REV. 35, n.1 (1995). (Aristotle's Rhetoric 1.2 discussed three aspects of persuasion: moral character (*ethos*), emotion (*pathos*), and logic (*logos*)).

The fear of embarrassment alone is sufficient to keep most people from participating in public debates. If the authority in power, be it an administrator, a teacher, a judge, or some other figure adds another level of intimidation, the debate necessarily becomes less effective. In fact, if the level of intimidation (punishment) increases to an oppressive level, no effective debate can even come into being.[58] In the classroom, that means the debate is stifled and students are deprived of an important learning experience. In other words, there are many more victims of political oppression than the few who are occasionally identified by the press.[59]

The movement to control speech on campus is born out of legitimate concern for the well-being of students, but the very concept of a speech code, with prior restraint and restricted debate, is anti-educational.[60] Even if those in control do not want to enforce the regulations except in extreme cases, the chilling effect on those who are concerned about the potential punishment (or even about officially being branded as a bigot by the institution) will surely stifle the free and robust exchange of ideas that is so critical to the campus climate.[61]

IV. THE INTERNET AND FREE EXPRESSION

In light of my interest in free speech, not just the First Amendment, I was particularly delighted when in 2004, the State Department invited me

58. As illustrated in *Doe v. Board of Regents*, 721 F. Supp. 852 (E.D. Mich. 1989), students are keenly aware of the risk of sanctions. That, in turn, interferes with the learning process.

59. Offensive speech should instead be dealt with on a case-by-case basis. Strossen, *supra* note 25, at 507 ("[T]he question whether any particular racist speech should be subject to regulation is a fact-specific inquiry. We cannot define particular words as inherently off limits, but rather we must examine every word in the overall context in which it was uttered.") (footnotes omitted). One could imagine instances where harassment on campus should lead to punishment; however, it is unlikely that any regulation needs to be enacted to cover those situations. If harassment becomes routine, it is likely to come from no more than a very small group of people. The standard remedy in such cases would be to seek a narrowly tailored injunction to prohibit the offensive speech from being directed from one specific person to another specific person. Perhaps universities could, after an appropriate hearing, issue something similar to an injunction in situations where verbal expression has gotten out of hand. That would certainly be preferable to the speech codes and chilled debate that we are now seeing on college campuses. In almost every such case, there is likely to be conduct that is punishable, not mere speech. "It makes better sense, legally and morally, to prosecute someone for harassment, trespassing, or disturbing the peace without judging the content of their expression than it does to proscribe certain forms of expression." *Breaking the Code*, *supra* note 39, at 8.

60. Debates about offensive speech on campus will continue, since this type of speech may come close to unprotected speech. For instance, face-to-face speech may constitute "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-573 (1942), or be deemed likely to produce "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and therefore fall outside the First Amendment. *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (describing racist speech as "outside the realm of protected discourse"); *cf.* Sean M. SeLegue, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 CAL. L. REV. 919, 931-33 (questioning the continuing viability of the "fighting words" exception); Strossen, *supra* note 25, at 508-14 (same). *But see* U.M.W. Post, Inc. v. Bd. of Regents, 774 F.Supp. 1163, 1172-73 (E.D. Wis. 1991) (finding that the University of Wisconsin's speech code went well beyond the fighting words exception). As a general rule, however, the chilling effect that necessarily follows any speech code is undesirable.

61. Strossen, *supra* note 25, at 528. In addition to being a tool used to oppress minorities, speech codes "[m]ake bigots into First Amendment martyrs and [elevate] noxious prejudices to the status of political ideas." *Breaking the Code*, *supra* note 39, at 8.

to Paris for a meeting of the Organization for Security and Cooperation in Europe (OSCE).[62] This was the first-ever conference on Internet hate speech.[63] The purpose was to examine how governments could work together to fight harmful effects of hate on the Internet, and my role would be to present the U.S. position on free speech.[64] To me, defending free speech was like defending mom, baseball, and apple pie. Unfortunately, when I got to Paris I was stuck defending terrorists, Skinheads, and Nazis.

A. European Free Speech

Unlike the USA, many European nations have criminalized hate speech. The precise national laws, of course, vary from one country to the next. Consider, however, the German Penal Code which specifically targets hate speech.[65] Under Article 131 of that code it is illegal to write or broadcast anything that incites racial hatred or describes "cruel or otherwise inhuman acts of violence in a manner which glorifies or minimizes such acts."[66] Other sections prohibit insults to personal honor and defaming the memory of the dead.[67]

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62. The meeting was part of an OSCE focus on racism, xenophobia, discrimination, and anti-Semitism.

63. Christopher Wolf, *A Comment on Private Harms in the Cyber-World*, 62 WASH. & LEE L.REV., 355 (2005).

64. The U.S. Delegation to the Paris meeting was jointly led by Ambassador Stephan M. Minikes, head of the U.S. Mission to the OSCE; R. Alexander Acosta, Assistant Attorney General for Civil Rights; and Dan Bryant, Assistant Attorney General for Legal Policy. Markham Erickson, General Counsel from Net Coalition; Brian Marcus, Director of Internet Monitoring; Anti-Defamation League and I joined the delegation as Public Members. The full texts of statements circulated at the Paris meeting by the United States and other participants are available through the OSCE's Internet web site at http://www.osce.org/documents/cio/2004/09/3642_en.pdf.

65. Germany first applied its Criminal Code to the Internet in 1995, when the Munich Public Prosecutor investigated CompuServe for violating obscenity regulations. Fearing criminal sanctions, CompuServe blocked access to 200 Web sites for four million subscribers in 147 countries. In 1996, the Manheim Public Prosecutor's office formally charged a German citizen residing in Canada, with violating Section 131 of the German Criminal Code (depiction of violence). While the German citizen published his Holocaust-denial Web site in the United States, Section 9 of the German Criminal Code attaches liability to anyone who commits a crime that has effects within German borders. German courts have upheld and rigorously enforced these regulations. Germans, like many European nationals, do not see this as a violation of free speech. The *Grundgesetz*, or Basic Law, the foundation of the German constitutional system, includes broad guarantees for free expression. Section 1 of article 5 of the German Basic Law provides: "Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There will be no censorship." GRUNDGESETZ [GG] [Constitution] art. 5, sec. 1 (F.R.G.). On the other hand, section 2 of that same article provides: "These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the youth, and in the right to personal honor. GRUNDGESETZ [GG] [Constitution] art. 5, sec. 2 (F.R.G.).

66. Article 2.1 states that "everyone shall have the right to the free development of his/her personality in so far as he/she does not violate the rights of others or offend the constitutional order or moral code." GRUNDGESETZ [GG] [Constitution] art. 2.1 (F.R.G.); Article 10.1 proclaims that the "privacy of posts and telecommunications shall be inviolable,"while article 10.2 states that 'this right may be restricted [by] statute." GRUNDGESETZ [GG] [Constitution] art. 10.1, 10.2 (F.R.G.).

67. Section 191 of the code also authorizes criminal prosecution for distribution of insulting or defamatory broadcast statements concerning victims or members of groups prosecuted by the Nazis or other totalitarian regimes. Using this authority, German lawmakers passed comprehensive Internet

We Americans would also prefer that people generally not insult personal honor or the memory of the dead. In fact, we have laws relating to defamation, slander, and libel that can sometimes be used against a speaker. We do not, however, believe in prior restraints. We tend to let people say things. Then, and only then, we may take some kind of legal action to hold the speaker responsible, usually in a civil action. Europeans are much more likely to use their criminal laws. Consider the following:

> 1. In June of 2004 (just days before I was to speak in Paris on the importance of free speech), actress Brigitte Bardot was convicted of inciting racial hatred and ordered to pay $6,000 (the fourth such fine imposed on Bardot since 1997) because she wrote a book lamenting the "Islamization of France."[68]
> 2. British researcher David Irving has been expelled form Canada, fined and imprisoned in Germany, and denied a visa to enter Australia, all because of his controversial views on the Holocaust.[69]
> 3. In Italy, author Robert Katz was given a 14-month suspended prison sentence and ordered to pay a fine because one of his books defamed Pope Pius XII, even though the pontiff had long-since departed and the events at question had taken place a quarter of a century before Katz wrote his agenda-driven book.[70]
> 4. A French court ordered that Internet provider Yahoo!, Inc. eliminate French citizens' access to Nazi-related material on the Yahoo.com auction site and subjected Yahoo! to a penalty of 100,000 Euros for each day that it failed to comply with the order.[71]

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content control legislation, the Information and Communication Services Act ("ICSA"). This Act subjects Internet Service Providers ("ISPs") to liability for knowingly making illegal content, such as Holocaust denial material, "available for use" if it is "technically possible to halt in transmission." The ICSA mandates the creation of a "cyber sheriff[ ]" to search out objectionable content. The ICSA also makes it a crime to disseminate or make accessible materials deemed harmful to children.

68. *Bardot Convicted Of Inciting Racial Hatred*, NY TIMES, June 11, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9802E0D91530F932A25755C0A9629C8B63.

69. The German Constitutional Court has recently said that the extermination of 6 million Jews in Hitler's concentration camps is a fact and that Holocaust denial is a "proven untruth;" therefore, those who spread the "Auschwitz Lie" are not protected by the basic law's guarantees of freedom of opinion and may be banned from stating their inaccurate views in public. BBC News, *Holocaust Denier Irving is Jailed*, Feb. 20, 2006, http://news.bbc.co.uk/1/hi/world/europe/4733820.stm (after pleading guilty to having said, in 1989, that there were no gas chambers at Aushwitz, Irving was sentenced, in 2006, to three years imprisonment).

70. *See* RONALD J. RYCHLAK, RIGHTEOUS GENTILES: HOW PIUS XII AND THE CATHOLIC CHURCH SAVED HALF A MILLION JEWS FROM THE NAZIS 240-44 (Spence Publishing 2005).

71. The order was not fully enforceable against Yahoo!, an American corporation, but the company did change some procedures in response to the French court's order. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199 (9th Cir. 2006).

Clearly, matters that Americans consider to be protected speech are prohibited in many European nations.

In 2002 the Council of Europe voted to outlaw "acts of a racist and xenophobic nature conducted through computer systems."[72] The Council proclaimed that it "considers racism not as an opinion but as a crime."[73] The Council emphasized that "[n]ot only racism, but also the dissemination of hate speech against certain nationalities, religions and social groups must be opposed."[74]

The first ever international treaty on criminal offenses on the Internet, the Convention on Cybercrime, was opened for signature in November 2001. That convention does not directly prohibit hate speech, but the "Committee of Experts on the Criminalization of Racist or Xenophobic Acts Using Computer Networks" drafted an Additional Protocol that calls for the criminalization of hate speech on the Internet.[75]

The United States signed the Convention on Cybercrime, but it has not (and will not) sign the Additional Protocol. The American Constitution protects free speech to a degree that the laws of most European nations do not.[76] As such, the U.S. will not ban hate unless we consider it to be harassment, incitement to imminent lawlessness, or a threat. Most hate web pages do not go that far, so they are legal in the United States.

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72. Michelle Madigan, *Internet Hate-Speech Ban Called 'Chilling,' Council of Europe's Internet Restrictions Raise Uneasy Questions About Civil Rights Online*, Medill News Service, Dec. 2, 2002, http://www.pcworld.com/article/id,107499-page,1/article.html. The measure was added to the Convention on Cybercrime, criminalizing hacking, intellectual property violations, and use of computers to commit fraud. The first set of rules was signed in November 2001.

73. The Council of Europe—not to be confused with the European Union—comprises 44 European countries, plus a handful of non-European nations. Canada, Japan, Mexico, South Africa, and the United States have observer status only.

74. The Convention on Cybercrime defines racist and xenophobic material as "written material, images or other representations of ideas or theories advocating, promoting or inciting hatred, discrimination or violence against individuals or groups, based on race, color, descent, or national or ethnic origin, or religion." Madigan, *supra* note 72.

75. The Additional Protocol imposed obligations on state parties to criminalize the following acts of racist and xenophobic nature committed through computer systems:

1. The dissemination of racist and xenophobic material;
2. Racist and xenophobic motivated threats;
3. Racist and xenophobic motivated insults;
4. Revisionism; and
5. Aiding and abetting in the above activities.

Only material made available to the public is prohibited; one-to-one communications are not covered. See Report, Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm.

76. The European Union has expressed its approval and support of the Convention on Cybercrime and of its initiative on the Additional Protocol. It established the European Convention for the Protection of Human Rights and Fundamental Freedom ("ECHR") to promote the "safer use of the Internet by combating illegal and harmful content," including "racist and xenophobic ideas."

B. The OSCE Meeting in Paris

Since most European nations have regulations restricting online hate speech,[77] racists, Holocaust revisionists, Islamic radicals, homophobes, and seemingly every other intolerant group seek refuge on American ISPs.[78] They take full advantage of the First Amendment's protection of speech, even though many of these web pages are put up in German, French, Arabic, or other languages, and they are clearly aimed at a non-American readership.[79] Of course, hate posted in any nation can be accessed from every nation.[80] As such, the OSCE meeting in Paris was largely a matter of Europeans trying to convince Americans that they had to find some way to "get around" the limitations of the First Amendment.[81] Robert Badinter,

77. *See* Organization for Security and Cooperation in Europe ("OSCE"), *Governing the Internet: Freedom and Regulation in the OSCE Region* (Christian Möller & Arnaud Amouroux, eds. 2007), *available at* www.osce.org/publications/rfm/2007/07/25667_918_en.pdf.

78. "Robert Badinter, a former French justice minister, complained that of 4,000 'racist sites' counted worldwide in 2002, some 2,500 were based in the United States." ZGram, *Censors trying to harness the Net*, June 23, 2004, *available at* http://zgrams.zundelsite.org/pipermail/zgrams/2004-June/000886.html. Internet hate speech can be found in almost any flavor: anti-gay, anti-Black, anti-White, anti-Semitic, anti-Islamic, anti-women, anti-American, and everything in between. Moreover, hate groups are not limited to text messages; hate music, interactive video games, and streaming audio broadcasts can be found on many of the estimated 4,000 hate-oriented web pages. Hate organizations also create web sites that resemble the domain names of legitimate news organizations and link those addresses to their hateful web pages. For example, one purveyor of hate bought the rights to domain names that appeared to link the viewer to the *Philadelphia Inquirer*, the *Pittsburgh Post-Gazette*, the *Chicago Sun-Times*, the *Atlanta Constitution*, and the *London Telegraph*. Instead of pulling up the web pages of those news outlets, however, unsuspecting Internet users end up visiting white-nationalist pages. Hate sites also routinely pop up in standard Internet searches.

79. In documenting the movement of "foreign haters" to the United States, Rabbi Abraham Cooper of the Los Angeles-based Simon Weisenthal Center found a "skyrocketing" number of hate-related sites in the United States. He notes that "the single largest growth is from European extremist groups migrating their Web sites to the U.S." Victoria Shannon, *From France, Yahoo Case Resonates Around Globe*, INTERNATIONAL HERALD TRIBUNE, Nov. 22, 2000, http://www.iht.com/articles/2000/11/22/yahoo.2.t_0.php.

80. In his opening speech, French Foreign Minister Michel Barnier said:

> We have to be able to act directly against those that commit these crimes. On our own territory, we have decided to take measures against these activities, by toughening the laws dealing with crimes motivated by racism, anti-Semitism or xenophobia, by holding Internet providers responsible for their sites, and by systematically searching for hate speech in the media. However, one State can only do so much. The Internet does not have any boundaries. The OSCE must become an 'observatory to identify and help propagate best practices, and, based on this work, it must also act as a 'laboratory' where, for example, a code of conduct could be developed.

Organization for Security and Cooperation in Europe, *States Called to Act Against Hate Speech on the Internet, available at* http://www.hrea.org/lists/wcar/markup/msg00234.html.

81. One of the sub-texts of the meeting was the putative "Atlantic Divide." *See* Christopher Wolf, *A Comment on Private Harms in the Cyber-World,* 62 WASH & LEE L. REV. 355, 360 (Winter 2005). In the context of discussions of "cyber hate" and hate crimes, this phrase was used to describe the perceived gulf between the United States' and Europe's approaches to hate propaganda. *Id.* at 360-361. According to the adherents of the "Atlantic Divide" theory, the United States is a free-speech Wild West, where speech has no limitations or legal consequences. *Id.* at 361. Europe, in contrast, is portrayed as a unified region speaking with one voice, populated by those who have wisely learned from the horrors of World War II that dangerous speech can and must be sanctioned and that governments are easily capable of performing this task and do so as a matter of course. *Id.* at 360. "A number of Europeans bragged that their governments regularly censor harmful content on the Internet, and that the world is a better place for it." *Id.* at 360-361.

the Socialist former French Minister of Justice and current president of the OSCE Court of Arbitration and Conciliation, in a keynote address, appealed to the United States to "stop hiding behind the First Amendment."[82] The United States, on the other hand, argued that the First Amendment was not a shield behind which we were hiding. Rather, it is a banner that we hold high because we value free speech.[83]

In my presentation at the OSCE meeting, I told an assembly of representatives from 55 nations that tolerance of diverse speech is so ingrained into the American fabric that virtually every school boy and girl knows Voltaire's famous statement: "I may not agree with what you say, but I will defend to the death your right to say it."[84] Americans fear censorship much more than they fear offensive speech.

We have the Ku Klux Klan and neo-Nazis in America. Their rallies are usually dwarfed by counter-rallies, and it seems to me that their arguments never get significant traction, even within susceptible sub-cultures.[85] One critic of speech regulation pretty much expressed my feeling when he said: "for all [the hate groups'] vitriol, these people are only a tiny handful of the 30-40 million users on the Internet. . . I'm far more concerned about [the government] attacking the Net, and thus our freedom, than I am about watching the Nazis."[86]

Unfortunately, I don't think my talk changed many European minds. A later American speaker was complimented because he did not exhibit "typical American arrogance." I've always assumed that - at least in the eyes of the person who made that statement - I did exhibit typical American arrogance. Really though, I don't think it's arrogance.[87] Our American view is that when speech crosses the line and becomes more than

82. *Id.* at 361. "While many constructive ideas were expressed, many speakers at the fifty-five nation gathering harped on how the First Amendment impedes global efforts to reduce the incidence of online hate." *Id.* at 360.

83. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the speech clause does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") The Supreme Court indicated its reluctance to permit government regulation of racist or otherwise derogatory speech. *Id.* In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), the Court struck down a Minnesota city ordinance that banned speech that "arouses anger, alarm or resentment in others . . . on the basis of race, color, creed, religion or gender." Justice Scalia noted that "the First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* Although the government may have a valid interest in protecting individuals from hateful invective, such concerns do not overcome the constitutional protection of speech. Similarly, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court overruled portions of the Communications Decency Act of 1996 ("CDA"), which criminalized the transmission of obscene and indecent material over the Internet in a manner that was easily available to children.

84. Whether Voltaire actually said this is a matter of some dispute, though it is traditionally attributed to him. *See* Hypernote.com, *Would Voltaire Die That This Might Be Printed?*, http://www.hypernote.com/C745182673/E253798223/index.html.

85. In fact, these groups seem to be more active in Europe than in the United States.

86. The Ethical Spectacle, *An Interview With Ken McVay*, http://www.spectacle.org/695/mcvay.html.

87. The ISP industry can and should develop "best practices" standards to facilitate cooperation and mutual assistance between law enforcement authorities to ensure that effective action can be taken against the dissemination of racist, xenophobic and anti-Semitic material via the Internet. The best

speech – when it presents a clear and present danger – the authorities must be prepared to step in.[88] At that time, the speech may constitute an actual threat, harassment, or be an incitement to imminent lawlessness.[89] When speech becomes action, punishment can be warranted.[90]

Americans believe that ideas and opinions should be available in the "marketplace of ideas," no matter how unpopular or offensive they may be. This view, as adopted by the U.S. Supreme Court, reflects the idea that good and bad ideas should compete, and when that happens, with truth will prevail and harmful speech will be tested and rejected.[91] Indeed, under the

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approach would be based upon self-regulation or co-regulation, through developing codes of conduct, and through increasing users' and providers' awareness and sensitivity to the problem. As a starting point, ISPs should initiate a dialogue with all service providers to convince them of the need to take steps to combat the existence of hate sites. Once an ISP promulgates such regulations, it must monitor the use of its service to ensure that the regulations are followed. If a violation does occur, the ISP should, as a contractual matter, take action to prevent it from happening again. Some ISPs do not undertake contractual obligations but declare a "hate-free policy" and reserve the right to modify or terminate their services at any time if the service is used for posting or transmitting objectionable material. Of course, even if we could set aside constitutional issues, there are numerous technological challenges related to tracking, filtering, or blocking hate propaganda transmitted through the Internet, emails, or text messaging. Asking ISPs to be responsible for screening all content on the web is not feasible, anymore than making telephone companies responsible for everything that gets said over the telephone. In fact, an ISP can create problems simply by trying to be responsible. One ISP removed an innocuous site devoted to English philosopher John Stuart Mill after a non-governmental organization – testing the bases upon which ISPs would act – urged the ISP to take down the allegedly racist site.

88. The issue of "hate crimes" is controversial because it can be seen as punishing thought or expression. *See* George F. Cole & Christopher E. Smith, The American System of Criminal Justice 52 (8th ed. Wadsworth Pblishing Company 1998). I must admit to being troubled by hate crimes, in that additional punishment may be imposed due to the perceived mindset of the defendant. *See Anti-Christian Bill Passed in U.S. House*, Christian Anti-Defamation Commission, Oct. 2007 (discussing *The Local Law Enforcement Hate Crimes Prevention Act of 2007*, H.R. 1592, 110th Cong. (2007)). The Supreme Court, however, has upheld the idea of increasing the punishment for crimes when the defendant "intentionally selects the person against whom the crime [is committed] because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . ." Wisconsin v. Mitchell, 508 U.S. 476, 481 (1993). In that case, the law was used to increase the punishment imposed against a black defendant for inciting an attack against white victims.

89. In Paris, US officials provided examples of numerous recent cases where individuals were prosecuted for sending email messages that rose to the level of being a racially motivated threat. While it is important that criminal sanctions based purely on one's opinion remain prohibited, cases such as this should dispel the misimpression that there are no limitations on speech in the United States. In February 1999, a Pennsylvania court entered an injunction against Web site owner and controller Ryan Wilson, his white supremacist group ALPHA, and Stormfront, Inc. (which had been providing the ALPHA Web site with domain name service), barring them from displaying certain messages on the Internet. The order stemmed from charges filed against Ryan Wilson for terroristic threats, harassment and ethnic intimidation. One of the pictures on Wilson's ALPHAWeb site depicted a bomb blowing up the office of Bonnie Jouhari, a fair housing specialist who regularly organized anti-hate activities and focused on issues concerning hate crimes, racial hatred and the activities of local hate groups. Next to her picture, the ALPHAweb site stated "Traitors like this should beware, for in our day, they will be hung from the neck from the nearest tree or lamp post." Wilson did not contest the state's action, and the site was removed from the Internet. In early 2000, the Federal Office of Housing and Urban Development filed a civil discrimination suit against Wilson. The U.S. Department of Justice reportedly is also investigating Jouhari's case for possible criminal violations. Chris Wolf, *Cyber-Hate on the Internet*, (Remarks of Christopher Wolf, Chair of the International Network Against Cyber-Hate, at the Conference on Hate on the Internet, Co-hosted by the Canadian Human Rights Commission and the Association of Canadian Studies), Dec. 16, 2005, http://www.chrc-ccdp.ca/proactive_initiatives/hoi_hsi/page9-en.asp.

90. *Id.*

91. Keyishian v. Board of Regents, 385 U.S. 589, 605-606 (1967).

U.S. Constitution, any governmental regulation that abridges speech based on the content is presumptively invalid.

Legal restrictions on hate speech suppress the symptoms; they do not treat the underlying causes of the social disease. Bringing hate speech into the open allows dialogue, promotes rather than restricts the free flow of ideas.[92] This can alert us to the fact that something is wrong-in the body politic, in ourselves, or in the speakers. Speech codes, ordinances, and statutes (if they are enforced) only blind us to the problems and deny us the opportunity to solve them before they become worse.

C. Do Europeans Know Better?

More than once, when debating the importance of free speech, I have heard defenders of restrictions say that the European approach is better because they "have seen what can happen." The point, of course, is to suggest that Hitler and the Holocaust took place because the powers that be (leaders of the Weimar Republic) did not stop him from speaking when they had a chance. I have written two books on the Nazi era,[93] and I think that is the wrong lesson to take from history. Rather than being a result of free speech, Nazism existed only because expression was limited.

The Nazis *were* prohibited from speaking in public following the failed beer hall putsch of March 1923. Nazism was banned. Even after Hitler was released from prison in December of 1924, he was still barred from speaking in public for several months. He was permitted to revive his party only by making several promises to the Bavarian authorities.[94] Of course, it was during this time of imposed silence that Hitler actually rose to national prominence and achieved the status of a hero in Germany. The efforts to restrict his speech did nothing more than allow him to portray himself as a victim fighting for the real German people, and he became all the more popular.

The real concern about speech and the Nazis was not that they exercised free speech prior to taking over. Rather, it is that they prohibited free speech once they were in power. Freedom of the press, freedom of speech, and the freedom to hold political meetings were all lost. You could

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92. It should be noted that although the OSCE meeting in Paris was mandated to examine the relationship between hate propaganda on the Internet and hate crimes, few participants actually discussed the nexus between these two phenomena. For many, the existence of a cause-and-effect relationship was accepted as an article of faith, and they did not explore the nature of that relationship. As such, the meeting made little contribution to understanding which populations might be most vulnerable to the influence of hate speech on the Internet, whether such speech fosters particular kinds of hate crimes, whether web-based hate is related to spikes in hate crimes, or why some places with unregulated content have relatively lower levels of hate crimes than other places with restricted Internet content.

93. RONALD J. RYCHLAK, HITLER, THE WAR, AND THE POPE (Our Sunday Visitor 2000); RONALD J. RYCHLAK, RIGHTEOUS GENTILES: HOW PIUS XII AND THE CATHOLIC CHURCH SAVED HALF A MILLION JEWS FROM THE NAZIS 240-44 (Spence Publishing 2005).

94. IAN KERSHAW, HITLER: 1889-1936: HUBRIS 262-63 (W. W. Norton & Company 2000).

get the death penalty for listening to foreign radio stations.[95] Anyone even suspected of opposing Hitler was silenced. We are all aware of the notorious Nazi book burnings and of the retaliation that was taken against anyone who dared to stand up against the Nazis.

In 1937, when Pope Pius XI issued a condemnation of Nazi practices, it had to be smuggled into Germany, copied and distributed secretly by an army of motorcyclists, and read by the priests during services. All of the copies that were discovered by the Nazis were confiscated. Presses that had printed it were closed, and those convicted of distributing it were arrested.[96] Of course, the Nazis were able to point to their own history to find precedents justifying restrictions on speec.

Defenders of speech restrictions often try to justify their actions by arguing that they are protecting the vulnerable from hate-mongers, but - as happened with the Nazis (and, by the way, Islamic radicals)[97] - the parties can get switched.[98] At the OSCE meeting in Paris, one non-governmental representative argued that evangelical Christian sites that reach out to Jews in an effort to bring them to Christ should be considered anti-Semitic. Similarly, with all the truly vicious hate web pages on the Internet, when the Russian delegation had its turn to speak, it identified the web sites of the Jehovah's Witnesses and Hare Krishnas as "promoting hate doctrines" because they purport to set forth "the truth." The American delegation thought that this made our point more strongly than anything else could have.

D. Free Speech in the Middle East

As you know, religion is often the target of ridicule in modern American culture. In 2006, I was part of a delegation that met in Rome with a group of influential Iranian leaders to discuss the common origins of Christianity, Judaism, and Islam. Obviously, there were also significant political overtones to these meetings. In my formal presentation, I was asked to

95. RIGHTEOUS GENTILES, *supra* note 93, at 240; *Catholic Historian's Report Details Perils of 'Martyrs of Vatican Radio'*, NATIONAL CATHOLIC REGISTER, Feb. 1, 1976.

96. HITLER, THE WAR, AND THE POPE, *supra* note 93, at 93-94.

97. There is an interesting parallel related to modern Islamic terrorism. Most modern Islamic terror groups trace their roots back to a group known as the Muslim Brotherhood. On October 26, 1954, Muslim Brother Mahmoud Abd al Latif failed in an attempt to assassinate Egyptian leader Gamal Abd an-Nasser (who had led a successful coup in 1952). Nasser then outlawed the Brotherhood and over 4000 members were imprisoned, including Sayyid Qutb, who wrote highly influential books while in prison and later became the most influential intellectual in the group. Today, the worst Islamic governments are very severe in their restrictions on speech. Within the past few years, for instance, Iran has shut down or sanctioned about 100 newspapers that dared to question governmental policy. In other fundamentalist, Islamic nations, one would be hard pressed even to find 100 voices willing to question the government.

98. History teaches that those with the least power (in this case, the supposed beneficiaries of such regulations) are most often the victims of the abuses of power. *See* Presser, *supra* note 35, at 52, 55 (speech codes used to punish minority students). One of the U.S. recommendations made during the meeting was that the OSCE Representative on Freedom of the Media should examine whether hate speech laws are being enforced in a discriminatory or selective manner or misused to suppress political dissent.

address the American notion of free speech in light of the riots that had just taken place following the publication by a Danish newspaper of comics that depicted the Prophet Mohammed.[99]

They Ayatollahs in the group felt that those in the West tolerated these comics only because they knew it was an insult to Islam, not to Christianity. They were not familiar with television programs like *South Park* or artwork like *Piss Christ*, but I tried to explain that we Christians in the West see our religions insulted and denigrated on a very regular basis. This is not good, and I would prefer that it not happen, but it is consequence of our devotion to free speech.

The result of my talk was a half hour lecture from an Ayatollah who explained, in a heated voice while pointing his finger in my face, that Islam would never tolerate insults to the Prophet, and we need to change our ways and our concept of acceptable free speech. We at least needed to prohibit anti-Islam speech if not all speech critical of religion.

E. Harassment of Religious Leaders

Actually, in those areas where speech restrictions are in place, religious leaders are more likely to be prosecuted by those codes than protected by them.[100] Today, in many nations, religious leaders are threatened by legal action if they speak openly about practices that their faiths consider sinful. Brazilian legislators, for instance, are debating a "homophobia law." According to reports, "Priests could face two to five years of imprisonment for preaching against homosexuality, and the rector of a seminary who refuses admission to a homosexual student could face three to five years."[101] Recently, the archbishop of Mexico City, Cardinal Norberto Rivera Carrera, was investigated by the Mexican Ministry of Internal Affairs regarding charges that he violated the country's laws on religious expression by speaking out against the legalization of abortion.[102]

The Canadian Human Rights Commission, a quasi-judicial body with a mandate to investigate "hate speech," is pursuing a complaint against a web page that is popular with pro-life activists.[103] Calgary Bishop Fred

99. *Those Danish Cartoons*, *supra* note 9.

100. A bill currently making its way through Congress is *The Local Law Enforcement Hate Crimes Prevention Act of 2007*, H.R. 1592, 110th Cong. (2007). The Christian Anti-Defamation Commission has dubbed this "The Anti-Christian Bill" because it could be used against preachers who condemn homosexual acts and other matters they deem to be immoral. *See Anti-Christian Bill*, *supra* note 88.

101. Zenit News, *"Homophobia Law" Could Affect Homilies, Seminaries*, THE WANDERER, Aug. 23, 2007, at 12, *available at* http://www.zenit.org/article-19180?l=english.

102. Catholic News Service, *Mexican Government Clears Cardinal of Violating the Law by Speaking Out Against Abortion*, June 12, 2007, http://www.catholicnewsagency.com/new.php?n=9603.

103. *Canadian Government Threatens Web Site Popular With Canadian Pro-Lifers*, THE WANDERER, Aug. 9, 2007, at 9, *available at* http://www.catholicexchange.com/2007/07/28/94571/. The complaint stems from comments posted to the board by controversial Christian activist Bill Whatcott. "I can't figure out why the homosexuals I ran into are on the side of the Muslim," Whatcott wrote. "After all, Muslims who practice Sharia law tend to advocate beheading homosexuals." Whatcott also wrote on another occasion: "I defy Islamic censorship and speak about what I believe is the truth about violent Islamism and its threat to religious liberty in Canada." *Id.*

Henry was already brought before the Alberta Human Rights Tribunal after comparing homosexuality to prostitution in a letter he wrote to Calgary's Catholic community.[104] Similarly, Cardinal George Pell, Archbishop of Sydney, was recently cleared of contempt of Parliament. He had been referred to the Upper House Privileges Committee in June 2007 after he remarked that Catholic politicians voting for the Human Cloning Bill would face consequences for their votes.[105] Upon being cleared of the charges, the archbishop released a statement saying,

Along with other citizens I enjoy the right to comment on proposed laws on my own behalf and on behalf of the community I represent. That is the essence of democracy. Therefore it seems to me to be an extraordinary step for the Legislative Council to require a citizen to justify his contribution to the debate or risk a finding of contempt.[106]

V. FREE EXPRESSION AND DEMOCRATIC ACTION

A friend of mine, a law professor named Russ Weaver from the University of Louisville, has traveled all over Europe debating the American concept of free speech as opposed to the more restrictive European concept. Recently, I watched him debate a Canadian, and the audience seemed to be on the Canadian side. Russ's conclusion, however, is certainly worth serious consideration: Without free expression, Democracy cannot survive.

Democracy depends on full and honest debate. Unfortunately, the very nature of Democracy creates the desire among some political actors to stifle opposing voices or at least control the debate. This desire often manifests itself in legal restrictions on speech. Two of the currently-debated laws that impact free speech are the "fairness doctrine" and the McCain-Feingold finance reform law.

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104. THE WANDERER, *supra* note 101, at 9.

105. He had also described legislation overturning a ban on therapeutic cloning as grotesque, saying it would legalize the creation of human-animal hybrids. The Australian Broadcasting Corporation (ABC.net), *Pell welcomes contempt clearing*, Sept. 21, 2007, http://abc.net.au/news/stories/2007/09/21/2039920.htm?section=justin.

106. *Cardinal Pell's Response to Parliamentary Inquiry: "I Enjoy the Right to Comment on Proposed Laws"*, Zenit. Org, Sept. 21, 2007, *available at* http://www.cityes.org/cardinal-pell-s-response-to-parliamentary-inquiry.html. He also took the opportunity to re-assert his opposition to the legislation:

> Parliamentarians who legislate for the destruction of human life (in any circumstances and especially in this case where no cures from human embryos have been effected during many years of research) are acting in a way that departs from the principles of both the natural law known through human reason alone and Christian teaching. The natural law principles and the teaching in question are that human life should be accorded the full protection of the law without regard to race, ethnicity, sex, religion, age, condition of dependency or stage of development.

Id. (citing Robert P. George, *Political Obligations, Moral Conscience, and Human Life*, VOICES 22:2 15 (Pentecost 2007).

A. The Fairness Doctrine

The Federal Communications Commission ("FCC") originally enacted the Fairness Doctrine in 1949 to ensure the "right of the public to be informed" by presenting "for acceptance or rejection the different attitudes and viewpoints" on controversial issues.[107] The policy was upheld in 1969 by the Supreme Court because the public airwaves were a "scarce resource" that needed to be open to opposing views.[108] Unfortunately, it did not work that way.

In a 1985 report, the FCC concluded the Fairness Doctrine inhibited broadcasters from dealing with controversial issues and was no longer needed because of the growth of cable television.[109] Dennis Patrick, who was chairman of the FCC in 1987, explained: "Many, many broadcasters testified they avoided issues they thought would involve them in complaintsFalse The commission concluded that the doctrine was having a chilling effect."[110] Accordingly, in 1987 the FCC ended the Fairness Doctrine.[111] This move has been credited with triggering the explosive growth of political talk radio.[112] Recently, however, after talk shows helped defeat an important immigration bill that was supported by leaders of both parties, some in Congress have suggested reinstating the Fairness Doctrine.[113]

The Fairness Doctrine would, of course, mandate certain content. If a show featured one side of a political debate, it would also have to show the other side. Many good programs already do this. If it is a legal requirement, however, we have a problem.[114]

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107. Jim Puzzanghera, *Some in Congress pushing for reinstatement of Fairness Doctrine*, LA TIMES, July 23, 2007.

108. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

109. Jim Puzzanghera, *Some in Congress Pushing for Reinstatement of Fairness Doctrine*, LA TIMES, July 23, 2007, *available at* http://www.c3.ucla.edu/newsstand/media/a-push-for-reinstatement-of-the-fairness-doctrine/.

110. *Id.*

111. The decision was controversial. Congress passed a law in 1987 reinstating the Fairness Doctrine, but President Reagan vetoed it. *Id.*

112. "A 1997 study in the Journal of Legal Studies found that the percentage of AM radio stations with a news, talk or public affairs format jumped to 28% in 1995 from 7% in 1987." *Id.*

113. Mississippi's Senator Trent Lott lamented the undue influence of conservative talk radio in opposing the Senate's immigration legislation. "These are public airwaves and the public should be entitled to a fair presentation," said Senate Majority Leader Dianne Feinstein (D-Calif.). *Id.*

114. The ACLU has correctly noted that the federal government may not make the awarding of a broadcast license contingent on the surrender of one's First Amendment, or any other, constitutional rights. Ron Weich, *Interested Persons Memo on Franks/Pickering Amendment on Internet Filtering*, http://www.aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID=8972&c=55. Asked about expanding the Fairness Doctrine to other media, the president of the ACLU replied:

> We have historically supported the Fairness Doctrine, although I've dissented from that position, as have other prominent people within the ACLU. Our basis for supporting it was so narrow and so historically contingent that I really have my doubts as to whether even the Fairness Doctrine itself would be reaffirmed if the ACLU National Board took another look at it. It was based on the notions of spectrum scarcity and of government having conveyed a public trust, if you will, to the broadcasters. Both facts have changed substantially. We have never taken that position with respect to any other media and certainly have never taken it with respect to print media.

If an issue has multiple sides, it could become too confusing to even venture into the subject. An openly political network, like Air America, would be entirely impractical. The Fairness Doctrine would likely make station owners so fearful of balancing viewpoints that many of them would avoid airing controversial topics altogether. In other words, it would chill debate. That is exactly what happened with the last incarnation of the Fairness Doctrine. Michael Harrison, who hosted a weekend radio talk show in Los Angeles from 1975 to 1985, said the policy kept him from giving his opinions on controversial topics. "I would never say that liberals were good and conservatives were bad, or vice versa. We would talk about, 'Hey, all politicians are bad,' or 'It's a shame that more people don't vote,'" said Harrison. "It was more of a superficial approach to politics."[115] As the president of the National Association of Broadcasters has written: "Free speech must be just that — free from government influence, interference and censorship."[116]

B. McCain–Feingold

Another content threat to our political speech is The Bipartisan Campaign Reform Act, more commonly known as McCain–Feingold.[117] This federal law regulates the financing of political campaigns. It prohibits national political party committees from raising or spending money (even on state races) that is not subject to federal limits and restricts broadcast advertisements shortly before an election, even when when the ad is paid for by a non-profit organization.[118]

Years ago, I represented a Senatorial candidate from Louisiana.[119] He was new to politics, so he did not have many supporters. He did, however, have a few financial backers who were capable of making significant contributions to his campaign. Federal regulations, however, limited what they were able to contribute. We argued in court that that the applicable regulations restricted the speech of these backers, because in politics money equals speech. Those restrictions we were facing, however, were not nearly as restrictive as McCain–Feingold. As one commentator on McCain–Feingold explained:

> [U]nder the guise of "campaign finance reform," Congress and the Supreme Court have repealed large parts of the First Amendment. They have simply discarded what were

Kathy Young, *Life, liberty, & the ACLU - American Civil Liberties Union President Nadine Strossen - Interview*, REASON (October 1994), *available at* http://findarticles.com/p/articles/mi_m1568/is_n5_v26/ai_16101043/pg_1.

115. Puzzanghera, *supra* note 107.

116. Puzzanghera, *supra* note 107 (quoting David K. Rehr, president of the National Assn. of Broadcasters, in a letter to lawmakers).

117. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 36 U.S.C.) (known as the McCain-Feingold Act).

118. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), is a case in which the United States Supreme Court upheld the constitutionality of most of the Bipartisan Campaign Reform Act of 2002.

119. Khachaturian, v. Fed. Election Comm'n, 980 F.2d 330 (5th Cir. 1992).

> once considered constitutional rights of free speech and political association. It is not that these rights have vanished. But they are no longer constitutional guarantees. They're governed by limits and qualifications imposed by Congress, the courts, state legislatures, regulatory agencies—and lawyers' interpretations of all of the above.[120]

As the ACLU complained: "Without a meaningful First Amendment exception [to McCain-Feingold], the ACLU could not even broadcast an ad in the pre-election period asking people to urge their representatives to restore the right to habeas corpus that Congress eliminated in the Military Commissions ActFalse."[121]

Fortunately, the Supreme Court recently decided a case in which it recognized that at least portions of the law went too far in terms of restricting speech.[122] Of course, not all were pleased with the decision. Sen. John McCain (R.-Ariz.) issued a statement calling the decision "regrettable." Not only does McCain–Feingold carry his name; it is very favorable to incumbents like him. Laws like this help silence citizens, critics, commentators, and active opposition. Our concern for free speech, however, is fueled by the desire to protect the people from the government, not to protect elected officials from the people.

VI. CONCLUSION

There are many ways to prohibit certain kinds of speech without offending the First Amendment. There are also tempting reasons to do it. As Justice Oliver Wendell Holmes explained, in his famous dissent from the decision in *Abrams v. United States*,[123] however, free expression is inexorably tied to the pursuit for truth.

In the past, totalitarian regimes often recognized the relationship between free speech and the pursuit of truth. When they suppressed speech, they justified it by claiming to have the truth. After all, the logic went, if I am giving you the truth, why would you ever need to raise a "non-true" contradiction? Those who would suppress speech today sometime make

120. Robert J. Samuelson, *So Much for Free Speech*, WASHINGTON POST, Aug. 25, 2004 at A17. *See also* George F. Will, *Free Speech Under Siege: In California, 'Progressive' Thinking Has Progressed to the Idea That Because Money in Politics is Bad, Political Competition Is, Too*, NEWSWEEK, Dec. 5, 2005.

121. ACLU.org, http://www.aclu.org/scotus/2006term/29169res20070322/29169res20070322.html.

122. In Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2659 (2007), the Supreme Court disallowed the application of the McCain-Feingold law to a series of television ads run by Wisconsin Right to Life that called upon Wisconsin citizens to call their Senators (including Sen. Russ Feingold (D.-Wis.)) about filibustering against judicial nominees. The Court ruled that the organizations engaged in genuine discussion of issues were entitled to a broad, "as applied" exemption from those portions of McCain-Feingold that limit advertising that names a particular candidate close in time to an election. *Id.* at 2674. Writing for the majority, Chief Justice Roberts said, "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 2669.

123. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

similar claims. Thus, when Harvard President Lawrence H. Summers dared to suggest that it might be worth studying whether innate differences between men and women are one reason why fewer women succeed in science and math careers, he was drummed out of the academy.[124]

Other times, modern speech restrictions are justified not by a claim to the truth. Instead, those who would restrict expression devalue the pursuit of truth by claiming that there is no truth or that, if it exists, it cannot be identified. If there is no truth, or if truth can never be discovered, then there is no reason to elevate the search for truth above other concerns. As such, speech - the means we use to pursue truth - need not be given special protection.[125] Accordingly, Law Professors J. Peter Byrne of Georgetown and Kent Greenawalt of Columbia have argued that speech intended to hurt the listener cannot lead to truth, so it is acceptable to prohibit racial name-calling.[126] Professor Mari Matsuda, also of Georgetown Law School, claimed that under principles of academic freedom and free expression, only academically tenable views need be protected; ignorant speech can be prohibited without harming the pursuit of truth.[127] Similarly, Cornell law professor Steven Shiffrin argued that racist speech can be prohibited because it makes "no contribution to public political dialogue."[128]

This generation's suppression of speech is being done for well-intended reasons. Speech regulations, however, cut against the basic American belief in debate and the pursuit of truth. They also hinder education, thwart Democracy, and put all of our civil liberties at risk. Those who would bar certain words because they are thought not to contribute to the search for truth miss the point of debate. The truth of the speech itself is not the issue. What must be protected is the *pursuit* of truth, and even false statements can contribute to that cause. Those who assert unfounded or unprincipled positions can be challenged and if their arguments do not hold up, then those arguments - wrong though they were - have contributed to the pursuit of truth. This is how our society works and how our best

124. Marcella Bombardieri, *Summers' Remarks on Women Draw Fire*, THE BOSTON GLOBE, Jan. 17, 2005, *available at* http://www.boston.com/news/education/higher/articles/2005/01/17/summers_remarks_on_women_draw_fire/.

125. This argument is often made by those who seek to prohibit racial epithets. Law Professors J. Peter Byrne of Georgetown and Kent Greenawalt of Columbia, for instance, argue that speech intended to hurt the listener cannot lead to truth, so it is acceptable to prohibit racial name-calling. Professor Mari Matsuda, also of Georgetown Law School, claims that under principles of academic freedom and free expression, only academically tenable views need be protected; ignorant speech can be prohibited without harming the pursuit of truth. Similarly, Cornell law professor Steven Shiffrin argues that racist speech can be prohibited because it makes "no contribution to public political dialogue." The ultimate point made by each of these legal scholars is that speech cannot lead to truth, so there is no need to give it special protection.

126. Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 293 (1990); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 400 (1991).

127. Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

128. Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, And The Meaning Of America*, 80 CORNELL L. REV. 43, 87-88 (1994).

universities work. Judge Keady clearly recognized this. Justice Holmes called it the theory of our Constitution. Few, if any, legal scholars have been more perceptive.